

The California Supreme Court and the Popular Will

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INTRODUCTION

Over the past half century, California has been a battleground for conflicts over the nature, scope, and limits of rights. While Americans have always clashed over rights, the modern rights revolution has expanded the conflict throughout the country, and nowhere more than in California. These struggles have been hard fought, because rights have power. Once an interest is converted into a right, it can trump competing interests that lack the status of right. The ability to recognize, create, or limit rights is consequential, indeed.¹

California's prominence in these conflicts can be traced to several factors. First, the state has deep ideological divides. California is home to progressive social movements that have sought to establish new rights in areas including abortion, capital punishment, criminal procedure, school funding, gay rights, aid-in-dying, and more—and home, as well, to highly motivated conservative groups that have resisted many of these changes. Second, California exists within a federal system that allows states to innovate in the area of rights. State constitutional rights operate semi-independently of the U.S. Constitution—that is, states may define state constitutional rights more expansively than the Federal Constitution requires. An assertive state supreme court, through state constitutional interpretation, can establish new rights. The California Supreme Court, more than any other state court, has expanded state constitutional rights beyond federal minimums.² Third, citizens of California have extraordinary power to counter their state supreme court, through state constitutional amendment or

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¹ See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF PUBLIC DISCOURSE 16 (1991); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 892 (2001).

² Kenneth P. Miller, *Defining Rights in the States: Judicial Activism and Popular Response*, 76 ALBANY L. REV. 2061, 2065–67 (2013).

judicial election, when it issues decisions they oppose. California's court-constraining powers are particularly robust because citizens have the ability to adopt state constitutional amendments directly through the initiative process.³

A state with an ambitious, rights-creating court and an energized electorate that holds competing views and wields institutional counter-powers is poised for clashes over rights.⁴ In the 1970s, such conflicts emerged in California. A progressive majority on the California Supreme Court sought national leadership of a movement called "the new judicial federalism"—an effort to expand rights at the state level—but faced the constraint of the state's powerful system of majoritarian democracy.⁵

This Article examines the efforts of the California Supreme Court to advance the rights revolution at the state level and the popular response to those decisions. This exchange between the court and the people now spans more than four decades, from the early 1970s through the relatively recent struggle over the definition of marriage. During this period, the California Supreme Court expanded a broad range of state constitutional rights, many of which remain intact today. Yet, the people countered the court when it expanded rights in ways that conflicted with their strongly held values. These controversies showed that, under California's constitution, the people, not the courts, have the last word on the state definition of rights—so long, of course, as their decisions do not contravene federal law.

The record indicates that Californians have exercised this power selectively, overturning some new state-level rights, but accepting many others. The system has imposed accountability on the court when it strays too far from the popular will, but also has conferred greater legitimacy on the expansion of rights above federal minimums when the people accept what they can, through a vote, reject.

³ On the use of court-constraining amendments in California and other states, see generally John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007).

⁴ See Reed, *supra* note 1, at 874–75.

⁵ For a discussion of the California Supreme Court's early leadership of the new judicial federalism, see Ronald K.L. Collins, Peter J. Galie & John Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HAST. CONST. L.Q. 599, 603 (1986); and see Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211–17 (2003).

I. THE NEW JUDICIAL FEDERALISM IN CALIFORNIA, 1970–1986

The movement known as the new judicial federalism emerged in the early 1970s as progressive lawyers and judges sought to extend the rights revolution in constitutional law following the denouement of the Warren Court.⁶ The strategy was straightforward: if Warren-era liberal justices were being replaced by more conservative Nixon nominees and the U.S. Supreme Court was moving to the Right, progressive state courts needed to assume greater responsibility for the rights revolution—that is, they needed to abandon their reliance on the Supreme Court to expand federal constitutional rights, and instead, start expanding rights at the state level through new, expansive interpretations of state constitutions. In this view, for example, as the U.S. Supreme Court chose to interpret the warrant requirements of the Fourth Amendment narrowly, in a way that favored law enforcement, a progressive state supreme court should chart an independent course by interpreting its state constitution's comparable warrant requirements more expansively, in a way that favored criminal defendants.⁷

The California Supreme Court was well positioned to pursue this goal. Through the leadership of the legendary justice Roger J. Traynor (1940–1970), the court had developed a reputation as the nation's most innovative state court, and was especially influential in transforming American common law to align with the values of modern liberalism.⁸ Working under the shadow of the U.S. Supreme Court during the Warren era (1953–1969), the California Supreme Court, like its progressive counterparts in other states, had only rarely chosen to expand state constitutional rights. But as the Warren era came to a close, it was poised to move into that arena.

⁶ Reed, *supra* note 1, at 889.

⁷ See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113–15 (2009). See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

⁸ See generally BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* (2003). During Traynor's tenure, the California Supreme Court became the nation's most influential state court, as measured by, among other factors, citations by other state courts. See, e.g., Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83 (1983); Jake Dear & Edward W. Jessen, *"Followed Rates" and Leading State Cases, 1940-2005*, 41 U.C. DAVIS L. REV. 683 (2007); Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977).

A. The Composition of the California Supreme Court, 1970–1986

In 1970, the California Supreme Court was a progressive body consisting of six justices appointed by former two-term Democratic Governor Edmund G. “Pat” Brown—Chief Justice Traynor (Chief Justice 1964–1970) and Associate Justices Raymond E. Peters (1959–1973), Mathew O. Tobriner (1962–1982), Stanley Mosk (1964–2001), Louis H. Burke (1964–1974), and Raymond L. Sullivan (1966–1977).⁹ The court had one conservative holdover, Justice Marshall F. McComb (1956–1977), but was solidly liberal overall.¹⁰

Brown’s successor as Governor, Ronald Reagan (1967–1975), believed the court was too liberal and wanted to nominate new, conservative justices who would exercise “judicial restraint.”¹¹ Reagan got his first opportunity to try to redirect the court in 1970, when Chief Justice Traynor announced his retirement. Reagan turned to an appellate judge, Donald R. Wright, to fill the vacancy. Before his nomination, Wright was viewed as a reliable conservative. Soon after assuming the role of chief justice, however, Wright surprised Reagan and other conservatives by firmly aligning with the court’s progressive majority.¹² Indeed, it was during Donald Wright’s tenure as chief justice (1970–1977), and with his full participation, that the court began aggressively expanding state constitutional rights. Governor Reagan’s other two nominees, William P. Clark, Jr. (1973–1981) (later Deputy Secretary of State, National Security Advisor, and Interior Secretary under President Reagan) and Frank K. Richardson (1974–1983), were solid conservatives, but generally unable to curb the court’s progressive majority. When Democrat Edmund G. “Jerry” Brown, Jr. succeeded Reagan in 1975, he gave the court a new infusion of liberal justices. During his first two terms as governor (1975–1983), Brown nominated seven progressives to the court—Wiley W. Manuel (1977–1981), Rose Elizabeth Bird (1977–1987), Frank C. Newman (1977–1982), Otto M. Kaus (1981–1985), Allen E. Broussard (1981–1991), Cruz Reynoso (1982–1987), and Joseph R. Grodin (1982–1987).¹³

⁹ Democratic Governor Culbert Olsen appointed Traynor to the court in 1940 as an associate justice; Governor Pat Brown elevated him to Chief in 1964. *California Supreme Court Justices*, CAL. SUP. CT. HIST. SOC’Y, <http://www.cschs.org/history/california-supreme-court-justices/> [http://perma.cc/V6R6-QG2C].

¹⁰ *Id.*

¹¹ LOU CANNON, GOVERNOR REAGAN: HIS RISE TO POWER 222–23 (2003).

¹² JACQUELINE R. BRAITMAN & GERALD F. UELMEN, JUSTICE STANLEY MOSK: A LIFE AT THE CENTER OF CALIFORNIA POLITICS AND JUSTICE 150–51 (2013).

¹³ *California Supreme Court Justices*, *supra* note 9.

Only four Democrats served as Governor of California during the twentieth century, but three of them, Culbert Olson (1939–1943), Pat Brown (1959–1967), and Jerry Brown (1975–1983), had an outsized influence on the court, together nominating nineteen justices (including Traynor twice), nearly all of whom can be described as liberal or progressive.¹⁴ These appointments, combined with Republican governors' inconsistency in nominating conservatives, made the California Supreme Court one of the nation's most liberal courts from mid-century through 1986. In that year, as discussed further below, voters removed three liberal justices (Bird, Reynoso, and Grodin) through a judicial retention election, and Republican Governor George Deukmejian replaced them with conservatives, thereby shifting the court's balance to the Right.¹⁵

B. The Court's Expansion of Rights, 1970–1986

Looking back, the span from 1970 to the election of 1986 (that is, the Wright-Bird era) can be seen as the height of the new judicial federalism in California. During those years, the court actively expanded state constitutional rights in several areas of law, including:

1. capital punishment
2. criminal procedure
3. equal protection (gender equality, sexual orientation equality in employment, equality in public school financing, desegregation of public schools, and racial non-discrimination in jury selection)
4. abortion (basic right to abortion and right to publicly funded abortion)
5. free speech (expansion of free speech and petition rights on private property)
6. non-establishment of religion

Table 1 sets forth these new state constitutional rights, and the court decisions establishing them, in more detail.

¹⁴ Olson nominated three justices, Pat Brown nine, and Jerry Brown seven (during his first two terms from 1975–1983). These figures separately count both nominations of Traynor.

¹⁵ See *infra* Section III.D.

**Table 1: New Court-Established California State
Constitutional Rights, 1970–1986**

Category	New State Constitutional Rights	Cases Establishing Rights
Criminal Justice (capital punishment)	Right against execution / abolition of capital punishment	<i>People v. Anderson</i> (1972) ¹⁶
Criminal Justice (procedure)	Procedural rights of criminal defendants, including those related to admissions, confessions, searches, exclusionary rule, ¹⁷ vicarious exclusionary rule ¹⁸	<i>People v. Krivda</i> (1971) ¹⁹ (searches); <i>Mozetti v. Superior Court</i> (1971) ²⁰ (searches); <i>People v. Superior Court (Hawkins)</i> (1972) ²¹ (blood tests); <i>Burrows v. Superior Court</i> (1974) ²² (warrants); <i>People v. Longwill</i> (1975) ²³ (searches); <i>People v. Brisendine</i> (1975) ²⁴ (searches); <i>People v. Disbrow</i> (1976) ²⁵ (admissions); <i>People v. Jimenez</i> (1978) ²⁶ (confessions); <i>People v. Pettingill</i> (1978) ²⁷ (interrogations); <i>In re Tony C.</i> (1978) ²⁸ (stop and frisk); <i>People v. Wheeler</i> (1978) ²⁹ (jury selection)
Criminal Justice (procedure)	Procedural rights of criminal defendants, including those related to reciprocal discovery; hearsay at preliminary hearing; post-indictment preliminary hearing	<i>Reynolds v. Superior Court</i> (1974) (restrictions on prosecutorial discovery), ³⁰ <i>Allen v. Superior Court</i> (1976) (restrictions on prosecutorial discovery), ³¹ <i>In re Misener</i> (1985) ³² (restrictions on prosecutorial discovery); <i>Mills v. Superior Court</i> (1986) ³³ (confrontation of accusers)

¹⁶ *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

¹⁷ *People v. Cahan*, 282 P.2d 905 (Cal. 1955).

¹⁸ *People v. Martin*, 85 P.2d 880 (Cal. 1955).

¹⁹ *People v. Krivda*, 486 P.2d 1262 (Cal. 1971).

²⁰ *Mozetti v. Superior Court*, 484 P.2d 84 (Cal. 1971).

²¹ *People v. Superior Court*, 493 P.2d 1145 (Cal. 1972).

²² *Burrows v. Superior Court*, 529 P.2d 590 (Cal. 1974).

²³ *People v. Longwill*, 538 P.2d 753 (Cal. 1975).

²⁴ *People v. Brisendine*, 531 P.2d 1099 (Cal. 1975).

²⁵ *People v. Disbrow*, 545 P.2d 272 (Cal. 1976).

²⁶ *People v. Jimenez*, 580 P.2d 672 (Cal. 1978).

