

CALIFORNIA'S FIRST JUDICIAL STAFF ATTORNEYS:

The Surprising Role that Commissioners Played, 1885–1905, in Creating the Courts of Appeal

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In the late nineteenth and early twentieth centuries, the California Supreme Court employed legal staff — then called “commissioners” — quite differently from how it uses chambers attorneys and law clerks today. Controversy surrounding that former system led to creation of the Courts of Appeal. As we’ll see, the story unfolds like a Gilbert & Sullivan operetta:

◆ The Supreme Court, which was regularly traveling up and down the state hearing oral arguments in San Francisco, Sacramento, and Los Angeles,

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was chronically unable to keep pace with an increasing influx of direct appeals from numerous trial courts throughout the state.

◆ After the Legislature directed the court to hire “commissioners” to help with its workload, a few thousand opinions authored and signed by the court’s new staff were published in the *California Reports* — and approximately 700 more were published, along with hundreds of other unreported Supreme Court opinions, in the reports of “*California Unreported Cases*.”

◆ There were public accusations of overreaching by the staff commissioners and abdication of judicial responsibility by the justices, culminating in major litigation by a disgruntled appellate lawyer — ultimately upholding the court’s authority to use legal staff.

◆ The hired staff commissioners and elected justices played musical chairs, trading places numerous times — appearing to confirm criticisms that they were inappropriately interchangeable.

◆ Meanwhile, and amidst growing calls for the state to create an intermediate appellate court, the Supreme Court remained backlogged even with help from the staff commissioners. At one point the court fell so far behind that all seven justices, unable to file cases within ninety days after submission, went unpaid for eight months.

◆ And finally, after nearly two decades, there was an agreement to jettison the criticized staff commissioner system, and to forbid its use ever again — paving the way for the voters’ acceptance of a constitutional amendment to create the California Courts of Appeal. When the music stopped, all remaining staff commissioners became appellate court justices.

I. AN OVERBURDENED COURT TRIGGERS A LEGISLATED MANDATE: HIRE HELP

The Supreme Court bench, having been enlarged from three to five justices in 1862, was nevertheless severely backlogged by the late 1870s.¹ To

¹ *Current Topics* (July 20, 1878) 1 PAC. COAST L.J. 401 [describing the “long calendar of cases waiting to be argued” before the Supreme Court and calling for “more courts and more judges”]; WILLIS & STOCKTON, 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA (State Printing Office, Sacramento, Cal. 1880) at 950 [reporting that in the prior four years the court had been

cope with increased litigation in a growing and evolving state, the court resorted to strong measures. Taking advantage of its earlier conclusion that the Legislature could not force it to state the grounds for its decisions in writing,² the court frequently decided cases by cursory memorandum decision, instead of by full written opinion — and sometimes it decided cases with no written decision at all.³ It published new rules⁴ under which it was quick to find that parties had waived their right to appeal,⁵ and attempted to shrink its docket by imposing costs when it deemed appeals to be frivolous.⁶ And the court frequently avoided “the annoyance of petitions for rehearing” by simply making its judgments final immediately.⁷

Yet those and related palliatives⁸ did not reduce the backlog. Instead they just upset and frustrated litigants and their attorneys — fueling existing calls for a constitutional convention.⁹ And although a former justice proposed that the state create an intermediate appellate court,¹⁰ that would not happen for another quarter century. In the meantime, the state’s new Constitution,

“unable to fully dispatch the business before it” although it had decided more than 2,200 cases through “an almost incredible amount of labor”].

² *Houston v. Williams* (1859) 13 Cal. 24. The court branded the statute mandating written decisions “a most palpable encroachment upon the independence of this department.” *Id.* at 25. Indeed, the court said, an opinion stating reasons for a decision is warranted “in important cases.” But “not every case . . . will justify the expenditure of time necessary to write [such] an opinion.” *Id.* at 26. Moreover, the court viewed the statute as an impermissible incursion on its necessary ability to control and modify the opinions that the court did deem worthy of rendering. *Id.* at 27–28.

³ 2 WILLIS & STOCKTON, *supra* note 1, at 950 [noting that in the prior four years the court had decided 559 cases without written opinion]; see also McMurray, *An Historical Sketch of the Supreme Court of California*, in HISTORICAL AND CONTEMPORARY REVIEW OF BENCH AND BAR IN CALIFORNIA (The Recorder Printing & Pub. Co., S.F. Cal. 1926) at 22, 35–37.

⁴ Set out in (1878) 52 Cal. 677.

⁵ McMurray, *supra* note 3, at 35.

⁶ *Id.* [noting that the court did so “with some liberality”].

⁷ *Id.* at 34.

⁸ The court also adopted a problematic rule, which in turn it frequently ignored, requiring the justices to prepare an official syllabus for each full written decision — and making that brief syllabus, and not the full opinion of the court, “the authoritative precedent.” *Id.* [referring to 52 Cal. at 689, rule 39].

⁹ McMurray, *supra* note 3, at 34.

¹⁰ *Current Topics* (Apr. 20, 1878) 1 PAC. COAST L.J. 141, 142 [reporting former Supreme Court Justice Solomon Heydenfeldt’s suggested creation of “three Courts of Appeal”].

approved by the voters in 1879, attempted to address the court's backlog through other incremental measures: It increased the Supreme Court bench from five to seven members, and adopted a novel procedure that allowed the court to designate some of its cases for decision by one of two departments of three-justice panels, with the possibility of rehearing in bank.¹¹

Even with these reforms, and although the court was regularly resolving many hundreds of cases annually (most with written opinions; the *California Reports* for 1882 contain approximately 880),¹² it was still quite backlogged five years later, for various reasons. First, because the court's appellate jurisdiction was mandatory — if an appeal of any superior court decision throughout the state was filed, the Supreme Court was obligated to resolve the case — even such high productivity was insufficient in the face of increasing appeals. Second, in an effort to delay judgment against them, many litigants contested minor rulings arising from increasing numbers of trial courts.¹³ Third, the Supreme Court's department decisions frequently were reconsidered by the full court in bank, meaning the court decided them twice.¹⁴ And it could not have helped efficiency that the justices were, as a

¹¹ Kagen et al., *The Evolution of State Supreme Courts* (1978) 76 MICH. L. REV. 961, 975; McMurray, *supra* note 3, at 35–36. The department system was originally proposed for California in *Current Topics* (June 1, 1878) 1 PAC. COAST L.J. 261, 261–62 [reporting and describing the submission of trial court Judge Eugene Fawcett, of the “First Judicial District”]. The practice of sitting in departments (or divisions) apparently traced to procedures used by “the English Court of Appeal.” POUND, ORGANIZATION OF THE COURTS (Little, Brown Co., Boston, Mass. 1940) at 165–66, 214. *See also id.* at 214–20 [describing practices in other jurisdictions that subsequently followed California's lead].

¹² Volumes 60–62 of *California Reports*, “Table of Cases Reported.” *See also* Blume, *California Courts in Historical Perspective* (1970) 22 HAST. L.J. 121, 169–70 [describing a 790-case backlog in 1882].

¹³ These problems became only more acute over the ensuing twenty-five years. *See, e.g., Notes* (1884) 1 WEST COAST REP. 639 [“Seventy [superior court] trial judges are sending up a crop of litigation that no seven judges on earth could do justice to, and write the reason for their rulings”]; *The Witness* (Aug. 29, 1891) Vol. 7, No. 17 THE WAVE, at 8 [asserting that litigants filed appeals posing “the most frivolous questions,” so as to “keep their legal antagonists out of their just deserts for years”]; *Appellate Courts Provided For by Amendment* (Aug. 15, 1904) SAN FRANCISCO EXAMINER, at 6 [noting that although the Supreme Court resolved on average 650 cases yearly, it took in and was required to hear 1,000].

¹⁴ Blume, *supra*, 22 HAST. L.J. at 169 [noting that cases remained on calendar for nearly two years prior to being heard] and 170 [the “working power of the two

constitutional convention delegate described, “a Court on wheels”¹⁵ — constantly boarding horse-drawn carriages and steam locomotives, traveling around the state to hear oral arguments not only at its headquarters in San Francisco, but also in Sacramento and Los Angeles.¹⁶

In 1884 San Joaquin County Judge A. Van R. Peterson revived the earlier suggested solution to the backlog: create an intermediate court of appeal.¹⁷ But instead, in March 1885, the Legislature adopted a stop-gap measure, directing the Supreme Court to hire help. It was to appoint “three persons of legal learning and personal worth” as “commissioners,” who would be paid the same as the justices, to “assist the Court in the performance of its duties and in the disposition of the numerous cases now pending.”¹⁸ This initial program was funded to last four years.

departments [was] not much greater than that of a single court, for after a hearing in department many cases were heard in bank’”].

¹⁵ 2 WILLIS & STOCKTON, *supra* note 1, at 954 [remarks of Mr. Hale, arguing against “cart[ing] . . . all over the state, and asserting that the court should “have some stability” and be based in Sacramento exclusively]. See generally Dear & Levin, *Historic Sites of the California Supreme Court* (1998–99) 4 CAL. SUP. CT. HIST. SOC’Y Y.B. 63, 72–74 [recounting the delegates’ assessments of the merits and demerits of Sacramento, Los Angeles, and San Francisco — along with discussions of excessive heat, flooding, vultures, earthquakes, and the relative quality of available whiskey].

¹⁶ Despite 1872 legislation directing the court’s justices, clerk, and reporter to “re-side at and keep . . . offices in the City of Sacramento (former CAL. POL. CODE, § 852), the court had returned to San Francisco for its headquarters in early 1874. Dear & Levin, *supra*, 4 CAL. SUP. CT. HIST. SOC’Y Y.B. at 71–72. That same year the Legislature retroactively gave its blessing to the court’s move, instructing it to hold oral arguments in both cities. ACTS AMENDATORY OF THE CODES, 1873–1874, ch. 675, § 1, at 395–96. In 1878 the Legislature directed the court to additionally hold oral arguments in Los Angeles. ACTS AMENDATORY OF THE CODES, 1877–1878, ch. 142, § 2, at 22. See generally Blume, *supra*, 22 HAST. L.J. at 162.

¹⁷ *Notes* (1884) 1 WEST COAST REP. 639.

¹⁸ CAL. STATS. 1885, ch. 120, § 2, at 102. See generally Bakken, *The Court and the New Constitution in an Era of Rising Industrialism, 1880–1910*, in SCHEIBER (Ed.), CONSTITUTIONAL GOVERNANCE AND JUDICIAL POWER — THE HISTORY OF THE CALIFORNIA SUPREME COURT (Berkeley Pub. Policy Press, Institute of Governmental Studies, Berkeley, Cal. 2016) 82–84; McMurray, *supra* note 3, at 38. Other states also initially adopted various commissioner systems in lieu of intermediate appellate courts, in attempts to deal with increasing demands on state high courts. See Kagen et al., *supra*, 76 MICH. L. REV. at 975, fn. 33; POUND, *supra* note 11, at 201–13 [describing the various forms of commissions used over seventy years in nineteen states]. Previously, the California Constitution, both as amended in 1861 (art. VI, § 11) and thereafter under

The court promptly appointed three commissioners, and within a few months the “Supreme Court Commission” was up and running. The court’s original plan was to tap three former justices for the positions, but as it turned out, only one of them was available.¹⁹ Each of the three commissioners was nevertheless highly experienced.