²⁷ *People v. Pettingill*, 578 P.2d 108 (Cal. 1978).

²⁸ *In re Tony C.*, 582 P.2d 957 (Cal. 1978).

²⁹ *People v. Wheeler*, 583 P.2d 748 (Cal. 1978).

³⁰ *Reynolds v. Superior Court*, 528 P.2d 45 (Cal. 1974).

³¹ *Allen v. Superior Court*, 557 P.2d 65 (1976).

³² *In re Misener*, 698 P.2d 637 (Cal. 1985).

³³ *Mills v. Superior Court*, 728 P.2d 211 (Cal. 1986).

Category	New State Constitutional Rights	Cases Establishing Rights
		at preliminary hearing); <i>Hawkins v. Superior Court</i> (1978) ³⁴ (right to post-indictment preliminary hearing)
Equal Protection (gender)	Strict scrutiny for laws that classify on basis of gender	<i>Sail'er Inn, Inc. v. Kirby</i> (1971) ³⁵
Equal Protection (race)	Right to desegregation of public schools regardless of cause of segregation	<i>Crawford v. Board of Education of Los Angeles</i> (1976), ³⁶ re-affirming dictum in <i>Jackson v. Pasadena City School District</i> (1963) ³⁷
Equal Protection (sexual orientation)	Right to non-discrimination based on sexual orientation in employment	<i>Gay Law Students Association v. Pacific Telephone & Telegraph Co.</i> (1979) ³⁸
Equal Protection (education)	Right to equalized public school funding	<i>Serrano v. Priest II</i> (1976) ³⁹
Abortion	Right to abortion	<i>People v. Belous</i> (1969); ⁴⁰ <i>People v. Barksdale</i> (1972) ⁴¹
Abortion	Right to publicly funded abortion	<i>Committee to Defend Reproductive Rights v. Myers</i> (1981) ⁴²
Free speech	Right to free speech on private property	<i>Robins v. Pruneyard Shopping Center</i> (1979) ⁴³
Religion (non-establishment)	Prohibition on religious displays on public property	<i>Fox v. City of Los Angeles</i> (1978) ⁴⁴
Religion (non-establishment)	Prohibition on state-loaned textbooks to parochial schools	<i>California Teachers Association v. Riles</i> (1981) ⁴⁵

³⁴ *Hawkins v. Superior Court*, 586 P.2d 916 (Cal. 1978).

³⁵ *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971).

³⁶ *Crawford v. Bd. of Educ. of L.A.*, 551 P.2d 28 (Cal. 1976).

³⁷ *Jackson v. Pasadena City Sch. Dist.*, 382 P.2d 878 (Cal. 1963).

³⁸ *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

³⁹ *Serrano v. Priest II*, 557 P.2d 929 (Cal. 1976).

⁴⁰ *People v. Belous*, 458 P.2d 194 (Cal. 1969).

⁴¹ *People v. Barksdale*, 503 P.2d 257 (Cal. 1972).

⁴² *Comm. to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

⁴³ *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal. 1979).

⁴⁴ *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978).

⁴⁵ *California Teachers Ass'n v. Riles*, 632 P. 2d 953 (Cal. 1981).

C. The Court's Primary Focus: Criminal Justice

As Table 1 indicates, during this period the California Supreme Court expanded state constitutional rights most actively in the area of criminal justice. This ordering is logical, considering that a large share of a state supreme court's constitutional jurisprudence arises in criminal cases, and because the Burger Court was retreating from the Warren Court's expansive interpretation of the rights of criminal defendants.⁴⁶ At the urging of Justice Stanley Mosk, the California Supreme Court made the deliberate choice to distance itself from U.S. Supreme Court's definitions of the rights of defendants and start charting its own, independent, more progressive course.⁴⁷

1. Capital Punishment

Perhaps the most influential case in establishing the new judicial federalism was *People v. Anderson* (1972),⁴⁸ a state constitutional challenge to California's death penalty. As state constitutional law scholar Robert F. Williams has noted, the California Supreme Court's decision in the case stimulated "the initial recognition that state courts could evade decisions of the United States Supreme Court by relying on their own state constitutions."⁴⁹ At the time, the U.S. Supreme Court had granted review in *Furman v. Georgia* (1972)⁵⁰ on the question of whether capital punishment violated the Eighth Amendment. The California Supreme Court's progressive majority distrusted the Burger Court on this question and accelerated proceedings in *People v. Anderson*.⁵¹ Before the U.S. Supreme Court could issue its decision in *Furman*, the California Supreme Court, in an opinion by Chief Justice Wright, held that capital punishment violated the California Constitution's prohibition on cruel or unusual punishments. By basing the *Anderson* ruling on independent state grounds rather than on the Federal Constitution, the court showed other state supreme courts how to establish new rights in a way that insulated the decision from federal court review.⁵²

⁴⁶ See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 125 (2009). Williams notes: "The field of criminal procedure has, in many ways, provided the driving force behind the NJF. It is in this area that state courts first realized they could reach results different from those reached by the U.S. Supreme Court, or at least consider doing so." *Id.*; see also G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 178 (1998).

⁴⁷ BRAITMAN & UELMEN, *supra* note 12, at 152–54.

⁴⁸ *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

⁴⁹ Williams, *supra* note 5, at 213.

⁵⁰ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁵¹ RONALD M. GEORGE, *CHIEF: THE QUEST FOR JUSTICE IN CALIFORNIA* 76–77 (2013).

⁵² WILLIAMS, *supra* note 46, at 120; see also Scott H. Bice, *Anderson and the*

2. Criminal Procedure

From 1970 forward, the California Supreme Court's criminal procedure rulings formed an expansive web of state-level protections greater than those offered by the Federal Constitution's Fourth, Fifth, and Sixth Amendments, as interpreted by the U.S. Supreme Court. This outpouring of new state constitutional rights related to admissions, confessions, searches, "stop-and-frisk," jury selection, and other elements of criminal procedure shifted the balance of state constitutional interpretation in California markedly in favor of defendants at a time when the U.S. Supreme Court was shifting the federal constitutional balance in favor of police and prosecutors.⁵³

D. Other Decisions: Advancing the Progressive Agenda of the 1970s and 1980s

Beyond criminal justice, the California Supreme Court's rights-expanding decisions during this era spanned a range of topics. The rulings corresponded with the progressive agenda of the 1970s and 1980s in areas including: racial, gender, and sexual orientation equality; abortion rights; equalization of education; free speech; and secularization of the public square. Each case, by definition, involved the discovery of a gap between the rights provisions of California Constitution and the U.S. Constitution, as interpreted, respectively, by the state and federal supreme courts.⁵⁴

1. Racial Equality

In the 1970s and 1980s, equal protection jurisprudence related to race became increasingly complex as the U.S. Supreme Court wrestled with the scope of remedies for racial inequality. During this period, the California Supreme Court expanded state constitutional rights beyond federal minimums in a highly controversial area: desegregation of public schools.

In the 1970s, the U.S. Supreme Court placed limits on court-ordered busing to achieve desegregation. Perhaps most importantly, the Court held in *Milliken v. Bradley* (1974) that if school districts had not imposed de jure segregation, that is, had not intentionally segregated students on the basis of race, the

Adequate State Ground, 45 S. CAL. L. REV. 750 (1972).

⁵³ For an overview of the expansion of state constitutional rights of criminal defendants during this era, see generally BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* (1991).

⁵⁴ Joseph R. Grodin, *Liberty and Equality Under the California Constitution*, 7 CAL. LEGAL HIST. 167, *passim* (2012).

Equal Protection Clause generally did not require such remedial measures.⁵⁵ Several districts in California, including Los Angeles Unified School District, had significant racial imbalances between schools, but it was a contested question whether school officials had intentionally segregated schools on the basis of race.⁵⁶ The California Supreme Court was unwilling to accept the limitations of the *Milliken* standard, and in *Crawford v. Board of Education of Los Angeles* (1976),⁵⁷ the court invoked the state constitution's equal protection guarantee to require desegregation regardless of the reasons for racial imbalances.⁵⁸ The decision paved the way for court-ordered busing in Los Angeles and elsewhere in the state.⁵⁹

The court again expanded equality principles beyond federal minimums when it held in *People v. Wheeler* (1978) that, during jury selection in criminal trials, attorneys could not “[use] preemptory challenges to remove prospective jurors on the sole ground of group bias.”⁶⁰ The preemptory challenge historically allows attorneys to excuse potential witnesses without any explanation, but could be abused to exclude potential jurors based solely on their race, ethnicity, religion, or other group

⁵⁵ *Milliken v. Bradley*, 418 U.S. 717 (1974).

⁵⁶ A 1970 L.A. Superior Court decision found that the L.A. Unified School District had established de jure segregation, but, later, the state court of appeals reversed, concluding that there was insufficient evidence for such a finding. See *Crawford v. Bd. of Educ. of L.A.*, 170 Cal. Rptr. 495 (Ct. App. 1981).

⁵⁷ *Crawford v. Bd. of Educ. of L.A.*, 551 P.2d 28 (Cal. 1976).

⁵⁸ Sylvia Yau, *School Board's Affirmative Duty to Alleviate Segregation Regardless of Race*, 65 CAL. L. REV. 319–29 (1977).

⁵⁹ During this period, the California Supreme Court departed from progressive ideology on race in one important case, *Bakke v. Regents of University of California*, 553 P.2d 1152 (Cal. 1976). This famous case involved a constitutional challenge to the admissions policies at the University of California at Davis medical school. Under those policies, the medical school set aside 16 of its 100 seats each year for a separate “special admissions program” that admitted only racial minorities. In a decision authored by Justice Mosk, the court held that this quota program violated the Federal Constitution. Many on the left attacked the court, and especially, Justice Mosk, for the decision. Mosk decided to base the *Bakke* decision not on the California Constitution, but rather on the Federal Constitution's Equal Protection Clause. As a consequence, the constitutional limitation on affirmative action was subject to U.S. Supreme Court review. The high court granted certiorari in the case and agreed with the California Supreme Court's judgment that the U.C. Davis medical school's admissions quota system violated the Fourteenth Amendment. In a letter to Hans Linde, Mosk noted: “I calculatingly relied on federal constitutional grounds for my *Bakke* opinion. Some of us are hopeful the United States Supreme Court will grapple with the issue so improvidently avoided in *De Funis*. Had I employed state constitutional provisions, our brethren in Washington would have had good reason to avoid certiorari. They now must consider the inevitable certiorari application on its merits. This is a rare exception to our normal desire to hasten finality of litigation.” BRAITMAN & UELMEN, *supra* note 12, at 172.

⁶⁰ *People v. Wheeler*, 583 P.2d 748 (Cal. 1978). The court based its ruling on California Constitution article I, section 16, which guarantees the right to a trial by a jury drawn from a representative cross-section of the community.

characteristics. In the absence of a U.S. Supreme Court ruling addressing the problem, the California Supreme Court acted, establishing the right to challenge such bias in the jury selection process. Nearly a decade later, in *Batson v. Kentucky* (1986),⁶¹ the U.S. Supreme Court established a federal constitutional protection against this type of bias in jury selection, following the principles the California Supreme Court established in *Wheeler*.⁶²

2. Gender Equality

The birth of the new judicial federalism corresponded with the rise of second wave feminism, an era of heightened activism in support of gender equality. Proponents of women's rights used both political activism and legal mobilization to advance their goals. As proponents of a Federal Equal Rights Amendment struggled to win ratification, litigants attempted to persuade the U.S. Supreme Court to employ the Fourteenth Amendment's Equal Protection Clause to strike down laws that made distinctions on the basis of gender. The Court moved in that direction, but with some ambivalence. In *Reed v. Reed* (1971),⁶³ the Court invoked the Fourteenth Amendment to strike down a law that discriminated against women in the administration of estates, but did so using rational basis analysis rather than heightened judicial scrutiny. Two years later, in *Frontiero v. Richardson* (1973),⁶⁴ the Court struck down gender distinctions in benefits to military personnel, but fell one vote short of declaring gender a suspect classification subject to strict judicial scrutiny. Finally, in *Craig v. Boren* (1976),⁶⁵ a case invalidating gender distinctions in the state's drinking age, the Court decided to treat gender as a "semi-suspect" classification, subject to intermediate judicial scrutiny. The California Supreme Court moved further and faster. In 1971, in *Sail'er Inn, Inc. v. Kirby*,⁶⁶ the court invalidated a state law banning women from serving as bartenders. The court declared that gender classifications should be treated as suspect and should be subjected to strict judicial scrutiny—that is, gender should be treated like race.⁶⁷ The court based its *Sail'er Inn* decision on the equal protection provisions of

61 *Batson v. Kentucky*, 476 U.S. 79 (1986).