Chief Commissioner Isaac Sawyer Belcher, a former gold miner, had been a district attorney and then a district court judge in Yuba County. He served briefly as a justice on the California Supreme Court in 1872–74, and presided as president pro tempore at the then-recent state constitutional convention.²⁰ Henry S. Foote, son of a United States senator, had been a federal judge in Oklahoma.²¹ Niles Searls, a true ‘49er, survived an arduous migration to California, and after trying mining took up law practice in Nevada City. He became district attorney, then a district judge, and then a state senator.²²

For good and ill, they also reflected their times. Key parts of the 1879 Constitution were astonishingly racist.²³ These mirrored the prejudices of

the 1879 charter (art. VI, § 14), permitted trial courts — first called district courts, and subsequently named superior courts — to employ “commissioners” to undertake some of the “chambers business” and other work of trial court judges. As observed *post* note 123, a corresponding provision remains today.

¹⁹ JOHNSON, 1 HISTORY OF THE SUPREME COURT JUSTICES (Bender-Moss Co., S.F., Cal. 1966) 122 & fn. 4 [recounting the Supreme Court’s plan to appoint former justices I. S. Belcher, W. W. Cope, and Jackson Temple].

²⁰ JOHNSON, *supra* note 19, at 121–23. See also generally McKinstry, *Supreme Court of 1890: An Historical Overview* (Spring 1993) CAL. SUPREME CT. HIST. SOC’Y NEWSLETTER 8, 9. Regarding Belcher’s election as president pro tempore at the constitutional convention, see 1 WILLIS & STOCKTON, *supra* note 1, at 38.

²¹ McKinstry, *supra* note 21, at 9.

²² JOHNSON, *supra* note 19, at 152–55. Searls was a “dyed-in-the-wool Democrat” who nevertheless admired President Lincoln. *Id.* at 153. See also SCHUCK, HISTORY OF THE BENCH AND BAR OF CALIFORNIA (The Commercial Printing House, L.A., Cal. 1901) at 494–95.

²³ Some of the history and resulting provisions are related in *In re Chang* (2015) 60 Cal. 4th 1169, 1172–73 [describing the anti-Chinese sentiment that was a major impetus for the convention, and the ensuing constitutional provisions (1) denying the right to vote to any “native of China”; (2) directing the Legislature to enact laws to combat “the burdens and evils” posed by Chinese immigrants; (3) prohibiting any corporation or government entity from “employ[ing] directly or indirectly, in any capacity, any Chinese or Mongolian” and directing the Legislature to “pass such laws as may be necessary to enforce this provision”; and (4) directing the Legislature to “provide

the era, as already reflected in early case law and statutes.²⁴ Similarly, the justices elected to the court under the new state charter were overwhelmingly members of the xenophobic Workingmen's Party.²⁵ It seems probable that some of the hired staff commissioners held similar views.²⁶

II. THE COURT'S USE OF COMMISSIONERS

The staff commissioners performed functions similar to those of today's appellate court and Supreme Court attorney staff. After a case was assigned to three commissioners, they were to review the record and briefs,

the necessary legislation to prohibit the introduction into this State of Chinese" and to "discourage their immigration by all the means within its power"]. The convention delegates invested substantial time addressing these and related issues. See WILLIS & STOCKTON, *supra* note 1, at (vol. 1) 627–40; (vol. 2) 641–92; 695–721, 724–29, 739, 756; and (vol. 3) 1428–31, 1435–37, 1493–94.

²⁴ See, e.g., *People v. Hall* (1854) 4 Cal. 399 [finding a Chinese person to be an "Indian" under a statute that prohibited a "Black or Mulatto person, or Indian . . . [from] giving evidence in favor of, or against a white man," and reversing the murder conviction of a white man for killing a Chinese miner because the witnesses who testified at trial were Chinese]. Regarding *Hall*, see, e.g., Nagel, *The Worst Statutory Interpretation Case in History* (2000) 94 N.W. L. REV. 1445, 1459–68; Traynor, *The Infamous Case of People v. Hall (1854) — An Odious Symbol of Its Time* (Spring/Summer 2017) CAL. SUPREME CT. HIST. SOC'Y NEWSLETTER 2 [noting that on remand, the defendant escaped retrial] and *id.* at 6–8 [appended "colorful tidbits"]. Regarding corresponding and equally odious anti-Chinese early legislation, see CAL. STATS. 1858, ch. 313, at 295; CAL. STATS. 1862, ch. 339, at 462; CAL. STATS. 1872 (1872 Reg. Sess.) res. ch. 20, at 970 (Assem. Conc. Res. No. 3); and CAL. STATS. 1874 (1874 Reg. Sess.) res. ch. 29, at 979 (Sen. Conc. Res. No. 25). Statutory law also required segregated schools. E.g., CAL. STATS. 1870, ch. 556, § 53, at 838, & § 56, at 839 ["The education of children of African descent, and Indian children, shall be provided for in separate schools"]. The court in *Ward v. Flood* (1874) 48 Cal. 36, 52 found no constitutional problem with separate-but-equal schools.

²⁵ McMurray, *supra* note 3, at 37 [six of seven justices elected in 1879 "were nominees of the Workingmen's Party"]. McCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (U.C. Press, Berkeley, Cal. 1994) at 79–83, describes the influence on the constitutional convention of the Workingmen's Party, led by Dennis Kearney, whose slogan was "The Chinese Must Go!" One-third of the convention delegates were members of that party — "by far the largest voting block present." *Id.* at 81.

²⁶ As the constitutional debates disclosed, Belcher, like the vast majority of his fellow delegates, expressed (or at least acceded to) racist views concerning Chinese immigrants. 2 WILLIS & STOCKTON, *supra* note 1, at 715 & 727 [remarks of Belcher].

undertake any necessary legal research, and submit a draft memorandum in the form of a proposed opinion. This is in some respects akin to the model used currently.

There were substantial differences, however. The first related to constitutional organization. As noted, the 1879 Constitution encouraged the court to operate in two departments of three-justice panels.²⁷ This effectively created a somewhat crude and ultimately dysfunctional internal form of an intermediate court of appeal. Final review was possible in bank before the full seven-member court. Sometimes, full review was *required*: Under the Constitution's judicial article, department decisions had to be unanimous in order to produce a judgment — meaning that any dissent would automatically trigger an in bank hearing. The same provision afforded no right to oral argument except in cases that were heard in bank.²⁸

²⁷ In order to avoid exercising discretion in the distribution of cases, the chief justice assigned all even numbered cases to one department, and all odd to the other. McMurray, *supra* note 3, at 75–76. Sloss, *M. C. Sloss and the California Supreme Court* (1958) 46 CAL. L. REV. 715, describes how the department system worked in practice, and the chief justice's special role: "Each department, so far as its own work went, had a great deal of independence; it could adopt its own methods of assigning cases and announcing decisions. Each associate justice was for practical purposes a member of two separate, though interlocking, courts — his own department and the full bench. His most intimate association was with his departmental colleagues; and when . . . each department was operating harmoniously, its members influenced each other and a departmental view of legal issues was likely to emerge." *Id.* at 716. Moreover, the chief justice during most of the relevant period, William H. Beatty, "did not ordinarily sit in either department," and he wrote fewer "than the usual number of opinions in bank" because he "devoted much of his time to a painstaking study of the numerous applications for writs and petitions for rehearing." *Id.*

²⁸ At that time California Constitution article VI, former section 2 provided simply, and without reference to oral argument: "The presence of three Justices shall be necessary to transact any business in either of the departments, except such as may be done at Chambers, and the concurrence of three Justices shall be necessary to pronounce a judgment." By contrast, the procedure governing hearings in bank specifically contemplated oral argument: "The Chief Justice may convene the Court in bank at any time, and shall be the presiding Justice of the Court when so convened. The concurrence of four Justices present at the argument shall be necessary to pronounce a judgment in bank; but if four Justices, so present, do not concur in a judgment, then all the Justices qualified to sit in the cause shall hear the argument; but to render a judgment a concurrence of four Judges shall be necessary." Today's corresponding provision (art. VI, § 2), which was revised in 1966 to eliminate the by then disused department practice, assumes the court will hear argument in bank, and states, "Concurrence of 4

This, in turn, allowed the justices to assign to the commissioners cases that, the court hoped, would be decided on the briefs alone, and with the understanding that they could be resolved without oral argument.²⁹

Second, whereas today it is understood that attorney staff serve a behind-the-scenes research and drafting role for the justices,³⁰ the nineteenth century court commissioners were anything but anonymous. The commissioners' draft opinion — authored by one of them, and usually signed by the other two — would be submitted to a panel of three Supreme Court justices, sitting in one of the departments. And that signed “commissioner opinion” — with each commissioner's name as prominent as any justice's — would be adopted (sometimes after modifications, but often verbatim) by the justices, making it the court's judgment, subject only to rehearing before the full seven-member court in bank.³¹ The result of this system was that the commissioners' opinion usually would become *the* opinion of the Supreme Court. And most of these opinions would be published in the *California Reports*, in a format that looked just like any other Supreme

judges present at the argument is necessary for a judgment.” (Even under this provision, however, in limited circumstances there is no right to oral argument. See *Lewis v. Superior Court* (1999) 19 Cal. 4th 1232, 1253–61.)

²⁹ *People v. Hayne* (1890) 83 Cal. 111, 124 (Beatty, C.J., conc.) [“The cases which are referred by us to the commission are those which are fully presented on the papers”]; accord, *post* text at notes 49 & 50 [describing testimony of Justice Thornton and Commissioner Hayne]; *The Supreme Court, Justice Patterson Answers “The Witness”* (Sept. 5, 1891) Vol. 7, No. 18 THE WAVE at 8 [cases assigned to the commissioners were those “submitted on the briefs”]. See also Blume, *supra*, 22 HAST. L.J. at 170 [noting the court concentrated on deciding matters on the briefs and had little time for oral argument].

³⁰ See *post* note 122.

³¹ See generally POUND, *supra* note 11, at 204–05 [describing how the commissioners were utilized by the court]. There were substantial variations. For example, sometimes the full court adopted an opinion issued by the commissioners. E.g., *In re Asbill* (1894) 104 Cal. 205, 208; *Jones v. Board of Police Commissioners* (1903) 141 Cal. 96, 98. And not infrequently, a divided in bank court adopted the commissioners' opinion, with some justices dissenting. E.g., *Estate of Hugh J. Glenn* (1888) 74 Cal. 567, 569; *Yosemite Stage etc. Co. v. Dunn* (1890) 83 Cal. 264, 269–70; *Daley v. Russ* (1890) 86 Cal. 114, 118; *Tyler v. Mayre* (1892) 95 Cal. 160, 161–70; *Murray v. Murray* (1896) 115 Cal. 266, 279. Less frequently, when a department panel of justices adopted the commissioners' opinion, a justice wrote separately to explain his own reasons for concurring. E.g., *McLaughlin v. Clausen* (1897) 116 Cal. 487, 492. And sometimes a department panel adopted an opinion written by a commissioner and concurred in by only one other commissioner. E.g., *Pool v. Butler* (1903) 141 Cal. 46, 54.

Court case set out in those volumes, complete with caption, abstract, head-noted text, and a disposition paragraph.

This process appears to have vested far more authority in the commissioners compared with the present system, under which a staff attorney or law clerk submits a draft to a single justice to whom the case has been assigned — and who then reviews, edits, requires rewrites and generally has significant input into the version that finally circulates within the court. It is unknown whether comparable initial (or subsequent) oversight was employed by the justices when they assigned matters to the commissioners.

Fewer than five months after the Legislature told the court to hire help (and just two days after the court decided a case in which Chief Commissioner Belcher himself was counsel of record for one of the parties³²), three justices of the Supreme Court adopted the first “commissioner opinion”: *Smith v. Cunningham*, set out in the *California Reports* at 67 Cal. 262, looking like any other case of the court at that time.

Except for these differences: The opinion shows that it was written by “Searls, C.” At the end, after the opinion’s reasoning, comes this phrase — a version of which the commissioners and Supreme Court justices would use more than 3,700 more times in the *California Reports* over the next twenty years: “We find no error in the record and the judgment should be affirmed.” The signatures of the concurring commissioners, “Belcher, C. C., and Foote, C.,” appear next, followed by the statement: “The Court. — For the reasons given in the foregoing opinion the judgment is affirmed.”³³

³² *Scollay v. County of Butte* (1885) 67 Cal. 249 [Belcher represented Butte, and his client prevailed]. It is unclear whether, or to what extent, the commissioners were precluded from practicing law during their terms. The 1879 Constitution had adopted a provision barring judges and justices from engaging in the private practice of law while in office. CAL. CONST. art. VI, former § 22 [presently art. VI, § 17]. No similar prohibition appeared in any provision governing commissioners. The impetus for the judicial provision, in turn, might be traced to the practices of the earliest justices, two of whom “devoted a great part of their time while members of the Court to private affairs.” JOHNSON, *supra* note 19, at 20. The first chief justice, Serranus Clinton Hastings, opted not to seek re-election at the end of his term, in favor of becoming attorney general, so that he could be even “freer to engage in private business.” *Id.*

³³ As described *post*, text at notes 92–94, the phrasing changed periodically from case to case, and over the years, sometimes becoming more deferential on the part of the commissioners, and also becoming somewhat more transparent on the part of the justices, who eventually began signing their own names.

The justices immediately adopted the same approach with respect to unreported commissioner opinions. Some might, at this point, be thinking: *unreported* Supreme Court opinions? Yes indeed. Although an early statute mandated that all decisions were to be reported,³⁴ the 1849 Constitution did not address that issue. And the 1879 Constitution, even as amended today, calls only for the publication of opinions as the court deems warranted.³⁵ The court declined to report some of its opinions beginning in 1855, and that practice was codified in an 1860 statute, under which the justices were permitted to direct that certain opinions not be reported.³⁶ The court issued approximately 1,800 unreported opinions over the next twenty-five years. That practice continued unchanged with the advent of the commissioners, who produced nearly 700 of the unreported opinions, bringing the total number of Supreme Court commissioner opinions to approximately 4,400.

Eventually the court's unreported opinions began to be collected and published regularly, albeit unofficially, in the *Pacific Reporter*, which commenced operation in late 1883. All unreported opinions that could be

important to determine as to the validity of the writ of attachment under which the defendant as Sheriff levied upon the property. If regular it could not justify him in taking plaintiff's property, and if irregular he was in a worse position.

The errors assigned upon the action of the Court in the admission of testimony so far as supported by the record are without merit.

The find no error in the record and the judgment should be affirmed.

Searls, C.

Are concur
Beecher C. C.
Foster - C.

By the Court.
For the reasons given in the foregoing opinion the judgment is affirmed.

³⁴ CAL. STATS. 1850, ch. 90. See generally Strauss, *Historical Study — Written Opinions* (1964) 39 J. ST. BAR OF CAL. 127. As alluded to (*ante* note 2), another early statute, which the court first ignored and later found unconstitutional, required the court to explain its decisions in writing.

³⁵ The 1849 California Constitution's judicial article (VI) did not require that opinions be given in writing, much less that they be published. Article VI, former section 16 of the 1879 Constitution provided for publication as the court "may deem expedient." Currently, article VI, section 14, provides for publication as the court "deems appropriate"; and CALIFORNIA RULES OF COURT, rule 8.1105(a), which was adopted by the court itself, mandates publication of all Supreme Court opinions.

³⁶ CAL. STATS. 1860, ch. 132, 104.

found from the prior decades were retroactively rescued from archives and published in 1913, in the amusingly named reports, “*California Unreported Cases*.” Both publications showed *Moore v. Moore* (1885) 7 Pac. 688, 2 Cal. Unrep. 510, as the first unreported commissioners’ opinion case.³⁷

III. CRITICISM OF, AND LITIGATION CHALLENGING, THE COMMISSIONERS

Even with the help of the three commissioners, a substantial backlog of cases remained years later.³⁸ Renewed calls to create an intermediate appellate court³⁹ again failed. Instead, in early 1889, the Legislature renewed the commissioners program for another four years and increased their number to five.⁴⁰

Yet storm clouds were gathering. After the court had issued more than 1,200 commissioner opinions, there was a legal challenge to the system. In mid-August 1889 Ben Morgan, a local attorney and perennial unsuccessful

³⁷ The preface to 1 Cal. Unrep. highlighted “the extent to which the unreported decisions have been cited by courts and legal writers,” and asserted that “the intrinsic value revealed in the opinions themselves . . . have placed the question of their importance to the practitioner beyond all controversy.” *Id.* at “v.” Such cases are equally precedential as other officially reported Supreme Court cases — see *In re Harris* (1993) 5 Cal. 4th 813, 849, n. 18 [and cases cited]. Regarding the earliest days of the *California Reports*, including fire that destroyed the original documents, see Bennett, *Preface* (1851) 1 Cal. vii–viii. Concerning various publishers of timely unofficial reports of decisions prior to the *Pacific Reports*, see Wood, *Legal Journalism in San Francisco*, in *HISTORICAL AND CONTEMPORARY REVIEW OF BENCH AND BAR IN CALIFORNIA* (The Recorder Printing & Pub. Co., S.F. Cal. 1926) at 5; and McMurray, *supra* note 3, at 29–30. As observed *ante* note 3, until the practice was barred by the Constitution of 1879, the court also frequently issued decisions without any statement of reasons. At least one early unofficial publisher made available not only the unreported opinions of the court, but also provided sometimes detailed notes concerning the court’s unwritten decisions. See, e.g., (Apr. 20, 1878) 1 PAC. COAST L.J. at 145–55 [setting out nine unreported per curiam opinions], and 155–57 [setting out three “Notes of Unwritten Decisions”].

³⁸ See *Easing the Calendar, Proposals to Come to the Supreme Court’s Relief* (Dec. 5, 1888) S. F. EXAMINER, at 5 [noting that the court’s San Francisco docket was two to three years behind].

³⁹ *Id.* [describing a proposal to create an “intermediate Court of Appeals”].

⁴⁰ CAL. STATS. 1889, ch. 16, 13. Thereafter, the Commission continued to be periodically renewed, and ultimately a total of 16 commissioners were appointed. See *post* note 91.

candidate for political office,⁴¹ sued the sitting five commissioners in a quo warranto proceeding in the San Francisco Superior Court, naming Commissioner Robert Y. Hayne the lead defendant.⁴² Morgan had, by then, appeared before the Supreme Court in eight cases, losing in his most recent four — thrice, and quite tellingly, in commissioner opinions, two of which were authored by Hayne.⁴³ Hayne's most recent ruling against Morgan, filed three months earlier, had commenced: "There is absolutely no merit

⁴¹ See, e.g., *The Democratic Nominee for Congress in the Third District* (Sept. 12, 1888) OAKLAND TRIBUNE, at 8; [noting that Morgan had unsuccessfully run for the state Senate two years earlier, and was the sole nominee for Congress after the preferred candidate declined]; *Joe McKenna's Opponent, The Democrats Nominate Benjamin Morgan, of Alameda, for Congress* (Sept. 13, 1888) PACIFIC BEE, at 8; *Our Portrait Gallery of Prominent Citizens* (July 26, 1890) CITY ARGUS, at 7 [promoting for governor "Ben. Morgan of Berkeley, . . . a fluent and forcible speaker, a close and exact reasoner, and one who would inspire confidence in the trust and sincerity of his views"]; *American Nominations* (Sept. 26, 1890) SAN FRANCISCO CHRONICLE, at 8 [noting Morgan presided over the "State Central Committee of the American party," which nominated candidates for the California Supreme Court]; 2 *THE BAY OF SAN FRANCISCO: THE METROPOLIS OF THE PACIFIC COAST AND ITS SUBURBAN CITIES* (The Lewis Pub. Co., Chicago, Ill. 1892), at 309 [noting that "Colonel Morgan" was born in Virginia, studied law in Georgia, immigrated to California in 1867, worked four years in Arizona, had been nominated the American party's candidate for Lieutenant-Governor in 1890 — and was "imbued with the spirit of 1776" and the idea that "Americans should govern America"]. According to the San Francisco Directories, Morgan kept law offices at, variously, San Francisco, Berkeley, Alameda, and ultimately, Inverness, in Marin County.

⁴² *Coast Reports: Legality of the Supreme Court Commission Disputed* (Aug. 13, 1889) SAN DIEGO UNION AND DAILY BEE, at 1. ["San Francisco, August 12. — A complaint was filed in the Supreme Court today by Ben Morgan, a lawyer of this city, against R. Y. Hayne, H. S. Foote, I. S. Belcher, J. A. Gibson and S. Van Cliffe, to determine their right to act as Supreme Court Commissioners. . . ."] Morgan's suit proceeded despite the Attorney General's subsequent opinion, rendered August 15, that the system was constitutional, and that Morgan's "request for leave to sue should be denied." *The Act is Constitutional* (Aug. 16, 1889) SACRAMENTO DAILY UNION, at 3.

⁴³ *Morrow v. Graves* (1888) 77 Cal. 218 [opn. by Hayne, C., rejecting Morgan's assertion that a deed was fraudulently conveyed]; *Drexler v. Seal Rock Tobacco Co.* (1889) 78 Cal. 624 [opn. by Belcher, C. C., affirming an underlying judgment in light of Morgan's failure to file a brief]; *Shain v. Belvin* (1889) 79 Cal. 262 [opn. by Hayne, C., rejecting Morgan's defense concerning a promissory note]; *Drinkhouse v. Spring Valley Waterworks* (1889) 80 Cal. 308 [Department 1 opn. by Beatty, C. J., rejecting Morgan's choice of venue]. Regarding the latter case: Co-counsel with Morgan was 25-year-old Abe Ruef, who had been admitted to the bar only a few years earlier, and later became notorious as a corrupt political boss. See generally THOMAS, A DEBONAIR SCOUNDREL

in this appeal.” The opinion proceeded to call the underlying judgment, which Morgan sought to undo, “clearly right,” and it dismissively concluded: “We cannot see the least shadow of excuse for the appeal.” Finally, Hayne’s opinion proposed not only affirmance, but also “20 per cent. damages” in sanctions.⁴⁴ The court, augmenting its customary per curiam adoption language, ordered judgment accordingly.⁴⁵

The *San Francisco Chronicle* noted Morgan’s filing under the headline, “Usurpation Charged — Ben Morgan Takes a Tilt at the Supreme Court Commissioners.”⁴⁶ His suit alleged that the commissioners, by undertaking to give the justices their written opinions, were exercising judicial power that was not theirs. And by inference it suggested that the Supreme Court justices, having routinely adopted opinions submitted to them, were abdicating their own judicial duties.

Justice James D. Thornton and Commissioner Hayne appeared at the trial to testify as fact witnesses. Eyebrows must have shot up when it was reported that the justices review the commissioners’ recommendations, but not the briefs submitted by counsel.⁴⁷ Three times in his direct

(Holt, Rienhart and Winston, N.Y. 1962), at 11 [Ruef was then “small-time in the political swirl, primarily a lawyer with a political avocation”].

⁴⁴ *Shain v. Belvin*, *supra*, 79 Cal. at 261–64.