62 The U.S. Supreme Court based its *Batson* ruling on the Federal Equal Protection Clause. *Id.* at 89.

63 *Reed v. Reed*, 404 U.S. 71 (1971).

64 *Frontiero v. Richardson*, 411 U.S. 677 (1973).

65 *Craig v. Boren*, 429 U.S. 190 (1976).

66 *Sail'er Inn v. Kirby*, 485 P.2d 529 (Cal. 1971).

67 Through *Sail'er Inn*, the California Supreme Court became the nation's first state supreme court to treat gender as a suspect classification. John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 690–91 (1971).

both the federal and state constitutions. When the U.S. Supreme Court rejected the strict scrutiny rule for gender classifications in *Reed v. Reed*, the *Sail'er Inn* doctrine remained a state constitutional principle—again demonstrating how state supreme courts can establish rights beyond federal constitutional minimums.

3. Sexual Orientation Equality

During this period, the gay rights movement was also gaining strength in California and in other parts of the country. Among other goals, the movement sought to protect gay and lesbian persons as a class from discrimination based on sexual orientation, in the workplace and elsewhere. Well before the U.S. Supreme Court issued its decision in *Romer v. Evans* (1996),⁶⁸ interpreting the Federal Equal Protection Clause to protect gay and lesbian persons, the California Supreme Court established this principle under the California Constitution. In *Gay Law Students v. Pacific Telephone and Telegraph Co.* (1979), the court held that the equal protection provisions of California Constitution article I, section 7(a) prohibit public employers (in this case, a publicly regulated private utility company) from discriminating against persons based on their sexual orientation.⁶⁹ Through this decision, the California Supreme Court again advanced the rights revolution into an area where other courts would later follow.

4. Abortion

Meanwhile, the movement for personal autonomy in matters of procreation generated another contested question of constitutional rights—that is, whether a woman has a constitutional right to terminate her pregnancy. In 1973, the U.S. Supreme Court issued its sweeping decision in *Roe v. Wade*,⁷⁰ but again it was trailing the California Supreme Court. In *People v. Belous* (1969),⁷¹ the California Supreme Court invalidated a statute that criminalized abortion except when “necessary to preserve the life” of the pregnant woman, on the grounds that the law was unconstitutionally vague—the nation’s first judicial decision declaring an abortion statute unconstitutional.⁷² In

⁶⁸ *Romer v. Evans*, 517 U.S. 620 (1996).

⁶⁹ *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

⁷⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

⁷¹ *People v. Belous*, 458 P.2d 194 (Cal. 1969).

⁷² *See id.* at 203–08 (overturning the conviction of a physician prosecuted under the statute); *see also* S.B. 462, 1967–1968 Legis. Sess., Reg. Sess. (Cal. 1967) (before the Court issued its decision in *Belous*, the California Legislature adopted the Therapeutic Abortion Act of 1967, a statute that liberalized abortion policy in the state).

People v. Barksdale (1972),⁷³ the California Supreme Court struck down under both the California and Federal Constitutions the next iteration of the state's abortion law, which had allowed abortion only in cases where "there is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother," or in cases of rape or incest—again on the grounds that this criminal statute was unconstitutionally vague.⁷⁴ The California Supreme Court's constitutional analysis of abortion restrictions influenced courts in other states, as well as the U.S. Supreme Court in *Roe*.⁷⁵

In the post-*Roe* era, the California Supreme Court expanded abortion rights beyond where the U.S. Supreme Court was prepared to go. For example, when the U.S. Supreme Court rejected a federal constitutional right to federally funded abortion in *Harris v. McRae* (1980),⁷⁶ the California Supreme Court, in *Committee to Defend Reproductive Rights v. Myers* (1981),⁷⁷ established a state constitutional right to state-funded abortion. And, as further discussed below, after the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)⁷⁸ allowed states to impose certain restrictions on abortion rights, including parental consent rules, the California Supreme Court determined that California's parental consent rule violated the state constitution.⁷⁹

5. Educational Equality

In the 1970s, a gap emerged between the California Supreme Court and the U.S. Supreme Court on the question of whether there is a constitutional right to equalized funding of public education. In *Serrano v. Priest I* (1971),⁸⁰ the California Supreme Court held that the state's school funding policies involved both a suspect classification—because tying school funding to the property values in a local school district created a classification based on wealth—and a fundamental interest, education. Based

⁷³ *People v. Barksdale*, 503 P.2d 257, 267 (Cal. 1972).

⁷⁴ *Id.* at 260.

⁷⁵ Arthur G. Scotland, *The Landmark Abortion Decisions: Justifiable Termination or Miscarriage of Justice?—Proposals for Legislative Response*, 4 PAC. L.J. 821, 823–27 (1973).

⁷⁶ *Harris v. McRae*, 448 U.S. 297, 309–16 (1980).

⁷⁷ *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 806 (Cal. 1981).

⁷⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992).

⁷⁹ *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 818–19 (Cal. 1997). California's parental consent law was enacted in 1987 through Assembly Bill 2274, which became 1987 Cal. Stat. 1237 (amending California Civil Code section 34.5 and adding California Health and Safety Code section 25958). The law was challenged immediately after its adoption and its enforcement was stayed pending the outcome of the litigation. It was never enforced.

⁸⁰ *Serrano v. Priest I*, 487 P.2d 1241, 1249, 1264–65 (Cal. 1971).

on these determinations, the court applied strict scrutiny to state's system for school funding and invalidated the system.⁸¹ When the U.S. Supreme Court addressed these same issues in *San Antonio Independent School District v. Rodriguez* (1973),⁸² however, it reached the opposite result, rejecting the view that wealth is a suspect classification and that education is a protected right under the Federal Constitution. The California Supreme Court was unwilling to accept that outcome. In *Serrano v. Priest II* (1976),⁸³ the court invoked the state constitution alone, requiring equalization of public school funding.

6. Free Speech

In *Robins v. Pruneyard Shopping Center* (1979),⁸⁴ the California Supreme Court expanded the constitutional protection of free speech to include speech and political solicitation activities in shopping centers, even when the property is privately owned. The decision expanded California's free speech rights beyond federal constitutional standards, which protect speech against abridgement by government actors, not private entities. When the mall challenged the ruling in the U.S. Supreme Court, the Court narrowly affirmed in *PruneYard Shopping Center v. Robins* (1980), noting that California has the "right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."⁸⁵ This is true so long as the state court's ruling did not violate any provision of the Federal Constitution. Here, the Court held that the California rule requiring a private shopping mall to protect free speech on its property did not rise to the level of an unconstitutional taking. The California Supreme Court's *Pruneyard* decision remains an anomaly in state constitutional jurisprudence, almost universally rejected by other states.⁸⁶ Nevertheless, it again highlights how a state supreme court can establish new constitutional rights when the right is rejected by the U.S. Supreme Court.

⁸¹ See *id.*; see also Kenneth L. Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720 (1972) (explaining that the California Supreme Court was the nation's first court to declare that a state's education funding system violated the state and federal constitutions); Frank J. Macchiarola & Joseph G. Diaz, *Disorder in the Courts: The Aftermath of San Antonio Independent School District v. Rodriguez in the State Courts*, 30 VAL. U. L. REV. 551, 558 (1996).

⁸² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19 (1973).

⁸³ See *Serrano v. Priest II*, 557 P.2d 929 (Cal. 1976).

⁸⁴ *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 343 (Cal. 1979). For an analysis of the *Pruneyard* litigation, see Joseph R. Grodin, *Freedom of Expression Under the California Constitution*, 6 CAL. LEGAL HIST. 187, 198–207 (2011).

⁸⁵ *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

⁸⁶ Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145, 1151–52 (2007).

7. Non-establishment of Religion

In its Establishment Clause cases, the U.S. Supreme Court has allowed, under some conditions, limited government accommodation and even support of religion, including the display of religious objects on public property⁸⁷ or the provision of textbooks or transportation to students in religious schools.⁸⁸ The California Supreme Court has interpreted the California Constitution to require a stricter separation. Two examples are *Fox v. City of Los Angeles* (1978),⁸⁹ which prohibited religious displays on public property, and *California Teachers Association v. Riles* (1981),⁹⁰ which prohibited loans of state textbooks to religious organizations.

Through these and other cases, the California Supreme Court of the Wright-Bird era established a clear pattern of advancing a more progressive constitutional order in California. Some California Supreme Court decisions from this era helped catalyze the recognition of rights by the U.S. Supreme Court (for example, in *Roe v. Wade*⁹¹ and *Batson v. Kentucky*⁹²) and other state supreme courts. But the Court's innovations also invited controversy at home.

II. THE POLITICAL CONTEXT OF THE WRIGHT-BIRD ERA

The California Supreme Court does not operate in a vacuum, but, rather, in a complex checks-and-balances political system in which the people may override its decisions through constitutional amendment, and may remove justices from the court through retention elections or recall. In the period 1970–1986, the California Supreme Court was a highly ambitious, progressive court operating in a state that had strong progressive elements, but also a broad and deep conservative streak. Accordingly, the court was vulnerable to popular opposition. During these years, the California electorate was ideologically more conservative than it is today and stood clearly to the right of the court on a number of issues. On several occasions, the court's opponents were able to mobilize these more conservative elements of the electorate and use various

⁸⁷ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 714 (1984) (allowing the presentation of the nativity scene as part of an annual Christmas display by the city of Pawtucket, Rhode Island).

⁸⁸ See, e.g., *Bd. of Educ. v. Allen*, 392 U.S. 236, 252 (1968) (upholding a New York law providing for the lending of textbooks to students in private—including religious—schools).

⁸⁹ *Fox v. City of Los Angeles*, 587 P.2d 663, 682 (Cal. 1978).

⁹⁰ *Cal. Teachers Ass'n v. Riles*, 632 P.2d 953, 963 (Cal. 1981).

⁹¹ *Roe v. Wade*, 410 U.S. 113 (1973).

⁹² *Batson v. Kentucky*, 476 U.S. 79 (1986).

democratic means to overturn and otherwise limit the court's progressive agenda.

A. The Electorate

Although California is now one of the most liberal and solidly Democratic states in the nation, it has not always been so. In the early 1970s, as the California Supreme Court was launching the new judicial federalism, the California electorate was more conservative than it is today. In the late 1960s, in the wake of social unrest in the state, rising crime, and other factors, pollsters reported an increase in the percentage of California voters who identified as politically conservative.⁹³ As late as the 1990s, California remained a highly competitive battleground state in partisan elections as progressive and conservative ideologies vied for dominance. Voters roughly supported Democratic and Republican candidates equally, and often split tickets. Democrats generally controlled the Legislature, while Republicans more often won top-of-the-ticket races for Governor, U.S. Senator, and President of the United States.⁹⁴ For example, between 1966 and 1998, Republicans won six gubernatorial elections—Ronald Reagan (1966, 1970); George Deukmejian (1982, 1986); and Pete Wilson (1990, 1994)—a string interrupted only by Democrat Jerry Brown's two victories in 1974 and 1978. Even more remarkably, in the six presidential elections between 1968 and 1988, California voters supported the Republican candidate for President each time—Richard Nixon (1968, 1972); Gerald Ford (1976); Ronald Reagan (1980, 1984); and George H.W. Bush (1988). Democrats were not able to break Republican dominance in securing California's presidential electors until 1992.⁹⁵ This relatively conservative electorate was not necessarily inclined to embrace the state supreme court's progressive agenda.

B. Mobilization

Before the 1970s, voters had never overturned a rights decision of the California Supreme Court through constitutional

⁹³ MERVIN D. FIELD, THE CALIFORNIA POLL RELEASE #647: DRAMATIC UPSWING IN PROPORTION OF VOTERS WHO SEE THEMSELVES AS POLITICALLY CONSERVATIVE (Sept. 16, 1969); MERVIN D. FIELD, THE CALIFORNIA POLL RELEASE #703: PART I: SELF-STYLED CONSERVATISM THE DOMINANT MOOD OF CALIFORNIA ELECTORATE TODAY (Jan. 19, 1971).

⁹⁴ See, e.g., MERVIN D. FIELD, THE CALIFORNIA POLL RELEASE #1420: STATE EVENLY DIVIDED BETWEEN DEMOCRATS AND REPUBLICANS (Feb. 1, 1988).

⁹⁵ For a discussion of political change in California during this period, see Morris P. Fiorina & Samuel J. Abrams, *Is California Really a Blue State?*, in THE NEW POLITICAL GEOGRAPHY OF CALIFORNIA 291–308 (Frédéric Douzet, Thad Kousser & Kenneth P. Miller eds., 2008).

amendment, nor come close to defeating justices through retention elections.⁹⁶ Although the court had issued various controversial decisions during the Traynor era and before, opponents had never successfully persuaded the public to push back. In the 1970s, however, conservative elected officials (mostly Republicans, but also some Democrats), interest groups, and the Republican Party organization made a counter-discovery to the court's experimentation with the new judicial federalism. Just as progressive justices were exploring the possibilities of expanding rights through new interpretations of the state constitution, opponents realized they could mobilize the state's electorate to counter the court, at least on some issues.

C. Institutional Options

The court's critics had several ways to challenge its decisions and institutional power—legislative constitutional amendment, initiative constitutional amendment, and removal of justices, either by judicial retention election or recall.

1. Legislative Constitutional Amendment

The most common form of state constitutional amendment is the legislative constitutional amendment, or LCA. Under the LCA process, the legislature proposes an amendment and refers it to the people for ratification or rejection (the one exception is Delaware, which allows the Legislature to amend the state constitution without voter approval).⁹⁷ Different states have different threshold requirements for legislative and popular approval of amendments. California requires a two-thirds vote of both houses of the Legislature to propose the amendment, and a simple majority popular vote for ratification.⁹⁸ To succeed under these rules, a legislative amendment must enjoy broad support—that is, a supermajority of the Legislature as well as concurrence by the electorate.

2. Initiative Constitutional Amendment

California is one of sixteen states (the others are Arizona, Arkansas, Colorado, Florida, Illinois, Michigan, Missouri,

⁹⁶ See JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 105 (1989). In 1968, critics of Chief Justice Traynor stirred some opposition to his retention, but the effort failed. Traynor had authored the court's controversial decision in *Mulkey v. Reitman*, 413 P.2d 825 (Cal. 1966), striking down Proposition 14 of 1964. That measure had restricted the state's ability to enact fair housing legislation. Despite this controversy, Traynor won retention with 65% of the vote. *Id.*

⁹⁷ John Dinan, *State Constitutional Developments in 2013*, in 46 THE BOOK OF THE STATES 2014, at 12–13 tbl.1.2 (2014) [hereinafter THE BOOK OF THE STATES].

⁹⁸ CAL. CONST. art. XVIII, §§ 1, 4.

Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota) where citizens may invoke the initiative process to amend their state constitution directly, without involvement by the Legislature.⁹⁹ As noted above, California has the nation's most robust system for citizen-initiated constitutional amendment (ICA). The California initiative process gives citizens power to amend the constitution with little restraint. The main limitations on citizen-initiated amendments are that they must address only one subject and may only amend, rather than revise, the constitution.¹⁰⁰ To qualify an amendment for the ballot, proponents must gather signatures equaling 8% of the vote in the last gubernatorial election (compared to only 5% for initiative statutes) in a 150-day period. Once the amendment qualifies for the ballot, it can be adopted by a simple majority vote on the question—without any involvement or limitation by the Legislature or the Governor. Between 1970 and 2015, Californians adopted twenty-nine initiative constitutional amendments, the most of any state during that period.¹⁰¹ As discussed below, several of the approved amendments reversed decisions by the California Supreme Court.

3. Judicial Election

California's system for selection and retention of supreme court justices is unique among the states. As set forth in article VI of the California Constitution, the process gives the Governor broad discretion in nominating justices to fill vacancies on the court (that is, unlike the so-called "merit selection" system used in some states, the Governor is not limited to a pool of candidates selected by a commission); it then places two separate checks on the Governor's choice.¹⁰² The first check is a confirmation vote by the three-member Commission on Judicial Appointments, consisting of the chief justice of the California Supreme Court, the senior presiding justice of the state's courts of appeal, and the

⁹⁹ THE BOOK OF THE STATES, *supra* note 97, at 14. In two additional states, Massachusetts and Mississippi, citizens can initiate constitutional amendments, but must first submit them to the Legislature, and, in Massachusetts, the Legislature has the power to block the initiative's enactment. *Id.*

¹⁰⁰ CAL. CONST. art. XVIII, § 3. For a discussion of the distinctions between constitutional revision and amendment in California, see *Strauss v. Horton*, 207 P.2d 48 (Cal. 2009), and Eugene C. Lee, *The Revision of California's Constitution*, California Policy Seminar Brief 1991 (on file with author).

¹⁰¹ *Map of Initiatives Passed in the USA as of 2013*, MILLER-ROSE INITIATIVE DATABASE, <http://initiatives.roseinstitute.org/> (last visited Feb. 7, 2016); see also *California Ballot Measures*, U.C. HASTINGS C.L., <http://library.uchastings.edu/research/ballots/> (last visited Feb. 7, 2016); *Initiatives by Title and Summary Year*, CAL. SECRETARY ST. ALEX PADILLA, <http://elections.cdn.sos.ca.gov/ballot-measures/pdf/initiatives-by-title-and-summary-year.pdf> [<http://perma.cc/QD6Q-96RZ>].

¹⁰² THE BOOK OF THE STATES, *supra* note 97, at 241–42.

Attorney General. If confirmed by this body, the new justice takes a seat on the court and serves until the next gubernatorial election. At that point, the public exercises the second check, by deciding whether to confirm the new justice or remove her from the court. In this vote, only the name of the justice—no opponents—appear on the ballot and the voters cast a “yes” or “no” vote on the question of whether to retain that justice for the balance of the term. The court’s seven seats have staggered twelve-year terms. When a new justice fills a vacancy, she may serve the unexpired years remaining in the term. For example, if a vacancy occurs in the sixth year of a term, the new justice may serve for the remaining six years. At the expiration of the term, a justice seeking to remain on the court must face the voters again in a retention election. The election is again an up-or-down vote and the justice faces no competing candidates. Instead, the voters decide whether to retain the justice or remove the justice and create a new vacancy to be filled through the normal process of nomination by the Governor and confirmation by the commission and voters. If retained, the justice is authorized to serve an additional twelve years.¹⁰³

4. Judicial Recall

The California Constitution allows citizens to circulate petitions demanding the recall of public officials, including judges, prior to the expiration of their normal terms.¹⁰⁴ To force a recall election, proponents must obtain within 160 days signatures equaling 12% of the vote for the office in the last election.¹⁰⁵ Citizens have never qualified a recall petition against a member of the California Supreme Court, but the device provides an additional popular check on the court.¹⁰⁶ Through judicial election and recall, the people have periodic opportunities to remove justices who stray too far from the public will.

III. POPULAR PUSH-BACK AGAINST THE WRIGHT AND BIRD COURTS

The combination of several elements—an activist, progressive court; an electorate that was more conservative than the court on some issues; political actors who could mobilize voters to challenge the court and institutional tools that allowed the people to do so—defined the relationship between the court and

¹⁰³ CAL. CONST. art. VI, §§ 7, 16.

¹⁰⁴ *Id.* art. II; CAL. ELEC. CODE §§ 11001, 11006 (West 2015).

¹⁰⁵ CAL. CONST. art. II, § 14(b); ELEC. § 11221(c).

¹⁰⁶ Recall petitions have been circulated against several members of the court, but none have qualified for the ballot. See *Complete List of Recall Attempts*, CAL. SECRETARY ST. ALEX PADILLA, <http://www.sos.ca.gov/elections/recalls/complete-list-recall-attempts/> [<http://perma.cc/FXD2-R2RC>].

the people throughout the Wright-Bird era. Table 2 summarizes some of that conflict, listing, by category, leading cases establishing new rights and state constitutional amendments designed to override some of those decisions.

Table 2: New Court-Established California State Constitutional Rights, 1970–1986, and Overriding Amendments

Category	New State Constitutional Rights	Cases Establishing Rights	Overriding Amendments	Vote
Criminal Justice (capital punishment)	Right against execution / abolition of capital punishment	<i>People v. Anderson</i> (1972)	Prop. 17 (1972)	Pass (67.5%) ¹⁰⁷
Criminal Justice (procedure)	Procedural rights of criminal defendants, including those related to admissions, confessions, searches, exclusionary rule, ¹⁰⁸ vicarious exclusionary rule ¹⁰⁹	<i>People v. Krivda</i> (1971) (searches); <i>People v. Superior Court (Hawkins)</i> (1972) (blood tests); <i>People v. Longwill</i> (1975) (searches); <i>People v. Brisendine</i> (1975) (searches); <i>People v. Disbrow</i> (1976) (admissions); <i>People v. Jimenez</i> (1978) (confessions); <i>People v. Pettingill</i> (1978) (interrogations)	Prop. 8 (1982)	Pass (56.4%) ¹¹⁰
Criminal Justice (procedure)	Procedural rights of criminal defendants, those related to reciprocal discovery; hearsay at preliminary hearing; post-indictment preliminary hearing	<i>Reynolds v. Superior Court</i> (1974) (restrictions on prosecutorial discovery); <i>Allen v. Superior Court</i> (1976) (restrictions on prosecutorial discovery); <i>In re Misener</i> (1985) (restrictions on prosecutorial discovery); <i>Mills v. Superior Court</i> (confrontation of accusers at preliminary hearing); <i>Hawkins</i>	Prop. 115 (1990)	Pass (57.03%) ¹¹¹

¹⁰⁷ CAL. SEC'Y OF STATE EDMUND G. BROWN, JR., STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 7, 1972, at 30 (1972).

¹⁰⁸ *People v. Cahan*, 282 P.2d 905 (Cal. 1955).

¹⁰⁹ *People v. Martin*, 85 P.2d 880 (Cal. 1955).

¹¹⁰ CAL. SEC'Y OF STATE MARCH FONG EU, STATEMENT OF VOTE: PRIMARY ELECTION JUNE 8, 1982, at 45 (1982).

¹¹¹ CAL. SEC'Y OF STATE MARCH FONG EU, STATEMENT OF VOTE: JUNE 5, 1990, at 51 (1990).

Category	New State Constitutional Rights	Cases Establishing Rights	Overriding Amendments	Vote
		<i>v. Superior Court</i> (1978) (right to post-indictment preliminary hearing)		
Equal Protection (gender)	Strict scrutiny for laws that classify on basis of gender	<i>Sail'er Inn, Inc. v. Kirby</i> (1971)	No	—
Equal Protection (race)	Right to desegregation of public schools regardless of cause of segregation	<i>Crawford v. Board of Education of Los Angeles</i> (1976)	Prop. 1 (1979) (LCA)	Pass (68.6%) ¹¹²
Equal Protection (race)	Right against racial discrimination in jury selection (peremptory challenges)	<i>People v. Wheeler</i> (1978)	No	—
Equal Protection (sexual orientation)	Right to non-discrimination based on sexual orientation in employment	<i>Gay Law Students Association v. Pacific Telephone & Telegraph Co.</i> (1979)	No	—
Equal Protection (education)	Right to equalized public school funding	<i>Serrano v. Priest II</i> (1976)	No	—
Abortion	Right to abortion	<i>People v. Belous</i> (1969); <i>People v. Barksdale</i> (1972)	No	—
Abortion	Right to publicly funded abortion	<i>Committee to Defend Reproductive Rights v. Myers</i> (1981)	No	—
Free speech	Right to free speech on private property	<i>Robins v. Pruneyard Shopping Center</i> (1979)	No	—
Religion (non-establishment)	Prohibition on religious displays on public property	<i>Fox v. City of Los Angeles</i> (1978)	No	—
Religion (non-establishment)	Prohibition on state-loaned textbooks to parochial schools	<i>California Teachers Association v. Riles</i> (1981)	No	—

¹¹² CAL. SEC'Y OF STATE MARCH FONG EU, STATEMENT OF VOTE: SPECIAL ELECTION NOVEMBER 6, 1979 (1979).