⁴⁵ *Id.* at 264. The court wrote: “For the reasons given in the foregoing opinion the judgment and order are affirmed; and, it appearing to the court that the appeal herein was taken for delay, it is ordered that there be added to the costs 20 per cent. of the amount of the judgment as damages by virtue of the provisions of section 957, Code Civil Proc.”

⁴⁶ (Oct. 11, 1899) *SAN FRANCISCO CHRONICLE*, at 3. *See also Court Commissioners, Contention as to the Legality of Their Official Actions* (Oct. 11, 1889) *DAILY ALTA CALIFORNIA*, at 1. The latter reported: “The Attorney-General, on the relation of Ben Morgan, has applied to the Superior Court for a writ of quo warranto, to be directed to the Supreme Court Commissioners, ordering them to appear and show by what authority they claim the right to exercise any judicial powers within this State, and particularly that of considering and determining cases on appeal in the Supreme Court . . .”

⁴⁷ *Court Commissioners, Proceedings to Declare the Office Unconstitutional* (Nov. 1, 1889) *DAILY ALTA CALIFORNIA*, at 2. The article reported:

Mr. Morgan appeared on behalf of the people, and Messrs. Garber and Wilson for the Commissioners.

Justice Thornton and Commissioner Hayne were sworn as witnesses to show the duties which devolve upon Supreme Court Commissioners. It was shown that the Commissioners review briefs in cases, write their conclusions, and reasons therefor, which are handed up to the Supreme Judges, *who do not*

examination of Justice Thornton, Morgan pointedly referred to Commissioner Hayne as “Judge Hayne”; and even in his own testimony on cross-examination, Commissioner Hayne referred to his fellow commissioners as “Judge Belcher and Judge Gibson.”⁴⁸

The testimony shed light concerning how the commissioners interacted with the justices. Justice Thornton explained, “there is a general order that if a case is not . . . argued orally” it is assigned to the commissioners.⁴⁹

review the briefs, but affirm or reject the recommendations of the Commissioners, and if accepted indorse the same as the opinion and decision of the Court.

Mr. Morgan contends, on behalf of the people, that the Constitution limits the number of Judges of the Supreme Court and designates them and that the Act of the Legislature providing for Court Commissioners to aid and assist the Judges in the performance of their duties is unconstitutional, and, therefore, void. On the contrary, it is contended by Messrs. Garber and Wilson that it is an inherent power of all courts to call to their aid such assistance from the outside as may be necessary, and to adopt opinions so received as their own if they so elect.” (Italics added.)

See also *Court Commissioners, Proceedings to Declare that They are Exercising Illegal Power* (Nov. 1, 1889) SACRAMENTO DAILY UNION, at 1.

The *Daily Alta's* characterization was sensational, but perhaps not wholly accurate. The actual testimony, set out in *People v. Hayne, No. 13666, Transcript on Appeal* (Jan. 18, 1890, on file at the California State Archives, Sacramento), shows that although Justice Thornton apparently was willing to do so, he was not permitted to answer whether the justices “re-examine the entire record of” each case when reviewing and deciding whether to adopt the commissioners’ opinions. *Id.* at 14-15. There appears to have been no testimony concerning whether Thornton or other justices read the briefs filed by the parties.

⁴⁸ *People v. Hayne, No. 13666, Transcript on Appeal, supra* note 47, at 15-16 & 18. To be sure, all three *had earlier* been judicial officers. As observed previously, Isaac Belcher had served as a justice on the Supreme Court. Robert Y. Hayne had, before becoming a commissioner, served as judge of the San Francisco Superior Court. See, e.g., (1880) 57 Cal. at iv; Clarke (1928) *Robert Young Hayne* (San Mateo-San Francisco-Santa Barbara County CA Archives Biographies, available at <http://files.usgwarchives.net/ca/sanmateo/bios/hayne973nbs.txt>). Likewise, James A. Gibson, later a founder of the law firm Gibson, Dunn, and Crutcher, had served as a judge of the San Bernardino Superior Court. See, e.g., (1883) 64 Cal. at vii; see biography set out in San Diego Yacht Club, available at <https://sdy.org/vewebsite/exhibit2/e21261b.htm>. The title “judge” as used at trial may have been no more than polite deference (much as a former senator or president is often referred to by those titles), but given the circumstances of the litigation, one might have expected the commissioners, at least, to refer to themselves as just that, and not as judicial officers.

⁴⁹ *People v. Hayne, No. 13666, Transcript on Appeal, supra* note 47, at 14.

Commissioner Hayne elaborated that the commissioners very rarely hear oral argument, and had done so in only two cases in which the parties had specially requested that opportunity.⁵⁰ Hayne explained that he and his colleagues prepare opinions concerning cases assigned to them and “send [the opinions] up” to the justices for their review; the justices retain their own copies of the case “record” — presumably including briefs; and he confirmed that, when the justices decide to adopt an opinion by the commissioners, they file a brief per curiam statement to that effect.⁵¹ Hayne added that some commissioner opinions and work product, after being sent to the justices, “go[] into the waste basket.”⁵²

The trial judge ruled for the defendants, rejecting challenges to the statute and the court’s implementation of it.⁵³ The judge’s loquacious decision reached back to mid-eighteenth century English jurists Lord Hardwicke, Lord Mansfield, and Lord Chancellor Loughborough to demonstrate that “courts of the greatest authority and . . . the most eminent judicial personages” had long relied on the ability to consult with others in forming their opinions and making decisions.⁵⁴

The matter moved quickly from the superior court, housed inside San Francisco’s then “New City Hall,” to the Supreme Court’s temporary quarters in a commercial building a dozen blocks away on Post Street.⁵⁵

⁵⁰ *Id.* at 18–19.

⁵¹ *Id.* at 17–18.

⁵² *Id.* at 18–19.

⁵³ The decision was widely reported. See *Court Commissioners, Judge Wallace Declares They Were Lawfully Appointed; A Very Important Decision* (Jan. 3, 1890) *DAILY ALTA CALIFORNIA*, at 1 [reprinting verbatim Judge Wallace’s approximately 2,500 word decision]; *Supreme Court Commissioners* (Jan. 3, 1890) *THE LOS ANGELES TIMES*, at 4; *A Legal Body; The Supreme Court Commissioners’ Case Decided* (Jan. 4, 1890) *SAN JOSE DAILY MERCURY*, at 1. Thereafter, the press reported Judge Wallace’s denial of a new trial. *Court Notes* (Jan. 11, 1890) *SAN FRANCISCO CHRONICLE*, at 8 [relating that the motion had been denied “yesterday”].

⁵⁴ See *Court Commissioners, Judge Wallace Declares They Were Lawfully Appointed*, *supra* note 53, at 1.

⁵⁵ *LANGLEY’S SAN FRANCISCO DIRECTORY* (May 1890) at 1331 [listing Superior Court Judge Wallace’s chambers at “New City Hall,” 799 Van Ness Ave.] & 58 [listing the Supreme Court’s offices at 121 Post Street]. The court had moved to Post Street in 1884, and in early 1890 shared that building with numerous others, including The San Francisco Bar Association; Miss Isabella Gunn, dressmaker; and the Musicians’ Mutual Protective Union. See *SAN FRANCISCO DIRECTORY*, *supra*, at 90, 577, 987. Later in 1890

Wisely deciding to sit in bank, the Supreme Court agreed to expedite review in light of the “commanding public importance” of the issues raised, which potentially implicated the validity of approximately half of the court’s recent judgments.⁵⁶ The *Daily Alta California* reported extensively about the oral argument: “During the course of Mr. Morgan’s argument, Justice Works remarked: ‘The act seems to be an attempt to evade the Constitution. The only question is, whether or not the attempt has been successful.’ Chief Justice Beatty at once replied with decided emphasis: ‘Justice Works speaks for himself and not for the Court. I do not think there has been any evasion of the Constitution. The Commissioners certainly have not violated the Constitution. If there has been any dereliction of duty it has been, not by the Commissioners, but by the Court.’”⁵⁷

In addition to this revealing jousting among the justices, the oral argument also touched on the art and challenge of opinion writing: “Justice Thornton remarked that for him the task of writing out an opinion was *a most tedious one*, as he went over his work two and often three times if he had the time. Chief Justice Beatty said that to write a long and loosely constructed opinion required little effort, but to write a concise opinion is a most difficult task. He said he often reached a conclusion in very much less time than the same could be set forth in writing.”⁵⁸

the court moved to 305 Larkin Street — a handsome and apparently then-new building that was located on the footprint of its future and present home, at McAllister and Larkin. LANGLEY’S SAN FRANCISCO DIRECTORY (May 1891) at 63–64; *see also* Dear & Levin, *supra*, 4 CAL. SUP. CT. HIST. SOC’Y Y.B. at 75.

⁵⁶ *People v. Hayne*, *supra*, 83 Cal. at 111. *See also post* note 72 [estimates concerning the number of cases affected]. In deciding to hear the matter, which went directly to the heart of its own functioning and as to which one of its own had already testified, it is possible that the court determined that the “rule of necessity” applied, although it did not address the point. *See, e.g.*, *Olson v. Cory* (1980) 27 Cal. 3d 532, 537 [a judge or justice is not disqualified from adjudicating a matter in which he or she has an interest if there is no other judicial officer or court available to hear and resolve the matter].

⁵⁷ *Supreme Court Commission: Argument Heard on Judge Wallace’s Decision, Remarks from the Bench* (Jan. 25, 1890) DAILY ALTA CALIFORNIA, at 8. *See also The Court Commission, Argument in the Action to Oust Them from Office* (Jan. 25, 1890) SAN JOSE DAILY MERCURY, at 1; *Pacific Coast, The Commissioner Case Is Argued* (Jan. 25, 1890) SAN DIEGO UNION AND BEE, at 1.

⁵⁸ *Argument Heard on Judge Wallace’s Decision*, *supra* note 57, at 8, italics added. The article also reported: “M. Wilson, who appeared for the respondent [the

The article reported that the “questions asked by the Justices . . . left an impression” that the court would “sustain[] the constitutionality of the act.”⁵⁹

The prediction proved correct. Justice Fox’s majority opinion affirming the judgment was issued only twenty-seven days after the trial court’s final ruling, and only twelve days after oral argument before the Supreme Court.⁶⁰ He spoke for *four* of his colleagues — including Justice Thornton, who as noted had recently testified as a fact witness in the trial court below,⁶¹ but not Justice Works, who, after being reprimanded by the chief justice at oral argument, appears to have taken ill.⁶² Chief Justice Beatty penned a concurring opinion. As both documents showed, the justices were quite able to write their own. This assumes, of course, they didn’t get help from any of the five defendants.

Justice Fox’s decision downplayed the role of the commissioners. First, he said, they are kind of like retained counsel, or *amici curiae* — but maybe even more friendly and helpful: “It is no more unconstitutional for this court to receive such assistance from Commissioners designated by itself, or from *amici curiae*, than to accept similar assistance from the statements of fact and arguments of the counsel in the cause.”⁶³ He described the

commissioners], devoted most of his argument to the question how far does the work of the Commissioners affect or influence the Court, and would such influence be in any sense a usurpation of the judicial function. Mr. Wilson took the ground that the Commissioners were merely advisers of the Court. In support of his contention he referred at great length to the practice of the Judges of the English courts, from time immemorial, to call to their aid advice from a source competent to give it.” *Id.*

⁵⁹ *Id.*

⁶⁰ *People v. Hayne, supra*, 83 Cal. 111 [filed Feb. 6, 1890].

⁶¹ In this respect, again, the court may have determined that the “rule of necessity” applied. *See ante* note 56.