A. Crime

The biggest divide between the court and the people of California during the Wright-Bird era was in the area of criminal justice—in particular, capital punishment and criminal procedure. As the court focused on expanding the rights of criminal defendants, the public was much more concerned with controlling crime and protecting the rights of crime victims. Polling data from the era demonstrates the public's intense concern about crime policy and its frustration with the court's perceived leniency.

1. Capital Punishment

At the end of the 1960s, some legal scholars, activists, lawyers, and judges started developing the theory that capital punishment was per se cruel and unusual punishment, and therefore, could be abolished by courts.¹¹³ Before that time, the issue was considered a political question for the people and their representatives to decide. Pollsters regularly surveyed public attitudes on capital punishment. In California, a significant minority of voters favored “doing away with” the death penalty, but was consistently outnumbered by those who wanted to preserve the ultimate sanction. In the fifteen years leading up to *People v. Anderson* (1972),¹¹⁴ the Field Poll surveyed the question seven times. Table 3 summarizes those results, as well as the results of a survey taken after the *Anderson* decision.

Table 3: Public Opinion on Capital Punishment in California, 1956–1972¹¹⁵

Year	Keep Capital Punishment	Do Away With It	No Opinion
1956	49 %	29 %	22 %
1960	55 %	35 %	10 %
1963	56 %	28 %	16 %
1965	51 %	39 %	10 %
1966	54 %	30 %	16 %
1969	65 %	26 %	9 %
1971	58 %	34 %	8 %
Feb. 1972	<i>People v. Anderson</i>		
Sept. 1972	66 %	24 %	10 %

¹¹³ An influential article advocating judicial invalidation of capital punishment was Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

¹¹⁴ *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

¹¹⁵ MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #726: PUBLIC SUPPORT FOR THE DEATH PENALTY REMAINS AT A RELATIVELY HIGH LEVEL (Sept. 14, 1971) [hereinafter RELEASE #726]; MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #761: OVERWHELMING SUPPORT FOR DEATH PENALTY IN CALIFORNIA (Sept. 7, 1972) [hereinafter RELEASE #761].

In reporting the results of the 1971 poll, Field noted that “[s]ome legislators have suggested that this issue be presented to voters on the 1972 ballot, but if a public vote were being held now, there is little question that a substantial majority of California voters would favor keeping the death penalty.”¹¹⁶

When in February 1972 the California Supreme Court issued its decision in *Anderson* declaring that capital punishment per se violated the California Constitution, it was effectively testing that assumption. The state’s system of initiative constitutional amendment made it comparatively easy for opponents of the decision to put the question to voters: should the state constitution be amended to overturn *Anderson*? Law enforcement groups (including district attorneys, police, and sheriffs) and then-State Senator George Deukmejian mobilized and quickly qualified an initiative constitutional amendment for the November 1972 ballot. The amendment stated that the death penalty provided for under state statutes “shall not be deemed to be, or to constitute, infliction of cruel or unusual punishments . . . nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.”¹¹⁷ A survey taken in September 1972, during the early stages of the public debate on the amendment, indicated that public support for capital punishment had increased after the court’s decision in *Anderson*, from 58% in September 1971 to 66% in September 1972, rising to the highest level recorded by the Field Poll since it began surveying the issue in 1956.¹¹⁸ On Election Day, voters approved the amendment by a decisive 67.5–32.5% margin, thus overriding the court and restoring the validity of capital punishment under the California Constitution.¹¹⁹

2. Criminal Procedure

The California Supreme Court’s early advancement of the new judicial federalism featured many decisions expanding procedural rights of criminal defendants. The court’s agenda aligned with progressive ideas about reforming the criminal justice system, but conflicted with the broader public’s concerns about crime and public safety. Polling data again exposed this gap. In a 1973 poll, respondents listed crime and fear of crime as

¹¹⁶ RELEASE #726, *supra* note 115, at 2.

¹¹⁷ CAL. SEC’Y OF STATE EDMUND G. BROWN, JR., PROPOSED AMENDMENTS TO CONSTITUTION, PROPOSITIONS AND PROPOSED LAWS TOGETHER WITH ARGUMENTS: GENERAL ELECTION TUESDAY, NOVEMBER 7, 1972, at 42 (1972).

¹¹⁸ RELEASE #761, *supra* note 115; *see also* MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #766: RESTORATION OF DEATH PENALTY FAVORED BY VOTERS (Oct. 24, 1972).

¹¹⁹ CAL. SEC’Y OF STATE EDMUND G. BROWN, JR., *supra* note 107, at 30.

the most important problem facing the state, and one respondent in three claimed to have been a victim of crime in the past year.¹²⁰ Deep concern about crime persisted from the 1970s through the mid-1990s. In a 1984 survey, for example, respondents ranked crime as their greatest concern—with 73% “extremely concerned” and an additional 23% “somewhat concerned.”¹²¹

In light of these sentiments, the public became increasingly frustrated by the court’s focus on restricting the powers of law enforcement and expanding the state constitutional rights of criminal defendants. The law enforcement community saw an opportunity. It organized an effort to qualify an initiative constitutional amendment that would, in one stroke, overturn existing, pro-defense rulings and constrain future decisions of this type. In 1982, this coalition qualified for the ballot a combined initiative constitutional amendment and initiative statute called the Victims’ Bill of Rights. The measure, which appeared on the ballot as Proposition 8 of 1982, made sweeping changes to the state’s criminal justice system to limit the state constitutional rights of criminal defendants, increase the rights of crime victims, and enhance the powers of police and prosecutors. It embedded in the state constitution the right to restitution, restrictions on bail, limitations on plea bargaining, the right of crime victims to be heard at sentencing, enhanced punishment for recidivist offenders, restrictions on sentencing to the Youth Authority, as well as fundamental changes to the rules of evidence in criminal proceedings.¹²²

Perhaps most consequentially, its “truth in evidence” provision abolished the state’s exclusionary rule, which excluded the admission at trial of otherwise relevant evidence that the state obtained through violation of the defendant’s rights.¹²³ The California Supreme Court had established the state’s exclusionary rule in 1955 (before the U.S. Supreme Court required states to comply with a federal exclusionary rule in *Mapp v. Ohio*) and had expanded it over time to apply more

¹²⁰ MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #779: CRIME AND FEAR OF CRIME NUMBER ONE COMMUNITY PROBLEM IN CALIFORNIA (Mar. 22, 1973); MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #780: ONE IN THREE CALIFORNIANS CLAIM TO HAVE BEEN VICTIMIZED BY CRIME DURING PAST YEAR (Mar. 23, 1973).

¹²¹ MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1236: HIGH DEGREE OF PUBLIC CONCERN ABOUT TWO STATE ISSUES: CRIME AND LAW ENFORCEMENT; SCHOOLS AND EDUCATION 1 (Feb. 23, 1984).

¹²² CAL. SEC’Y OF STATE MARCH FONG EU, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION JUNE 8, 1982, at 32–33, 56 (1982).

¹²³ *Id.* at 33.

broadly than the federal rule.¹²⁴ The Victims' Bill of Rights initiative overturned that rule and instead provided that, under state law, all relevant evidence would now be admissible at trial, with exceptions for statutory rules of evidence such as hearsay and privilege. California courts would now enforce only the federal exclusionary rule, and would not be permitted to exclude evidence more broadly under a separate, independent state rule.¹²⁵

George Deukmejian, now California Attorney General, summarized the proponents' arguments in the official California ballot pamphlet:

Crime has increased to an absolutely intolerable level.

While criminals murder, rape, rob and steal, victims must install new locks, bolts, bars and alarm systems in their homes and businesses. Many buy tear gas and guns for self protection. FREE PEOPLE SHOULD NOT HAVE TO LIVE IN FEAR.

Yet, higher courts in this state have created rights for the criminally accused and placed more restrictions on law enforcement officers. This proposition will overcome some of the adverse decisions by our higher courts.¹²⁶

Voters approved the measure by a 56.4–46.6% margin.

The measure was challenged in court shortly after the election, and a closely divided California Supreme Court upheld it. Justice Mosk dissented, lamenting: "The Goddess of Justice is wearing a black arm-band today, as she weeps for the Constitution of California."¹²⁷ The Victims' Bill of Rights initiative was a devastating blow for Mosk, an architect of the new judicial federalism, because it wiped away a large body of case law expanding state constitutional rights in the area of criminal procedure, and restricted the court's ability to innovate in this area in the future.¹²⁸

Eight years later, as crime rates remained high and public concerns about crime persisted, the law enforcement community drafted another initiative constitutional amendment to protect

¹²⁴ See generally *People v. Cahan*, 282 P.2d 905 (Cal. 1955). As an example of its expansive nature, the California exclusionary rule applied vicariously, that is, it granted the defendant standing to object to the admission of evidence obtained in violation of a third person's constitutional rights. See *People v. Martin*, 290 P.2d 855, 857 (Cal. 1955). For the U.S. Supreme Court ruling applying the exclusionary rule to the states, see *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹²⁵ J. Clark Kelso & Brigitte A. Bass, *The Victims' Bill of Rights: Where Did It Come from and How Much Did It Do?*, 23 PAC. L.J. 843, 867–68 (1992).

¹²⁶ CAL. SEC'Y OF STATE MARCH FONG EU, *supra* note 122, at 34.

¹²⁷ *Brosnahan v. Brown*, 651 P.2d 274, 313 (Cal. 1982) (Mosk, J., dissenting).

¹²⁸ JACQUELINE R. BRAITMAN & GERALD F. UELMEN, *JUSTICE STANLEY MOSK* 155–57 (2013).

crime victims and limit the procedural rights of criminal defendants. This measure, known as the Crime Victims Justice Reform Act, was designated as Proposition 115 on the state ballot. Among other provisions, the measure sought to eliminate or limit the procedural rights of criminal defendants, including the defendant's right against prosecutor's pretrial discovery, the defendant's right to exclude hearsay at preliminary hearings, and the defendant's right to post-indictment preliminary hearings. These provisions, again, would overturn rights established by the California Supreme Court. Moreover, and more radically, Proposition 115 sought to establish a "lock-step" provision that would bar the California Supreme Court from interpreting the California Constitution to recognize state constitutional rights of criminal defendants beyond the requirements of the U.S. Constitution—a direct and total repudiation of the court's new judicial federalism jurisprudence in the area of criminal procedure.¹²⁹ Voters embraced Proposition 115 by a 57–43% margin.¹³⁰ As discussed further below, the California Supreme Court upheld most of Proposition 115's provisions but invalidated its sweeping lock-step rule.¹³¹

B. Busing

The California Supreme Court's decision to expand the constitutional basis for desegregative busing again conflicted with deeply held public views. By declaring that California's constitutional standard for desegregation would be more stringent than the federal standard (that is, that remedies would be required regardless of whether the segregation was

¹²⁹ California Constitution article I, section 24, reads as follows: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Proposition 115 sought to add the following amendment:

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

CAL. SEC'Y OF STATE MARCH FONG EU, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION JUNE 5, 1990, at 33 (1990).

¹³⁰ CAL. SEC'Y OF STATE MARCH FONG EU, *supra* note 111, at 51.

¹³¹ *Raven v. Deukmejian*, 801 P.2d 1077, 1089 (Cal. 1990); *see also infra* notes 176, 178.

intentional), the court increased the prospects that many students in the state would be bused in pursuit of racial desegregation.¹³²

Public opinion surveys indicated that California voters overwhelmingly opposed the busing of public school students to achieve racial balance. In a June 1979 Field poll, 79% of respondents said that they were opposed to busing, compared to only 14% who supported it.¹³³ A September 1979 Field Poll further underscored the state's overwhelming opposition to busing. Field noted:

The public itself is quite clear about where it stands on the basic idea of school busing to achieve racial balance. There is a four to one majority against the idea, and very few people are neutral or undecided.

Opposition to busing pervades all areas of the state, all political partisanship groups, all levels of education, and is not affected by whether any family members are in the schools or their propensity to vote.¹³⁴

Both white and Hispanic voters heavily opposed busing, while black voters were evenly divided on the remedy.¹³⁵

Opposition to court-ordered busing was especially intense in the suburban areas of the sprawling Los Angeles Unified School District. Legislators representing that area, including Democrat Alan Robbins, led a bipartisan effort to place a constitutional amendment on the ballot to overturn the court's decision.¹³⁶ The amendment, which became Proposition 1 of 1979, proposed a lengthy amendment to the state constitution's due process and equal protection clauses (article I, section 7(a)), to limit their independent force in the area of desegregation.¹³⁷ The amended clauses would read as follows:

A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that

¹³² See *Crawford v. Board of Education of L.A.*, 551 P.2d 28 (Cal. 1976), which affirmed the court's principles for school desegregation set forth in dicta in *Jackson v. Pasadena City School District*, 382 P.2d 878 (Cal. 1963). For discussion of the *Crawford* context, see PREBLE STOLZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* 34 (1981).

¹³³ MERVIN D. FIELD, *THE CALIFORNIA POLL, RELEASE #1031: CALIFORNIANS OVERWHELMINGLY OPPOSED TO SCHOOL BUSING* (June 14, 1979).

¹³⁴ MERVIN D. FIELD, *THE CALIFORNIA POLL, RELEASE #1043: LARGE MAJORITY OPPOSES SCHOOL BUSING, BUT MOST OF PUBLIC EITHER UNAWARE OF PROP. 1 (ROBBINS AMENDMENT) OR HAVE CONFLICTING VIEWS AS TO ITS EFFECTS 1* (Sept. 21, 1979).

¹³⁵ *Id.*

¹³⁶ STOLZ, *supra* note 132, at 33–37.

¹³⁷ CAL. SEC'Y OF STATE MARCH FONG EU, *CALIFORNIA BALLOT PAMPHLET: SPECIAL STATEWIDE ELECTION NOVEMBER 6, 1979*, at 6–7 (1979).

nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this State may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.¹³⁸

The Legislature placed the amendment on the ballot through a bipartisan, supermajority vote of 62–17 in the Assembly and 28–6 in the Senate.¹³⁹ Voters approved the measure by a 68.6–31.4% margin.¹⁴⁰

Progressive opponents of the amendment challenged it on federal constitutional grounds. In *Crawford v. Board of Education of L.A.* (1982),¹⁴¹ the U.S. Supreme Court upheld the people's decision to override the state supreme court. Justice Lewis Powell wrote:

We . . . reject[] the contention that once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede. We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court. . . .

In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States.¹⁴²

C. Other Rights—No Direct Challenges to the Court's Rulings

As noted above, during the early years of the new judicial federalism, the California Supreme Court expanded rights beyond federal minimums in a range of other areas, including abortion, gender equality, sexual orientation equality, equalized education funding, free speech, and non-establishment of religion. Polling information is not available for all of these

¹³⁸ *Id.* at 7.

¹³⁹ *Id.* at 6.

¹⁴⁰ CAL. SEC'Y OF STATE MARCH FONG EU, *supra* note 112.

¹⁴¹ *Crawford v. Bd. of Educ. of L.A.*, 458 U.S. 527, 535, 542 (1982).

¹⁴² *Id.*

issues, but the existing data suggest that decisions generally aligned with public opinion; at the very least, the court's decisions in these cases did not run counter to broad, strongly held opinion.

Polling was most extensive on the question of abortion. During the period that the California Supreme Court led the nation in expanding abortion rights, through *People v. Belous* (1969)¹⁴³ and *People v. Barksdale* (1972),¹⁴⁴ polls indicated that Californians broadly supported liberalizing abortion laws. A May 1967 Field Poll found that 73% of respondents favored changes to the state's long-standing abortion law which allowed abortions only when the pregnant woman's life was at risk.¹⁴⁵ The court's 1969 ruling in *Belous* declared that law unconstitutional. After the Legislature adopted the Therapeutic Abortion Act of 1967, which allowed abortion where the pregnancy could impair the physical or mental health of the mother or where the pregnancy was the result of rape or incest, polls indicated that the public favored even further liberalization.¹⁴⁶ A majority of respondents would allow abortion "if [the] baby might have a serious deformity," but did not fully support abortion on demand.¹⁴⁷ The California electorate was thus substantially pro-choice on abortion prior to *Roe v. Wade*, during the time that the California Supreme Court was establishing a constitutional basis for the pro-choice position.

Later, the abortion controversy turned to public funding for abortion, and in *Committee to Defend Reproductive Rights v. Myers* (1981),¹⁴⁸ the California Supreme Court declared that the state constitution's protection of abortion rights included the right to public funding for abortion. This outcome was opposite of the U.S. Supreme Court's ruling in *Harris v. McRae* (1980), which rejected a claim to a federal constitutional right to public funding for abortion.¹⁴⁹ Shortly after the *McRae* decision, and a year before *Myers*, a poll indicated that Californians continued to support abortion rights generally, and were evenly divided on the question of whether the state should keep funding abortions

143 See *People v. Belous*, 458 P.2d 194, 204–06 (Cal. 1969).

144 See *People v. Barksdale*, 503 P.2d 257, 270 (Cal. 1972).

145 MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #556: LIBERALIZING ABORTION LAWS IS FAVORED BY AN OVERWHELMING MAJORITY OF CALIFORNIA VOTERS 1–2 (May 9, 1967).

146 S.B. 462, 1967–1968 Legis. Sess., Reg. Sess. (Cal. 1967).

147 MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #633: CALIFORNIA PUBLIC FAVORS SLIGHT LIBERALIZATION OF ABORTION LAWS, BUT NO MORE 2 (May 20, 1969).

148 *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

149 *Harris v. McRae*, 448 U.S. 297 (1980).

(48% yes, 48% no, with 4% undecided).¹⁵⁰ Opponents of *Myers* did not organize an effort to overturn it through a state constitutional amendment.

While the Field Poll did not track California public opinion on gender equality at the time of the *Sail'er Inn* decision (1971),¹⁵¹ the Legislature voted to ratify the Federal Equal Rights Amendment in November 1972, shortly after it was referred to the states, and in 1980, nearly two-thirds of respondents (64%) favored the amendment.¹⁵² The *Sail'er Inn* decision faced no organized override effort. Similarly, by the time of the court's decision in *Gay Law Students* (1979),¹⁵³ public opinion in California had moved in favor of non-discrimination on the basis of sexual orientation in the workplace. In 1978 California voters soundly rejected a ballot measure that would have restricted employment of gays and lesbians in the public schools, and did not mobilize opposition to the court's *Gay Law Students* ruling the following year.¹⁵⁴

The public also accepted the court's decisions to expand rights beyond federal minimums in areas including free speech on private property, non-establishment of religion, and equalization of school funding.¹⁵⁵ Each of these cases generated some controversy, but none of them countered strongly held public views in the manner of the court's capital punishment, criminal procedure, and busing decisions.

150 MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1091: CALIFORNIA PUBLIC AGAINST CONSTITUTIONAL BAN ON ABORTIONS. EVENLY DIVIDED ON MEDI-CAL ABORTIONS PAYMENTS 1-2 (Aug. 19, 1980).

151 *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529 (Cal. 1971).

152 MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1089: STRONG SUPPORT FOR EQUAL RIGHTS AMENDMENT. REAGAN'S FAILURE TO ENDORSE IT MIGHT ADVERSELY AFFECT HIS CHANCES IF PRESIDENTIAL RACE TIGHTENS 1, 3 (Aug. 12, 1980).

153 *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

154 For text and analysis of Proposition 6 of 1978 (the "Briggs Initiative"), see CAL. SEC'Y OF STATE MARCH FONG EU, CALIFORNIA VOTERS PAMPHLET: GENERAL ELECTION NOVEMBER 7, 1978, at 28-31 (1978). The measure was defeated 58.4-41.6%. See CAL. SEC'Y OF STATE MARCH FONG EU, STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 7, 1978 (1978).

155 Some argue that one additional rights-expanding decision from this era, *Serrano v. Priest*, produced indirect pushback from voters. *Serrano* created a state constitutional right to equalized school funding in and de-linked local property taxes from the funding of local public schools. Although citizens did not mobilize to overturn *Serrano*, they did overwhelmingly support Proposition 13 of 1978, which reduced property taxes and placed strict limits on future increases. Some analysts believe that voters supported Proposition 13 at least in part because, as a result of the court's ruling, their property taxes no longer directly supported their local schools. While this theory is plausible, polls do not confirm that the public made this connection and it cannot be said that Proposition 13 "overturned" *Serrano* in the way that, for example, Proposition 17 overturned *People v. Anderson*. See DANIEL A. SMITH, TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY 60 (1998).

D. Judicial Retention Elections and the Death of the Bird Court

The tensions between the state supreme court and the electorate came to a head in 1986 when six of the court's seven justices faced judicial retention elections. The six justices on the ballot that year were Chief Justice Rose Bird, Justice Cruz Reynoso, Justice Joseph Grodin, Justice Stanley Mosk, Justice Edward Panelli, and Justice Malcolm Lucas.¹⁵⁶ By 1986, Chief Justice Bird had served on the court for nearly a decade, and had been a lightning rod for criticism the entire time.¹⁵⁷ She narrowly won popular confirmation in 1978, receiving 52% of the vote, by far the lowest percentage any California Supreme Court justice had received in a confirmation or retention election since the system was established in 1934.¹⁵⁸ After surviving that election, she remained a target. Opponents organized several efforts to recall her in 1981–1983, but each failed to qualify for the ballot.¹⁵⁹ Thereafter, public opposition to Bird continued to spread, and in mid-1985, opponents, including district attorneys and correctional officers, launched a campaign to defeat her in the 1986 retention election.¹⁶⁰ Between mid-1985 and the fall 1986 election, Field conducted eight separate polls measuring public attitudes toward the chief justice. The polls consistently showed that a substantial majority of voters were determined to remove her from office. When asked why they wanted to remove Chief Justice Bird, respondents mentioned, in order of frequency, that they did not like her opposition to the death penalty; they considered her too lenient and soft on criminals; they believed she let killers go free; they did not like her positions and stands on the issues; they thought she had not upheld the will of the people or enforced the law; they concluded that she had not done a good job; and they considered her too liberal—followed by other criticisms.¹⁶¹

¹⁵⁶ CAL. SEC'Y OF STATE MARCH FONG EU, STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 4, 1986, at 36–37 (1986). For Justice Grodin's account of the 1986 judicial election, see GRODIN, *supra* note 96, at 169–81.

¹⁵⁷ Barry Latzer, *California's Constitutional Counterrevolution*, in CONSTITUTIONAL POLITICS IN THE STATES 149, 166 (G. Alan Tarr ed., 1996).

¹⁵⁸ CAL. SEC'Y OF STATE MARCH FONG EU, *supra* note 156; GRODIN, *supra* note 96, at 167–68.

¹⁵⁹ See *Complete List of Recall Attempts*, CAL. SECRETARY ST. ALEX PADILLA, <http://www.sos.ca.gov/elections/recalls/complete-list-recall-attempts/> [<http://perma.cc/NK3K-LEP5>]; see also Richard Bergholz, *Effort to Recall Rose Bird Puts State GOP in a Quandary*, L.A. TIMES, Feb. 26, 1982, at B3.

¹⁶⁰ The Dolphin Group, a political campaign firm, managed the effort. In addition to law enforcement organizations, the campaign received support from business groups, agricultural interests, and the Republican Party. See Frank Clifford & John Balzar, *2 Groups Join Forces in Seeking Bird's Defeat*, L.A. TIMES, Jan. 29, 1986, at A20; see also GRODIN, *supra* note 96, at 169.