⁶² Works is shown in volume 83 of *California Reports* as participating in other filed opinions on February 3, 1890. There’s a notation in one opinion, issued that same date, that “Mr. Justice Works did not participate in the decision in this case.” *Russell v. McDowell* (1890) 83 Cal. 70, 82. In yet another opinion filed February 5, he is shown as having signed. *Cucamonga Fruit-Land Co. v. Moir* (1890) 83 Cal. 101, 107. In the commissioners’ case, *People v. Hayne, supra*, 83 Cal. 111, filed the next day, his absence is not noted. As observed in *JOHNSON, supra* note 19, at 160, Works “suffered considerable sickness through the years, particularly in the first half of his life” — a period that would have included this era.

⁶³ *People v. Hayne, supra*, 83 Cal. at 118.

commissioners' work product as simply "*serviceable instrumentalities to aid us in performing our functions.*"⁶⁴ He reported that the justices reject "many" commissioner opinions that don't see the light of day, and others are adopted only in part.⁶⁵ And, he stressed, the commissioners' opinions don't become judgments unless we, the real judicial officers, say so.⁶⁶

Chief Justice Beatty's concurring opinion was, in some respects, more candid. He said, in essence: Let's get real — our commissioners *write* some of our opinions⁶⁷ — yet there's nothing wrong with that. The 1879 Constitution, he pointed out, required that the court give its decisions "in writing, [with] the grounds of the decision . . . stated."⁶⁸ But, he explained, this requires only that the justices *agree* on an opinion, not that they write one.⁶⁹

⁶⁴ *Id.* at 121, italics added.

⁶⁵ *Id.*

⁶⁶ *Id.* at 122. Justice Fox rebuffed charges that the commissioners exercised undue influence over the justices. If that were true, Justice Fox intoned, that would not be a sign that the legislation is unconstitutional; instead, he wrote, that would be the justices' fault. But, he emphasized, the justices appreciate receiving well written draft opinions crafted by skilled and objective writers; and to the extent they are influenced by them, that is no more problematic than being persuaded by the well-reasoned prose of a self-interested retained counsel who acts "under spur of retainer, and in the direct interest of . . . clients." *Id.*

⁶⁷ Beatty noted that the majority opinion, by relying on and distinguishing an Indiana case, could be read to suggest that the California Constitution "declares the duty of writing its opinions is specifically imposed upon the supreme court by the constitution." *Id.* at 123. And he conceded: "If I held to this view, I confess I could see no escape from the conclusion that the duties we assign to our commissioners, and which are performed by them, involve a delegation by us and a usurpation by them of judicial functions." *Id.*

⁶⁸ *Id.* Language now found in CALIFORNIA CONSTITUTION, article VI, section 14, is substantially similar.

⁶⁹ Beatty said: "In order to comply with [the constitutional command], it is undoubtedly necessary that the court, or some member to whom the duty is assigned, shall in most cases prepare a written opinion, but there may be, and in fact are, many cases in which the labor of formulating a statement of the grounds of the decision has been performed in advance or may be properly delegated to others." *Id.* at 123–24. And he noted that the court sometimes had adopted opinions written by a superior court judge. *Id.* at 124. (The modern Supreme Court has done similarly, adopting, in whole or part, the opinions — or even the dissents — of the appellate court under review. *See, e.g.,* *Bozung v. Local Agency Formation Com.* (1975) 13 Cal. 3d 263, 267; *Roe v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal. 3d 884, 886; *Brandt v. Superior Court* (1985) 37

After briefly sketching how the system worked (and yet avoiding directly addressing whether the justices reviewed counsel's briefs),⁷⁰ Chief Justice Beatty responded to a practical question: "If the court, after receiving the report of the commission, re-examines the case for itself, what is the use of the commission?" How does it save labor, or facilitate the disposition of cases? Echoing some of his and Justice Thornton's comments at oral argument, he answered himself: Writing opinions is difficult work. And yet "[t]here are some persons in whom the literary faculty is highly developed, to whom the writing of opinions may be a trifling task."⁷¹ And so yes, he explained, this saves us time and energy, "without any abdication or delegation by the court of its constitutional functions."⁷²

Cal. 3d 813, 817 [adopting the dissent].) Indeed, Beatty observed, sometimes the court adopts the arguments of counsel verbatim. Is this a violation of the Constitution? He answered: "I think certainly not. The object of the constitutional requirement is not to compel judges to formulate opinions in their own language, but to put upon the record the grounds of their decisions . . ." *People v. Hayne*, *supra*, 83 Cal. at 124.

⁷⁰ He explained: "The cases which are referred by us to the commission are those which are fully presented on the papers. The object of the reference is to obtain a report containing a brief and logical statement of the material facts exhibited by the record, and of the legal propositions upon which the judgment depends. When that report is submitted in the form of an opinion by one or more of the commissioners, with a suggestion that for the reasons stated a particular judgment should be given, it then becomes the duty of the court to compare the report with the record and with the printed arguments of counsel, and to determine for itself whether the reported opinion ought to be adopted, modified, or rejected. If upon such examination the court finds that the facts and the law have been correctly stated by the commission, and it adopts the opinion as its own, the case is not different from those in which the opinion of the trial judge is adopted. The court, though not the author of the opinion, by adopting it, makes it its own." *People v. Hayne*, *supra*, 83 Cal. at 124–25, italics added. By his phrasing, Beatty left unaddressed whether all of the justices actually undertook the described duties. *Compare ante* note 47 [characterizing the trial testimony as establishing that the justices "do not review the briefs" of counsel].

⁷¹ *Id.* at 125, italics added. (Author's note: From my own experience, I very much doubt that the writing of opinions was a "trifling task" for many commissioners. After doing it for thirty-seven years, I find it a struggle and challenge, though ultimately a joy, every time.)

⁷² The court's validation of the program was widely reported. *See, e.g., Supreme Court Commission — Its Labors Are Declared Constitutional and Beneficial* (Feb. 7, 1890) *SAN FRANCISCO EXAMINER*, at 7 [noting that the commissioners had previously "assisted the court by examining and preparing for decision over 1,200 cases" and that

Meanwhile, the commissioners did not skip a beat. The next opinion filed by the court — just one day after rejecting the challenge in which Commissioner Hayne was the lead defendant — was written by Commissioner Hayne.⁷³

IV. CONTINUING CRITICISM OF THE COMMISSION PROGRAM

The court's affirmation of the commissioner system did little to quell growing public criticism of the program. A January 1891 article in the *Los Angeles Times* called the commissioners "little better than clerks" and the system "a mere makeshift."⁷⁴ It reported on pending legislation sponsored by the bar associations of San Francisco and Los Angeles to reorganize the Supreme Court and create intermediate courts of appeal in those cities and in Sacramento.⁷⁵

An August 1891 column in *The Wave*, a San Francisco literary weekly, criticized two recent opinions by the court's commissioners, and listed the names of the four commissioners who authored and signed those opinions.⁷⁶ Justice Patterson, who had a year earlier concurred in the *Hayne* opinion upholding the commissioner system, responded, apparently on behalf of the court: "There is a general impression that [the commissioners] exercise judicial powers, but that is a popular fallacy. Their functions are purely ministerial. They assist the Court in determining the law and the facts of cases submitted on the briefs, but they decide nothing. Their views are generally, but not always, approved."⁷⁷

"[t]he validity of nearly half the court's judgments depended on the decision"; *The Act Constitutional; The Supreme Court Commissioners Again Win Their Case* (Feb. 7, 1890) DAILY ALTA CALIFORNIA, at 2 [stating that the commissioners "have, unchallenged, assisted the Court in the examination and preparation for decision of over 1000 cases" and asserting that "[t]hese judgments would not have been valid if the commission was not a lawfully constituted body"].

⁷³ *Fulweiler v. Mining Co.* (1890) 83 Cal. 126.

⁷⁴ *Work Before the Legislature* (Jan. 19, 1891) THE LOS ANGELES TIMES, at 4.

⁷⁵ *Id.*

⁷⁶ *The Witness* (Aug. 29, 1891) Vol. 7, No. 17, THE WAVE, at 8.

⁷⁷ *The Supreme Court, Justice Patterson Answers "The Witness"* (Sept. 5, 1891) Vol. 7, No. 18, THE WAVE, at 8.

And yet, as commentators have observed, although the justices “could review and modify the commissioners’ opinions, . . . in practice [the court] simply issued them as its own.”⁷⁸ It was unsurprising that, despite the court’s protestations, many viewed the commissioners as “auxiliary judges.”⁷⁹ Another observer asserted that the commissioners operated as “an auxiliary court in intent and effect.”⁸⁰

V. MUSICAL CHAIRS

Notwithstanding these ongoing debates, the commissioner system had become useful to the governor, the justices, and the serving commissioners themselves — facilitating the filling of vacancies, advancement, and job security, all without any diminution in pay. The last two features were especially handy at a time of highly partisan elections, when judges and justices were regularly unseated.⁸¹

Consider, for example, Niles Searls — one of the first class of three commissioners. He had served two years in that capacity when, in 1887, the chief justice died in office. Being experienced, a Democrat, and in the

⁷⁸ Kagen et al., *supra*, 76 MICH. L. REV. at 975.

⁷⁹ *Id.*

⁸⁰ SCHUCK, *supra* note 22, at 495.

⁸¹ From the Supreme Court’s inception until 1911 its justices were selected in partisan elections. GRODIN, IN PURSUIT OF JUSTICE (U.C. Press, Berkeley, Cal. 1989) at 164–66; *see also post* note 82 [example of political party ticket including a candidate for the Supreme Court]. And there was considerable resulting turnover. Cf. McMurray, *supra* note 3, at 37 [under the Constitution of 1879, “the judicial office was thrown back into party politics”]. Reform legislation in 1911 converted those election contests to nonpartisan affairs. CAL. STATS. 1911, ch. 398, § 5, subd. 4, at 774; CAL. STATS. 1911, Ex. Sess., ch. 17, § 3, subd. 4, at 71. By initiative measure in 1934 California amended its Constitution to become the first state to adopt a “retention election” system for appellate justices, under which a justice appears on the statewide ballot unopposed, and the voters are asked to vote simply “yes” or “no” concerning the judicial officer. CAL. CONST., art. VI, § 16, subd. (d); *see* GRODIN, *supra*, at 165–66; *see also* Uelmen, *Symposium, California Judicial Retention Elections* (1988) 28 SANTA CLARA L. REV. 333, 339–40 [history of the 1934 initiative, Prop. 3 — and the failure of a corresponding measure designed to extend retention elections to trial court judges]; Levin, *A Brief History of the Court of Appeal for the Third Appellate District* (Autumn/Winter 2005) CAL. SUPREME COURT HIST. SOC’Y NEWSLETTER 2, 3 [describing how a 1932 appellate judicial election contest helped spur the 1934 reform].

right place at the right time, he was appointed by the governor to fill in as chief justice. In 1888 he sought to stay in that position, and was promoted on the Democratic ticket along with Grover Cleveland for President, and . . . Ben Morgan, for “Member of Congress, Third District.”⁸² But Searls lost the statewide partisan election to William H. Beatty. He went back to practice in Nevada City, but not for long: Four years later, and despite having lost to Beatty, he returned to the court to serve a final four years as a commissioner.⁸³

And now back to Isaac Belcher, also in the first class of commissioners. As noted, he was an associate justice before serving as *chief* commissioner. When that office expired he became a regular commissioner until 1898.⁸⁴

Others similarly traded hats as commissioners and justices. Jackson Temple holds the record, repeatedly bouncing in and out of the court, and between the bench and the Commission, over the course of thirty years. He was appointed to fill a vacancy when a sitting justice resigned, and served as a justice from 1870 to 1872. He ran as a Democrat to keep the seat, but lost. He was elected to the Supreme Court in 1886, but resigned three years later in ill health. After recovering, he returned to the court as a commissioner in 1891. Four years later, while still in that position, he ran for yet another term as an associate justice, and was once again elected to that position, serving until his death in office, in 1902.⁸⁵

The justices appointed W. F. Fitzgerald, then a private lawyer in Los Angeles, as a commissioner in 1891. This may not have been the court’s best hire. After moving up to San Francisco he served only about a year and a half, producing far fewer opinions than his contemporaries before he quit and briefly reentered private practice in that city. Then in early 1893 he was appointed by the governor to fill the vacancy created by a justice who had died in office.⁸⁶ He served a full two years, producing again comparatively few opinions that a reviewer described as “distinguished only by their brevity.”⁸⁷

⁸² *Regular Democratic Ticket!* (Nov. 1, 1888) PACIFIC BEE, at 3 [advertisement].