¹⁶¹ MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1362: BY A FIVE TO THREE

Voters were angry at the chief justice and, to a lesser degree, other members of the court, for many reasons, but the divide between the people and the court on the issue of capital punishment was the single biggest irritant. Many voters thought they had settled the question of the legitimacy of the death penalty under the California Constitution in 1972, when they had reversed the court's ruling in *Anderson*.¹⁶² But the controversy had persisted. After capital punishment was reinstated in California and juries had sentenced scores of convicted felons to death, the state supreme court had reversed nearly all of the sentences, often on technicalities. Several members of the court's progressive wing had not fully accepted the voters' verdict in overturning *Anderson* and affirming capital punishment. Rose Bird was the most resistant. During her tenure on the court, she participated in the review of sixty-one capital convictions, and voted to overturn the sentence in all sixty-one of them.¹⁶³ Meanwhile, by 1986, voter support for capital punishment had spiked to 83%, with only 14% opposed—a remarkably broad consensus.¹⁶⁴ The chief justice and the public were polarized on this emotional and high-profile issue. As opposition to Bird hardened, it was apparent that voters would remove her; it was less certain whether they would also reject one or more of her progressive colleagues. Veteran liberal justice Stanley Mosk escaped, but two other progressives, Cruz Reynoso and Joseph Grodin, were not so fortunate. On Election Day, voters defeated Bird, Reynoso, and Grodin—and thus, in one stroke, decimated the court's progressive majority.

Table 4: Results of 1986 California Supreme Court Elections¹⁶⁵

Justice	Appointing Governor	Outcome	% Yes Vote
Justice Malcolm Lucas	George Deukmejian (R)	Confirmed	80
Justice Edward Panelli	George Deukmejian (R)	Confirmed	79
Justice Stanley Mosk	Pat Brown (D)	Retained	74
Justice Joseph Grodin	Jerry Brown (D)	Defeated	43
Justice Cruz Reynoso	Jerry Brown (D)	Defeated	40
Chief Justice Rose Bird	Jerry Brown (D)	Defeated	34

MARGIN, VOTERS STILL OPPOSED TO RETAINING ROSE BIRD 2 (Oct. 9, 1986).

¹⁶² Dan Morain, *Both Sides Point to Death Penalty Decision of 1972*, L.A. TIMES, Feb. 18, 1986, at A3.

¹⁶³ Todd S. Purdum, *Rose Bird, Once California's Chief Justice, Is Dead at 63*, N.Y. TIMES, Dec. 6, 1999, at B18.

¹⁶⁴ MERVIN D. FIELD, THE CALIFORNIA POLL, RELEASE #1353: STRONG OPPOSITION TO ROSE BIRD CONTINUES. CONFIRMATION OF ALL OTHER JUSTICES FAVORED 3 (Aug. 12, 1986).

¹⁶⁵ CAL. SEC'Y OF STATE MARCH FONG EU, SUPPLEMENTAL VOTE COUNT STATISTICS CONCERNING THE SUPREME COURT JUSTICES: GENERAL ELECTION NOVEMBER 4, 1986 (1986).

IV. AFTER THE FALL: THE LUCAS COURT

The dismissal of Chief Justice Bird and Justices Reynoso and Grodin, on November 4, 1986, produced three vacancies on the court. George Deukmejian, the long-time critic of the court's jurisprudence, was elected to a second term as Governor the same day, and now had the opportunity to reconstitute the court in line with his vision of the California Constitution and the court's proper role in the state's constitutional design.

George Deukmejian's public career—as a state legislator, Attorney General, and Governor—spanned from 1963 to 1991, a period of intensifying public concern about crime and lenient courts. Of all elected officials in California during these years, he most consistently and effectively supported tough-on-crime measures and opposed the court's progressive orientation, especially on criminal justice issues.¹⁶⁶ While serving as Attorney General, Deukmejian publicly attacked what he considered to be the court's excessive embrace of the new judicial federalism—that is, its frequent use of independent state grounds to expand rights.¹⁶⁷ When he ran for Governor, Deukmejian remarked that he was motivated to seek the office because the Governor, not the Attorney General, is the one who appoints judges.¹⁶⁸ He wanted to appoint what he called “no-nonsense” judges, those who would show deference to the political branches, use self-restraint in exercising the power of judicial review, and not unnecessarily invoke the state constitution to expand rights.¹⁶⁹ During his two terms as Governor (1983–1991), Deukmejian nominated more than 1000 judges, including eight members of the California Supreme Court: Malcolm Lucas (1984–1996, chief justice 1987–1996); Edward A. Panelli (1985–1994); John A. Arguellas (1987–1989); David N. Eagleson (1987–1991); Marcus M. Kaufman (1987–1990); Joyce L. Kennard (1989–2014); Armand Arabian (1990–1996); and Marvin R. Baxter (1991–2015).¹⁷⁰

Governor Deukmejian's nominees to the state's highest court had several common characteristics. First, they were seasoned jurists. All of his nominees had served as lower court judges, and

¹⁶⁶ Kenneth Ofgang, *Personality Profile: George Deukmejian: East Coast Transplant Who Rose to Governorship Looks Back at Life of Service*, METROPOLITAN NEWS-ENTERPRISE 3 (Jan. 17, 2012), <http://www.metnews.com/articles/2012/deuk011712.htm> [perma.cc/4QZF-FFWC].

¹⁶⁷ See, e.g., George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979).

¹⁶⁸ Ofgang, *supra* note 166.

¹⁶⁹ Daniel M. Weintraub & Jennifer Warren, *Benchmarks: Governor Keeps Tight Rein on Who Will Become Judge*, L.A. TIMES, July 10, 1988, at AD1.

¹⁷⁰ *California Supreme Court Justices*, *supra* note 9.

most had “gone through the chairs”—that is, served as both trial court judge and as justice on the state’s intermediate court of appeal before being elevated to the state supreme court. Second, they were generally moderate-conservatives; none was a “movement conservative” who would seek to launch an ideological counterrevolution from the right. Third, they were practitioners, not law professors or theoreticians. In short, their backgrounds and jurisprudential orientations made them less likely to embrace the new judicial federalism, and more likely to limit the court’s role in expanding new constitutional rights.

Under the leadership of Chief Justice Malcolm Lucas, the court stabilized and repaired its legitimacy. At the same time, the court retained its national influence, as it continued to be highly cited by courts in other states.¹⁷¹ The Lucas years produced no deep conflicts between the court and the people and no organized efforts to remove justices. While the Lucas court was reticent to create new state constitutional rights, it also was generally careful not to overturn prior decisions establishing such rights.¹⁷² The court reversed some progressive precedents in the common law, especially in the area of tort, and upheld death sentences at much increased rates through modification of the harmless error rule.¹⁷³ But the Lucas court did not undo, for example, prior rulings in state constitutional rights cases such as *Serrano v. Priest II* (1976),¹⁷⁴ requiring school funding equalization, or *Committee to Defend Reproductive Rights v. Myers* (1981),¹⁷⁵ requiring public funding for abortion. Moreover, the Lucas court handed down a decision in *Raven v. Deukmejian* (1990) that defended the core principle of the new judicial federalism, namely that state supreme courts should be able to interpret state constitutional rights independently of U.S. Supreme Court interpretation of federal constitutional rights.¹⁷⁶ As discussed above, in 1990 voters approved Proposition 115, the Crime Victims Justice Reform Act. That initiative contained several specific limitations on the rights of criminal defendants, as well as a “lock-step” provision, which provided that the California Constitution “shall not be construed by the courts to afford greater rights to criminal defendants than those afforded

171 Dear & Jessen, *supra* note 8, at 701.

172 John H. Culver, *The Transformation of the California Supreme Court: 1977-1997*, 61 ALB. L. REV. 1461, 1476-77 (1998).

173 J. Clark Kelso, *A Tribute to Retiring Chief Justice Malcolm M. Lucas*, 27 PAC. L.J. 1401 (1996).

174 *Serrano v. Priest II*, 557 P.2d 929 (Cal. 1977).

175 *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

176 *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990).

by the Constitution of the United States.”¹⁷⁷ The court upheld the separate restrictions on defendant rights, but struck down the lock-step provision. In the court’s view, the lock-step rule would so restrict the power of the state judicial branch and so “severely limit[] the independent force and effect of the California Constitution” as to be a “revision” of the state constitution rather than an amendment, and therefore impermissible under the limits of the initiative process.¹⁷⁸ The most conservative court in modern California history thus protected the core institutional principle of the new judicial federalism.

V. THE GEORGE COURT: REVIVAL OF THE NEW JUDICIAL FEDERALISM AND POPULAR PUSH-BACK

In 1990, Republican Pete Wilson won election to replace George Deukmejian as Governor of California. Wilson was known as a moderate Republican, more liberal than Deukmejian on social issues, and prominently pro-choice on abortion. During his two terms as Governor (1991–1999), Wilson nominated four justices to the California Supreme Court: Ronald M. George (1991–2011, chief justice 1996–2011); Kathryn M. Werdegar (1994–present); Ming W. Chin (1996–present); and Janice Rogers Brown (1996–2005).¹⁷⁹ Of the four, Janice Rogers Brown was considered the most conservative—a movement conservative. But the other three were more moderate. Collectively, Wilson’s appointees moved the court to more progressive positions on some issues and revived the court’s expansion of state constitutional rights in the areas of abortion, same-sex marriage, and gay rights beyond marriage.

Table 5: New California State Constitutional Rights, Post-1986, and Overriding Amendments¹⁸⁰

Category	New State Constitutional Rights	Cases Establishing Rights	Overriding Amendments	Vote
Abortion	Right of minors to abortion without parental notification	<i>American Academy of Pediatrics v. Lungren</i> (1997)	Prop. 73 (2005) Prop. 85 (2006) Prop. 4 (2008)	Fail (47.2–52.8%) Fail (45.8–54.2%) Fail (48.0–52.0%)

¹⁷⁷ CAL. SEC’Y OF STATE MARCH FONG EU, *supra* note 129.

¹⁷⁸ *Raven*, 801 P.2d at 1086, 1088; *see also* John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 1015–16 (2007).

¹⁷⁹ *California Supreme Court Justices*, *supra* note 9.

¹⁸⁰ CAL. SEC’Y OF STATE BRUCE MCPHERSON, STATEMENT OF VOTE: SPECIAL ELECTION NOVEMBER 8, 2005, at 3 (2005); CAL. SEC’Y OF STATE BRUCE MCPHERSON, STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 7, 2006, at 73 (2006); CAL. SEC’Y OF STATE DEBRA BOWEN, STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 4, 2008, at 59, 62 (2008).

Category	New State Constitutional Rights	Cases Establishing Rights	Overriding Amendments	Vote
Marriage	Right of same-sex couples to marry	<i>In re Marriage Cases</i> (2008)	Prop. 8 (2008)	Pass (52.2–47.8%)
Equal protection	Strict scrutiny for laws that classify on basis of sexual orientation	<i>In re Marriage Cases</i> (2008)	—	—

A. Abortion Rights

The court signaled a shift in direction on abortion rights in 1996–1997, shortly after Ronald George succeeded Malcolm Lucas as chief justice. The case in question concerned a Deukmejian-era statute requiring a pregnant minor to obtain the consent of her parents (or a judge) before obtaining an abortion. After the U.S. Supreme Court held in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) that such parental consent laws did not violate the U.S. Constitution, opponents of the California law challenged the statute on state constitutional grounds in *American Academy of Pediatrics v. Lungren*.¹⁸¹ When the court first considered the *Lungren* case in 1996, it upheld the statute by a narrow four-to-three decision authored by Justice Mosk.¹⁸² But when Chief Justice Lucas retired, Governor Wilson nominated Ronald George to replace him and Ming Chin to replace George as associate justice. With these changes on the bench, the narrowly divided court reversed the outcome. The court granted rehearing in May 1996 and, in a new decision issued the following year, invalidated the parental consent law.¹⁸³ The new decision, authored by Chief Justice George, held that the California Constitution’s right to privacy included the right of a minor to terminate her pregnancy without parental consent—thereby again expanding California’s state constitutional abortion rights beyond the federal baseline.¹⁸⁴ Recognizing the potential backlash against the decision, George stated: “I thought it was important to decide the case the way it should be decided. And I assigned it to myself as a sign I would not be intimidated.”¹⁸⁵

¹⁸¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992).