⁸³ JOHNSON, *supra* note 19, at 154.

⁸⁴ *Id.* at 122–23.

⁸⁵ *Id.* at 115–17.

⁸⁶ JOHNSON, *supra* note 19, at 191.

⁸⁷ *Id.* After he departed the court as a justice, he ran for, and was elected to be, attorney general. When that term expired in 1899 the governor appointed him to the Los Angeles Superior Court. But when that term was up the voters preferred another

Finally, one last round of musical chairs: The voters elected Ralph C. Harrison, with no judicial or other public office experience, to a twelve-year position as an associate justice in 1891. He was said to have been “meticulous in everything he undertook” and to have “discharged every assignment with finesse.”⁸⁸ Many of his opinions appeared in casebooks prepared by “the first names in scholarship.”⁸⁹ He wanted to run for a second term that would start in 1903, but political party machinations gave the nomination to another, and he resumed private practice. Yet not for long: The court appointed him a commissioner in 1904 — as a biographer said, “*making him for all intents and purposes once more a member of the Court.*”⁹⁰

The latter and similar sentiments didn’t help matters. In light of the frequent position-trading, they only underscored one of the continuing criticisms — that unelected staff commissioners and elected justices were, in effect, interchangeable.

VI. MUDDLING ALONG, AND MAKING INCREMENTAL ADJUSTMENTS

After the constitutional validity of the commissioner system was upheld in 1890, the court’s backlog remained, and the Legislature periodically renewed the statute commanding the court to employ commissioners.⁹¹ But criticism of the Commission continued.

In apparent response, both the commissioners and justices made some conciliatory adjustments. Instead of routinely ending their opinions by telling the justices that a judgment “should” be affirmed or reversed, the commissioners sometimes used more deferential language, writing what they “think” or “advise” or “recommend” should happen to the judgment.⁹² Yet

candidate, forcing him to the last stage of his legal career: representing *The Los Angeles Times* under publisher Harrison Gray Otis. *Id.* at 192.

⁸⁸ JOHNSON, *supra* note 19, at 185.

⁸⁹ *Id.* at 187.

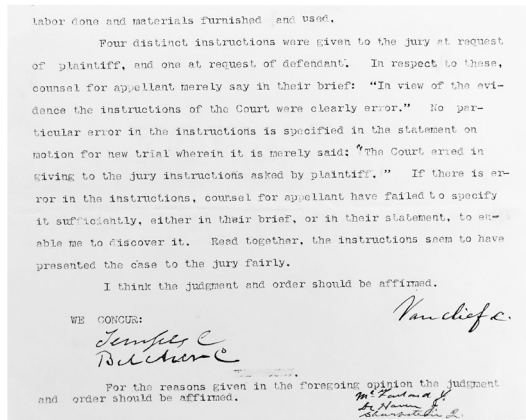
⁹⁰ *Id.* at 187–88, italics added.

⁹¹ CALIFORNIA BLUE BOOK, OR STATE ROSTER 1911 (State Printer, Sac., Cal. 1913) at 413 [listing six legislative renewals, and the succession of the commissioners appointed]. See the Appendix to this article for a roster of all 16 commissioners.

⁹² E.g., *Meade v. Watson* (1885) 67 Cal. 591, 595 [“think”]; *People v. Monteith* (1887) 73 Cal. 7, 9 [“advise”]; *Lind v. City of San Luis Obispo* (1895) 109 Cal. 340, 345 [“think”];

there was no standard language, and the original “should” form continued to appear frequently over twenty years, even after many if not most commissioner opinions eventually adopted more deferential phrasing.⁹³

In line with the commissioners’ sporadic efforts to show some deference, the justices in turn became a bit more transparent, signing their names when adopting the commissioners’ opinions — signaling, apparently, that they had taken judicial ownership of them. A mid-July 1892 commissioner opinion, authored by Vanclief, C., started this new procedure. It concluded: “I *think* the judgment and order should be affirmed.” Then the two other commissioners signed, showing they concurred: “Temple, C., and Belcher, C.” Next, the justices wrote: “For the reasons given in the foregoing opinion, the judgment and order are affirmed.” And then, squeezing their names onto the bottom of the original typed opinion, *they* signed: “McFarland, J., De Haven, J., Sharpstein, J.”⁹⁴



Yndart v. Den (1897) 116 Cal. 533, 548 ["recommend"]; People v. Sears (1897) 119 Cal. 267, 272 ["recommend"]; Arques v. Union Sav. Bank of San Jose (1901) 133 Cal. 139, 144 ["advise"].

⁹³ E.g., In re Asbill (1894) 104 Cal. 205, 208 ["should"]; People v. Town of Berkeley (1894) 102 Cal. 298, 308 ["should"]; People v. Slater (1898) 119 Cal. 620, 624 ["should"]; Allen v. Pedro (1902) 138 Cal. 202, 203 ["should"]; Jones v. Board of Police Commissioners (1903) 141 Cal. 96, 98 ["should"].

⁹⁴ Joyce v. White (1892) 95 Cal. 236, 239, italics added. The original typed opinion, on file in the California State Archives, Sacramento, shows that the justices had to scrunch their signatures to fit at the bottom of the page. Beginning with *Joyce v. White* the justices’ signatures appear regularly in the original filed opinions, and in turn are reflected, immediately after their unanimous adoption of the commissioners’ opinion, in the bound volumes of the *California Reports*. (Curiously, no such notations identifying the justices by name appear in the corresponding “unreported” commissioner opinions later published in *California Unreported Cases* — see ante note 37.) And yet, as of this writing, electronic versions of the *Joyce v. White* opinion (and, significantly,

VII. CREATING THE COURTS OF APPEAL (ON THE SECOND TRY)

But even as some things changed, others remained the same: Still the court remained backlogged; there was criticism of the justices and their commissioners; and there were louder and more frequent calls to create appellate courts. A trenchant 1897 editorial in the *San Francisco Examiner* focused on the unhappy symbiosis of the dysfunctional department system and the Commission: “The trouble with the Supreme Court Commission is fundamental. It is built upon one of the bad features of our Supreme Court system and it intensifies instead of correcting the evil.” For good measure, the editorial also slammed the decisions authored by the commissioners as “not highly regarded as authority by either the bench or bar.”⁹⁵

An article two years later in the *San Francisco Chronicle* reported that the court remained so far behind in its work that the justices had not been paid for eight months, having failed to decide and file its cases within ninety days after submission.⁹⁶ The same article critiqued the commissioner

hundreds of similar subsequent officially-reported opinions) fail to include this information and other key language contained in the official version(s), as published in the bound *California Reports*. For example, the versions of commissioner opinions issued after mid-1892, as presented on Westlaw.com and LexisNexis.com, omit the justices’ names immediately after the key paragraph in which they unanimously adopt the commissioners’ opinion. This highlights pitfalls lurking for those who might rely exclusively on electronic research, rather than consulting the original hard copy volumes.

⁹⁵ *In Place of the Commission* (Feb. 4, 1897) *SAN FRANCISCO EXAMINER*, at 6. By contrast, Roscoe Pound, although criticizing commissioner systems generally (POUND, *supra* note 11, at 213), lauded California’s department system, and those of other state high courts following that lead. *Id.* at 214–20.

⁹⁶ *Supreme Court — Proposed Amendment is not Satisfactory — Matter is Referred to a Subcommittee* (Feb. 4, 1899) *SAN FRANCISCO CHRONICLE*, at 2. The California Constitution then (art. VI, former § 24) as now (art. VI, § 19), prohibits a judge or justice from being paid if any matter remains pending and undetermined before the judicial officer more than ninety days after having been “submitted” for decision. See generally CAL. GOV. CODE, § 68210 [codifying the rule and requiring an affidavit signed by each judicial officer]. It appears that the 1898–99 salary snafu led the court to adopt the expedient practice of delaying “submission” until it was ready to file an opinion deciding the case, rather than submitting the matter immediately following argument. Decades later (and in the face of litigation in 1979 and 1986 challenging that practice) the court began to honor the ninety-day rule by “submitting” its cases immediately after oral argument, and in order to do so, it adopted procedures under which

system as a “fifth wheel on a coach,” and generally supported the idea of a constitutional amendment designed to reorganize the Supreme Court and to create appellate courts.⁹⁷

A few weeks later the Legislature finally adopted a proposed constitutional amendment that would revise the judicial article to provide for intermediate appellate courts. The would-be amendment also proposed to reduce the Supreme Court from seven to five justices and require the court to cease hearing oral arguments in Sacramento and Los Angeles, and instead hold all of its sessions at its headquarters in San Francisco.⁹⁸ Following litigation about whether the proposed amendment should appear on the ballot,⁹⁹ the measure was submitted to the voters at the 1900 General Election. Alas, it failed.

In 1903, after some additional proposals had been floated — including one to increase the court to ten justices working in three departments,¹⁰⁰ and another to double down on commissioners by increasing their number

it “frontloads” some of its internal deliberation procedures. *See generally* Liu, *How the California Supreme Court Actually Works: A Reply to Professor Bussel* (2014) 61 UCLA L. REV. 1246, 1252–58. The court nonetheless still can vacate submission and resubmit a case — something it occasionally does, usually in conjunction with post-argument supplemental briefing — an action that restarts the ninety-day period. CAL. RULES OF COURT, rule 8.524(h).

⁹⁷ SAN FRANCISCO CHRONICLE, *supra* note 96, at 2.

⁹⁸ CAL. STATS. 1899, ch. 37, at 503 (Sen. Const. Amend. No. 22) (adopted Mar. 18, 1899), § 2. As observed *ante* note 16, the court had maintained its headquarters in San Francisco since early 1874 but, as instructed by the Legislature in 1878, had continued to hold some oral arguments in Sacramento, and later added oral argument sessions in Los Angeles. To this day the court keeps its headquarters in San Francisco, but regularly hears oral argument in all three cities.

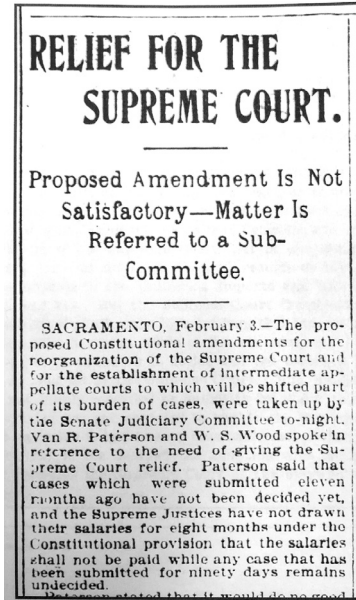
⁹⁹ In the meantime, the Legislature, having had second thoughts about some details of the proposed constitutional amendment, adopted a revised version of that amendment. In *People v. Curry* (1900) 130 Cal. 82, 90, the court held that the subsequent version, because it had been adopted at an extraordinary session that had been called for reasons other than to propose constitutional amendments, could not be presented to the voters, and hence the Secretary of State was required to submit the original version to the electorate.

¹⁰⁰ *To Increase the Number of Justices — Senator Caldwell Introduces a Constitutional Amendment Changing the Personnel of the Supreme Court* (Feb. 5, 1901) SAN FRANCISCO CHRONICLE, at 2. The proposal also would have abolished the Commission. *Id.*

to twelve¹⁰¹ — the Bar Association of San Francisco regrouped and proposed a new constitutional amendment.¹⁰² A few weeks later, the *Los Angeles Times* breathlessly reported on an “important amendment” to that legislation, a sweetener: The measure would be revised to provide that “when ratified by the people the offices of the Supreme Court Commissioners shall . . . be abolished.”¹⁰³ Three days later the Legislature adopted Senate Constitutional Amendment No. 2.¹⁰⁴

The question again went to the voters. This time the measure proposed to keep the Supreme Court at seven justices, and allowed them to continue to hear oral arguments in Sacramento and Los Angeles, as well as at their headquarters in San Francisco. The eleventh-hour amendment, designed to seal the deal with a skeptical public, was tacked on in a final section 25: “The present Supreme Court Commission shall be abolished at the expiration of the present term of office, and no Supreme Court Commission shall be created or provided for after January 1st, A. D. 1905.”

Newspaper articles before the election reminded voters that the court was “embarrassed” by being 1,000 cases behind and “hopelessly in arrears” — despite its filing about 650 opinions annually.¹⁰⁵ The voters overwhelm-



¹⁰¹ *For Relief of Supreme Court — Measures to Be Introduced to Increase its Personnel* (Feb. 2, 1903) *SAN FRANCISCO CHRONICLE*, at 2.

¹⁰² *To Revise Court System — San Francisco Bar Association’s Plan for State Appellate Tribunal* (Feb. 4, 1903) *SAN FRANCISCO CHRONICLE*, at 7.

¹⁰³ *Courts of Appeal — Important Amendment* (Mar. 11, 1903) *THE LOS ANGELES TIMES*, at 4.

¹⁰⁴ *CAL. STATS.* 1903, ch. 38, at 737 (adopted Mar. 14, 1903).

¹⁰⁵ *Appellate Courts Provided for by Amendment* (Aug. 15, 1904) *SAN FRANCISCO EXAMINER*, at 6. Fewer than twelve months later, and after the amendment had passed, the Supreme Court itself recounted that “for years” prior to the amendment it “had been unable to dispose of the business before it as fast as it accumulated, and the cases

ingly adopted the measure at the November 1904 General Election,¹⁰⁶ the intermediate appellate courts were born, and the Supreme Court Commission was eliminated. The “district courts of appeal” (note the “s” after “courts,” but not after “appeal”)¹⁰⁷ commenced work,¹⁰⁸ and the last published Supreme Court commissioner case was filed in mid-1905.¹⁰⁹

With the departure of the last five commissioners (along with their own dedicated support, a secretary and stenographer), the seven justices were left with a spare staff roster: A reporter of decisions, an assistant reporter, two secretaries, two phonographic reporters, two bailiffs, a librarian — and three janitors.¹¹⁰

were decided from two to three years after the appeals were filed.” *People v. Davis* (1905) 147 Cal. 346, 349.

¹⁰⁶ *Official Vote on Amendments* (Dec. 3, 1904) SAN FRANCISCO CHRONICLE, at 3 [reporting “93,306 for and 36,275 against”].

¹⁰⁷ As observed earlier, some prior proposals called for creation of a “court of appeals” — (note the sole plural) — a name akin to that employed for the federal counterpart, the “circuit court of appeals,” as denominated in an 1891 federal act, 26 U.S. STATS. 826, ch. 517, § 2. But the drafters of the winning version of the amendment went with a singular word for “appeal” — ostensibly, I once read (but can’t find the cite), because the cost-conscious state could not afford the “s.” In any event, that joke helps one to remember, if not understand, the different terminology for the otherwise analogous intermediate appellate courts. Ultimately, although the word “district” was dropped from the title of California’s appellate courts in the mid-1960s — see CALIFORNIA CONSTITUTION REVISION COMMISSION, PROPOSED REVISION OF THE CALIFORNIA CONSTITUTION (San Francisco, Feb. 1966) at 90–91 [as approved by the voters at the General Election of November 8, 1966, via Prop. 1-a] — the singular “appeal” persists. CAL. CONST., art. VI, § 3 [“The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions”].

¹⁰⁸ In that early period, the new appellate court’s jurisdiction was “narrowly limited” and its function was “primarily a device for assisting the supreme court by relieving it of very petty cases and giving preliminary screening to others. The Supreme Court continued to handle the major appellate load.” Sloss, *supra*, 46 CAL. L. REV. at 716. Regarding the early history of the Courts of Appeal, see N. P. Chipman, *The Judicial Department of California*, in CALIFORNIA BLUE BOOK, OR STATE ROSTER 1907 (State Printer, Sac., Cal. 1907) at 657–60 [addressing backlogs, the Supreme Court Commission, and creation of the appellate courts].

¹⁰⁹ *Estate of Dole* (1905) 147 Cal. 188.

¹¹⁰ Compare CALIFORNIA BLUE BOOK, OR STATE ROSTER 1903 (State Printer, Sac., Cal. 1903) at 49, with CALIFORNIA BLUE BOOK, OR STATE ROSTER 1907 (State Printer, Sac., Cal. 1907) at 53. The court also enjoyed services of a “Supreme Court Clerk” and deputies — yet at that time they were apparently not court employees. Starting with the

VIII. EPILOGUE — AND SAFE LANDINGS FOR THE COMMISSIONERS

The Supreme Court reacted to the amendment by articulating principles under which it operates today: It made clear that its oversight of intermediate appellate court work product would be discretionary¹¹¹ — and it would not expend time and energy to correct “mere errors” made by those lower appellate courts.¹¹² Its new role would be to preside over the orderly

first California Constitution in 1849 (art. VI, § 7), the position of Supreme Court Clerk was a statewide elective office. The 1879 Constitution (art. VI, former § 14), as originally adopted and as amended in 1904, continued that approach. Moreover, at that point the Supreme Court Clerk was, at least according to one source, considered to be within the executive department. See, e.g., CALIFORNIA BLUE BOOK 1907, *supra*, at 59 [listing, under the executive department, “Clerk of Supreme Court” and eight staff — five in San Francisco, two in Sacramento, and one in Los Angeles]. Prior and subsequent editions of that publication likewise listed the court’s clerk and employees as executive branch officers and employees. Notably, and by contrast, each new district court of appeal was directed to hire its own clerk — see CAL. CONST., art. VI, § 21 [as amended in 1904] — and those appellate court clerks and the staff were listed as employees of the judicial branch. CALIFORNIA BLUE BOOK 1907, *supra*, at 54. Eventually the Supreme Court was implicitly given the same authority over its clerk and related staff when article VI, section 14 was amended Nov. 4, 1924, to delete any reference to the Supreme Court Clerk as an independent statewide elected official. The currently operative provision concerning the Supreme Court Clerk is set forth in Cal. Gov. Code § 68842 [appointment of Clerk/Executive Officer of Supreme Court]. Regarding the Supreme Court’s authority to hire staff, see, e.g., CAL. STATS. 1927, ch. 565, § 1, at 950 [authorizing the court to hire “employees as it may deem necessary”], and CAL. STATS. 1951, ch. 655, § 5, at 1835 [similar]. For the current provision, see CAL. GOV. CODE § 68806.

¹¹¹ *People v. Davis*, *supra*, 147 Cal. at 349. The court during this period exercised its oversight of the appellate courts’ work primarily by way of the Supreme Court’s “transfer” authority. See *post* note 120. Similar oversight is today exercised via both the transfer power (CAL. CONST., art. VI, § 12(a)) and the power to grant review of a Court of Appeal decision (*id.*, § 12(b)), which, under an amendment effective in 1985, allows the Supreme Court to confine review to selected issues in the appellate court’s decision. See, e.g., *Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal. 4th 754, 767–73 [describing the history of the appellate jurisdiction provisions]; CAL. RULES OF COURT, rule 8.516. As explained in *Snukal*, prior to the 1985 amendment, the Supreme Court’s review had been plenary, amounting to review of the trial court’s judgment, and proceeded as if the Court of Appeal had never acted on the case. The 1985 amendment allowed the Supreme Court to realize the full potential of the original amendment creating the intermediate courts of appeal, by permitting the Supreme Court to “accord review of selected issues” decided by the lower appellate court. *Snukal*, *supra*, 23 Cal. 4th at 773 [and authorities cited].

¹¹² *People v. Davis*, *supra*, 147 Cal. at 347 & 350.

development of the law, by deciding important issues and resolving conflicts in appellate decisions.¹¹³ Doing otherwise, or more, the court reasoned, would defeat the purpose of the recent amendment.¹¹⁴ But, the Supreme Court cautioned, when it declines to intervene in an appellate decision, that doesn't mean it endorses that decision or opinion.¹¹⁵

And yet, even after the creation of intermediate appellate courts, the Supreme Court continued to struggle with an ever-growing backlog.¹¹⁶ It used the criticized department system fairly regularly for nearly fifty years, until the late 1920s, when the court began hearing each case in bank¹¹⁷ — except for two last instances in the early 1940s.¹¹⁸ The obsolete department

¹¹³ *Id.* at 348 & 350.

¹¹⁴ *Id.* at 349. The court added: “The state has done its full duty in providing appellate relief for its citizens, when it has provided one court to which an appeal may be taken as of right. There is no abstract or inherent right in every citizen to take every case to the highest court. The district courts must be deemed competent to the task of correctly ascertaining the facts from the records before them in each case decided therein, and they should be held solely responsible to that extent for their judgments.” *Id.* at 349.

¹¹⁵ *Id.* at 350. In this early period the court sometimes went out of its way to stress the point, occasionally writing brief, substantive opinions when denying a hearing, so as to expressly disassociate itself from parts of the appellate court's decision. E.g., *People v. Bunkers* (1905) 2 Cal.App. 197, 210 [specifying “we are not to be understood as approving” an identified portion of the court of appeal's opinion].

¹¹⁶ As predicted by the court itself in *People v. Davis*, *supra*, 147 Cal. at 349, it remained significantly backlogged during these years, and for “several years to come.” See also Salyer, *The California Supreme Court in an Age of Reform, 1910–1940*, in SCHEIBER (Ed.), *supra* note 18, at 190 [recounting reports in 1918 that the court was twenty months behind — and that previously it had been “as much as five years behind in its work”].

¹¹⁷ Prince, *The Composition and Jurisdiction of the Supreme Court of California* in JOHNSON, *supra* note 19, at 4; McMurray, *supra* note 3, at 36. The court began to sit mostly in bank in 1922. POUND, *supra* note 11 at 214. Yet it sporadically filed a few department cases in the mid-1920s, and then revived the department practice for about sixteen months, filing approximately 250 such opinions between December 1927 and March 1929. At first blush, *Sterrett v. The Curtis Corporation* (1929) 206 Cal. 667, appears to be the caboose — yet, as shown *post* note 118, it's not quite.

¹¹⁸ The court issued two department opinions back-to-back in March 1941 — shortly after Phil Gibson became chief justice, and nine months after the Supreme Court library was presented by Arthur Vanderbilt with a copy of Roscoe Pound's 1940 book, *supra* note 11, in which (at 214) Pound lamented the demise of the practice. See *Grolemund v. Cafferata* (1941) 17 Cal. 2d 679 [“Department 2,” opn. by Curtis, J., with Traynor, J., and Shenk, J., conc.]; *Wiseman v. Sierra Highland Mining Co.* (1941) 17 Cal. 2d 690 [“Department 1,” opn. by Shenk, J., with Carter, J., and Edmonds, J., conc.].

provisions were finally removed from the Constitution in 1966,¹¹⁹ when the judicial article was also amended to conform the appellate jurisdiction of both levels of appellate courts to longstanding practice.¹²⁰ Proposals to embrace a new version of the department system were made — but did not advance — in the early 1980s and late 1990s.¹²¹

Meanwhile, the opening pages of the *California Reports* continued to show the erstwhile department assignments of the associate justices through volume 64 (1966), and ceased doing so only after the department provision was removed from the charter. See *post note* 119.

¹¹⁹ As recommended by the California Constitution Revision Commission, *supra* note 107, at 84, the provision was deleted at the General Election of Nov. 8, 1966 [Prop. 1-a].

¹²⁰ It was not until “about 1941 [that] the Supreme Court adopted the practice of referring virtually all [of its cases on direct appeal from the trial court] to the district courts of appeal.” Prince, *supra* note 117, at 4. See also CALIFORNIA BLUE BOOK 1946 (State Printer, Sac., Cal. 1946) at 115 [the court’s practice at that time was to “transfer to the district courts of appeal for determination all cases except appeals involving the death penalty, tax cases and other matters of importance affecting the public interest or requiring the interpretation of new laws, and proceedings on review from the Railroad Commission” — and in fiscal year 1944–45 “approximately 28 percent of the petitions for hearing” from decisions of the appellate courts were granted]. Decades later, those drafting revisions to the 1879 Constitution recommended modernizing article VI, section 11 (addressing appellate jurisdiction of the Supreme Court and Courts of Appeal) to memorialize and extend the “long-standing practice” of referring most matters — except, most prominently, capital cases — to the intermediate appellate courts. California Constitution Revision Commission, *supra* note 107, at 81; see also *id.* at 90. The Legislature agreed, and voters enacted that change at the General Election of Nov. 8, 1966 [Prop. 1-a]. See generally Sosnick, *The California Supreme Court and Selective Review* (1984) 72 CAL. L. REV. 720, 726–30.

¹²¹ Mosk, *Opinion: A Two-Part State Supreme Court* (1983) 11 PEPPERDINE L. REV. 1 [proposing to increase the Supreme Court to eleven justices sitting in two departments — with five justices hearing criminal cases, and five hearing civil cases]. See Kopp, *Changing the Court for a Changing California* (July 19, 1998) THE LOS ANGELES TIMES, at B15 [lamenting the demise of the court’s department system and advocating a renewed version of Justice Mosk’s bifurcated court proposal, creating a new seven-justice “Court of Criminal Appeals” — Sen. Const. Amend. 31 (Feb. 26, 1998)]; GEORGE, CHIEF: THE QUEST FOR JUSTICE IN CALIFORNIA (Berkeley Pub. Policy Press, Berkeley, Cal. 2013) at 528–29 [criticizing these bifurcation proposals]. See also *id.* at 530–31 [describing Chief Justice George’s own proposal to allow the Supreme Court to transfer capital appeals for decision by the Courts of Appeal, thus freeing the court to better focus on important legal issues arising in both capital and review-granted cases]. Regarding the capital appeals transfer proposal, see also George, *Reform death penalty appeals* (Jan. 7, 2008) THE LOS ANGELES TIMES, at A15.

The Constitution's vaccination against Supreme Court commissioners remained enshrined in the judicial article for fifty-two years, long after that court and the Courts of Appeal had adopted less controversial methods of utilizing judicial staff.¹²² The vestigial provision explicitly

¹²² By 1930, the justices of the Supreme Court and Courts of Appeal were using judicial legal staff more discreetly, in a behind-the-scenes manner, under job titles such as "legal secretaries," "law clerks," and "chief law secretary." Often these incumbents became long-term, or even career, employees. See generally OAKLEY & THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* (U.C. Press, Berkeley, Cal. 1980) at 31–33 & n. 2.86. According to Bernard Witkin, during this era the justices, including the first one for whom he worked, exercised little oversight concerning the opinions drafted by their law clerks, whom he labeled "ghostwriters." Bakken, *Conversations with Bernard Witkin* (1998–99) 4 CAL. SUP. CT. HIST. SOC'Y Y.B. 109, 111. By contrast, Witkin stressed, the next justice for whom he worked as law clerk starting in 1939, Phil Gibson (who became Chief Justice in mid-1940), was substantially engaged in the process, and would "argue" with him about the cases. *Ibid.*; see also *An Interview with Bernard E. Witkin for the Roger J. Traynor Memorial Collection* (Sept. 3, 1986) at 14 (unpublished manuscript on file in the Witkin Archives, California Judicial Center Library, San Francisco). Finally, Witkin described how Justice Roger Traynor, upon joining the court in mid-1940, and thereafter, employed bright and skilled law clerks as collaborators. *Id.*, at 19; see also Bakken, *supra*, 4 CAL. SUP. CT. HIST. SOC'Y Y.B. at 111–12 [Traynor used law clerks as "participants in the thinking process that led to the decision as well as in the articulation by the opinion"].

By 1950, each Supreme Court justice could employ one "research attorney" (a career position today denominated a senior judicial staff attorney) and one "research assistant" (a recent graduate, often not yet admitted to the bar, today denominated an annual law clerk). OAKLEY & THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS*, *supra*, at n. 2.86. An extensive (albeit outdated) discussion of allocation of work between the Supreme Court justices and staff in the mid-1970s can be found in STOLTZ, *JUDGING JUDGES* (Free Press, N.Y. 1981) 352–59. Meanwhile, California's professional appellate staff attorneys emerged from seclusion and commenced holding annual statewide educational conferences, now known as the Appellate Judicial Attorneys Institute (AJAI). See, e.g., Witkin, *The Role of the Appellate Research Attorney — Past, Present and Future* (Oct. 13, 1988), Keynote Address delivered at the California Appellate Attorneys Institute, San Diego (on file in the Witkin Archives, California Judicial Center Library, San Francisco) [extolling the model of career attorneys who assist appellate justices]. These conferences in turn prompted a prominent commentator who perhaps had forgotten about the nineteenth century commissioner predecessors to assert: "There was a time . . . when these folks, who share a plenty big chunk of the responsibility for the operation of the courts, were faceless, nameless mushroom-like secret operatives, tucked away in the back recesses of the appellate courthouses. Their very existence was kept pretty close to the vest . . ." Lascher, *Lascher At Large* (Dec. 8, 1989) S.F. DAILY JOURNAL. The AJAI remains very active today.

prohibiting Supreme Court commissioners was deleted from the charter in the mid-1950s.¹²³

But although the Commission had been abolished, never to arise again, the safe landing program continued for the last five commissioners. After considerable press speculation about whom the governor would appoint to the newly created judicial positions,¹²⁴ when the music stopped in 1905, each existing commissioner was made a new Court of Appeal justice. Ralph Harrison served as presiding justice, First District Court of Appeal, 1905–07.¹²⁵ Wheaton A. Gray served as presiding justice, Second District Court of Appeal, 1905–06. N. P. Chipman served as presiding justice, Third District Court of Appeal, 1905–11. J. A. Cooper served as associate justice, First District Court of Appeal, 1905–07, and presiding justice, First District Court of Appeal, 1907–11. Finally, George H. Smith, then the senior commissioner, having been in that position for the prior fifteen years, served as associate justice, Second District Court of Appeal, 1905–06.

These former commissioners and their eleven predecessor colleagues are little remembered today. Yet all of them played a significant role in helping the Supreme Court fulfill its responsibilities for two decades. Moreover, as we have seen, they also facilitated, perhaps unwittingly, creation of the state's intermediate appellate courts. These early court staff attorneys are — and should be honored as — indirect ancestors of the current appellate judicial attorneys who provide analogous assistance to both the Court of Appeal and the Supreme Court, and help those courts fulfill their challenging and demanding responsibilities today.

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¹²³ Gen. Elec. of Nov. 6, 1956 [Prop. 17, removing art. VI, former § 25 from the California Constitution]. Yet as alluded to *ante* note 18, the state charter had long permitted trial courts to hire and use commissioners. That practice continued, and is reflected, as approved by the voters at the General Election of Nov. 8, 1966 [Prop. 1-a], in present CAL. CONST., art. VI, § 22, allowing superior courts to appoint “officers such as commissioners to perform subordinate judicial duties.”

¹²⁴ E.g., *Many Ask Pardee For Appointment to New Bench* (Nov. 30, 1904) SAN FRANCISCO EXAMINER, at 6.

¹²⁵ JOHNSON, *supra* note 19, at 188. Two years later political machinations again intervened, derailing efforts to nominate Harrison to a full term. There being no Commission to which to return, he was forced to resume the practice of law, which he undertook with his son. *Id.*

ROSTER OF CALIFORNIA SUPREME COURT COMMISSIONERS,

By month and year of service on the court (listed by first service on the court)



JACKSON TEMPLE

Associate Justice, Jan. 1870–Jan. 1872

Associate Justice, Jan. 1887–June 1889

Commissioner, March 1891–Jan. 1895

Associate Justice, Jan. 1895–Dec. 1902



ISAAC S. BELCHER

Associate Justice, March 1872–Jan. 1874

Chief Commissioner, May 1885–July 1891

Commissioner, Aug. 1891–Nov. 1898



NILES SEARLS

Commissioner, May 1885–April 1887

Chief Justice, April 1887–Jan. 1889

Commissioner, Feb. 1893–Jan. 1899



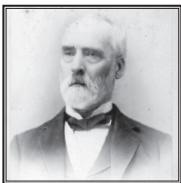
H. S. FOOTE

Commissioner, May 1885–Jan. 1893



ROBERT Y. HAYNE

Commissioner, May 1887–Jan. 1891

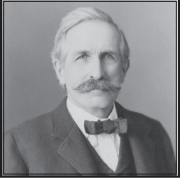


PETER VAN CLIEF

Commissioner, May 1889–Nov. 1896



JAMES A. GIBSON
Commissioner, May 1889–Jan. 1891



GEORGE H. SMITH
Commissioner, April 1990–May 1905
(Associate Justice, Second District Court of Appeal,
1905–1906)



RALPH C. HARRISON
Associate Justice, Jan. 1891–Jan. 1903
Commissioner, Jan. 1904–June 1905
(Presiding Justice, First District Court of Appeal, 1905–1907)



W. F. FITZGERALD
Commissioner, Feb. 1891–May 1892
Associate Justice, Feb. 1893–Jan. 1895



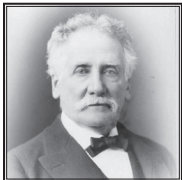
JOHN HAYNES
Commissioner, June 1892–Jan. 1904



E. W. BRITT
Commissioner, March 1895–April 1900



N. P. CHIPMAN
Commissioner, April 1897–May 1905
(Presiding Justice, Third District Court of Appeal,
1905–1921)



EDWARD J. PRINGLE
Commissioner, Feb.–April 1899



WHEATON A. GRAY
Commissioner, Feb. 1899–June 1905
(Presiding Justice, Second District Court of Appeal,
1905–1906)



J. A. COOPER
Commissioner, May 1899–June 1905
(Associate Justice, First District Court of Appeal, 1905–1907)
(Presiding Justice, First District Court of Appeal, 1907–1911)

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