¹⁸² *Am. Acad. of Pediatrics v. Lungren*, 912 P.2d 1148 (Cal. 1996), *vacated*, 940 P.2d 797 (Cal. 1997).

¹⁸³ *Lungren*, 940 P.2d at 831. For a discussion of the court’s switch in the case, see Edward J. Erler, *The California Supreme Court in the Culture Wars*, in *COURTS AND THE CULTURE WARS* 139, 141–45 (Bradley C.S. Watson ed., 2002).

¹⁸⁴ *Lungren*, 940 P.2d at 809–10, 813–14.

¹⁸⁵ MARK DICAMILLO & MERVIN FIELD, *THE FIELD POLL, RELEASE #1852: CHIEF JUSTICE RONALD GEORGE’S RULING COULD AFFECT HIS CONFIRMATION CHANCES NEXT*

Pro-life activists were outraged by the new *Lungren* decision and resolved to seek to defeat Chief Justice George and Associate Justice Chin in their upcoming confirmation elections, scheduled for November 1998.¹⁸⁶ However, public opinion was much less hostile to the George court's ruling on this issue than it had been to the court's criminal justice jurisprudence during the Wright-Bird era. Polls indicated that the California electorate had complex views about abortion (related to the stage and circumstances of the pregnancy) but leaned heavily toward the pro-choice position. Although some polls indicated that the public supported the idea of a parental consent law, others showed that large majorities of Californians consistently favored abortion rights.¹⁸⁷ Accordingly, while it was possible that voters might narrowly approve an initiative constitutional amendment to override the court's decision in *Lungren*, it was unlikely that the public would mobilize to remove a justice who issued a pro-choice decision. Indeed, the movement to defeat Chief Justice George and Associate Justice Chin (who had tipped the balance in the case) gained little traction. At the 1998 election, voters confirmed Chin by a 69% popular majority, George by more than 75%.

**Table 6: Results of 1998 California Supreme Court
Judicial Elections¹⁸⁸**

Justice	Appointing Governor	Outcome	% Yes Vote
Justice Janice Rogers Brown	Pete Wilson (R)	Confirmed	75.91
Chief Justice Ron George	Pete Wilson (R)	Confirmed	75.49
Justice Stanley Mosk	Pat Brown (D)	Retained	70.51
Justice Ming Chin	Pete Wilson (R)	Confirmed	69.26

After the challenges to George and Chin foundered, activists turned to the initiative process to try to overturn the court's *Lungren* decision through state constitutional amendment, not once, or twice, but three times: in 2005 (Proposition 73); 2006 (Proposition 85); and 2008 (Proposition 4). California voters narrowly defeated the measures each time, demonstrating that the court's decision in *Lungren* was closely enough aligned with the electorate's views to avoid popular override.

YEAR 4 (Sept. 4, 1997).

¹⁸⁶ *Id.* at 1.

¹⁸⁷ *Id.* at 4; see also MARK DICAMILLO & MERVIN FIELD, THE FIELD POLL, RELEASE #1747: LARGE MAJORITY TAKES PRO-CHOICE POSITION ON ABORTION, DECLINE IN SUPPORT FOR MEDI-CAL ABORTION PAYMENTS 1 (Mar. 17, 1995); MARK DICAMILLO & MERVIN FIELD, THE FIELD POLL, RELEASE #1863: STRONG SUPPORT FOR AND INITIATIVE WHICH WOULD REQUIRE A MINOR OBTAINING PARENTAL CONSENT BEFORE HAVING AN ABORTION (Dec. 12, 1997).

¹⁸⁸ CAL. SEC'Y OF STATE BILL JONES, STATE OF VOTE: GENERAL ELECTION NOVEMBER 3, 1998 (1998).

B. Same-Sex Marriage

The George court is best known for its rulings on the contested question of same-sex marriage, especially its landmark decision in *In re Marriage Cases* (2008), establishing a state constitutional right of same-sex couples to marry.¹⁸⁹ At the time the California Supreme Court considered the question, the U.S. Supreme Court had not yet held that same-sex couples had a federal constitutional right to marry. To the contrary, the Court had rejected such a claim in 1972, and had never squarely revisited the question.¹⁹⁰ The Supreme Court had issued other decisions protecting the federal constitutional rights of gay and lesbian persons in decisions such as *Romer v. Evans* (1996)¹⁹¹ and *Lawrence v. Texas* (2003),¹⁹² but strategists for the gay rights movement believed that the Court was not yet prepared to issue a broad decision granting same-sex couples federal constitutional marriage rights, a decision that would require the Court to overturn existing marriage laws across the country.¹⁹³ Instead, the movement pursued a “new judicial federalism strategy”—that is, it turned to state supreme courts in progressive states to declare that their state constitution protected the right of same-sex couples to marry.¹⁹⁴ In the tradition of the new judicial federalism, this approach called upon state courts to expand rights beyond what was, at the time, the federal constitutional standard.

The movement had a breakthrough in Massachusetts in 2003 when the Supreme Judicial Court declared that the Massachusetts Constitution guaranteed the right of same-sex couples to marry. Advocates of same-sex marriage pursued similar rulings in other states, but with little initial success. The supreme courts of New York (2006),¹⁹⁵ Washington (2006),¹⁹⁶ and Maryland (2007)¹⁹⁷ refused to recognize a state constitutional right of same-sex marriage. The New Jersey Supreme Court held that the state’s marriage laws violated the state constitution’s equal protection principles, but narrowly held that civil unions for same-sex partners was a sufficient remedy.¹⁹⁸ As of 2008,

189 *In re Marriage Cases*, 83 P.3d 384 (Cal. 2008).

190 *See Baker v. Nelson*, 409 U.S. 810 (1972).

191 *Romer v. Evans*, 517 U.S. 620 (1996).

192 *Lawrence v. Texas*, 539 U.S. 558 (2003).

193 *See generally* William C. Duncan, *Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts*, 29 CAMPBELL L. REV. 29 (2006).

194 *Id.*

195 *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006).

196 *Andersen v. King Cty.*, 138 P.3d 963, 990 (Wash. 2006).

197 *Conaway v. Deane*, 932 A.2d 571 (Md. 2007).

198 *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

Massachusetts remained the only state to recognize same-sex marriages.

The battle then shifted to California. In 2007–2008, the California Supreme Court deliberated on the question through review of a group of six consolidated appeals titled *In re Marriage Cases*.¹⁹⁹ The California litigation proceeded in the midst of shifting public opinion. In 2000, the state’s voters had approved a statutory initiative, Proposition 22, establishing that “only marriage between a man and a woman is valid or recognized in California,” by a wide 61–39% majority.²⁰⁰ Table 7 demonstrates that over the next eight years public opinion in California moved toward greater acceptance of same-sex marriage, but remained sharply divided on the question. The combination of the state’s highly accessible system of initiative constitutional amendment, divided public opinion, and a mobilized conservative opposition to same-sex marriage meant that a decision by the court to establish a new state constitutional right of same-sex couples to marry would likely face a serious challenge. And, indeed, as the court was reviewing the case, conservative defenders of existing marriage laws were preparing an initiative to embed in the state constitution the principle, approved by voters eight years before, that “only marriage between a man and a woman is valid or recognized in California.”²⁰¹ The amendment was designed to override the court in the same way that, a generation before, voters had overturned the court’s decisions on capital punishment, criminal procedure, and busing.

For nearly four decades, the Field Research Corporation has surveyed California voters’ attitudes toward same-sex marriage and has recorded a major shift in public attitudes in favor of marriage rights for same-sex couples.

As Table 7 indicates, in early 2008, the California Supreme Court reasonably could have concluded that public opinion had moved far enough in California that the electorate would accept a landmark ruling granting marriage rights to same-sex couples. When the court issued its decision in *Marriage Cases* on May 15, 2008, it put the question to the test. The proponents of the override measure qualified it for the November 2008 election under the ballot designation “Proposition 8.”

199 *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

200 CAL. SEC’Y OF STATE BILL JONES, STATEMENT OF VOTE: PRIMARY ELECTION, MARCH 7, 2000, at 50–53, 153–55 (2000).

201 CAL. SEC’Y OF STATE DEBRA BOWEN, OFFICIAL VOTER INFORMATION GUIDE, CALIFORNIA GENERAL ELECTION TUESDAY, NOVEMBER 4, 2008, at 54 (2008). The amendment would become California Constitution article I, section 7.5.

Table 7: Public Opinion of Same-Sex Marriage in California, 1977–2013²⁰²

Year	% Approve	% Disapprove	% No Opinion
1977	28	59	13
1985	30	62	8
1997	38	56	6
2003	42	50	8
2004	44	50	6
2006	44	50	6
May 2008	<i>In re Marriage Cases</i>		
May 2008	51	42	7
2009	49	44	7
2010	51	42	7
2012	59	34	7
2013	61	32	7

The campaign for and against the amendment was one of the most intense and expensive in state history. Both sides of the issue presented forceful arguments. Opponents of Proposition 8 framed the issue largely in terms of rights and emphasized that the voters should not take away the rights of gay and lesbian couples, while proponents framed the issue in terms of popular sovereignty and argued that the people, not the court, should determine this fundamental social question.²⁰³ In the ballot pamphlet argument, the measure’s proponents directly targeted the court:

Proposition 8 is simple and straightforward. It contains the same 14 words that were previously approved in 2000 by over 61% of California voters: “Only marriage between a man and a woman is valid or recognized in California.”

Because four activist judges in San Francisco wrongly overturned the people’s vote, we need to pass this measure as a constitutional amendment to RESTORE THE DEFINITION OF MARRIAGE as a man and a woman.²⁰⁴

Despite the broad trend in public opinion in California toward acceptance of same-sex marriage the state’s voters approved Proposition 8, and thus overturned *In re Marriage Cases*, by a narrow 52–48% margin.²⁰⁵ Passage of the amendment

²⁰² MARK DICAMILLO & MERVIN FIELD, THE FIELD POLL, RELEASE #2443: RECORD MAJORITY OF CALIFORNIA VOTERS APPROVES OF ALLOWING SAME-SEX MARRIAGE 2 (Feb. 28, 2013) [hereinafter RELEASE #2443].

²⁰³ For a discussion of the competing arguments and spending in the Prop. 8 election, see Kenneth P. Miller, *The Democratic Coalition’s Religious Divide: Why California Voters Supported Obama, but Not Same-Sex Marriage*, REVUE FRANÇAISE D’ÉTUDES AMÉRICAINES 46–62 (2009).

²⁰⁴ CAL. SEC’Y OF STATE DEBRA BOWEN, *supra* note 201, at 56.

²⁰⁵ CAL. SEC’Y OF STATE DEBRA BOWEN, STATEMENT OF VOTE: GENERAL ELECTION

produced new rounds of litigation in state and federal courts. The first case involved a state constitutional challenge to Proposition 8 titled *Strauss v. Horton* (2009).²⁰⁶ The petitioners argued that it was impermissible to take away a fundamental state constitutional right through the initiative process because such an action amounted to a revision of the state constitution. By a six-to-one majority, however, the California Supreme Court rejected the claim and upheld a central principle of state constitutionalism—namely, that the people have the power to define state constitutional rights and can override the court’s definition of a state-level right.²⁰⁷ Immediately after the *Strauss* ruling, opponents of Proposition 8 filed a challenge in federal court.²⁰⁸ This move finally shifted from state to federal court the question of whether there is a constitutional right to same sex marriage. After extensive litigation, the federal courts struck down Proposition 8 on federal constitutional grounds and, later, all state laws that limited marriage to a union between a man and a woman.²⁰⁹

NOVEMBER 4, 2008, at 7 (2008).

²⁰⁶ *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

²⁰⁷ In *Strauss*, Chief Justice George noted:

Under the California Constitution, the constitutional guarantees afforded to individuals accused of criminal conduct are no less well established or fundamental than the constitutional rights of privacy and due process or the guarantee of equal protection of the laws. As we have seen, in past years a majority of voters has adopted several state constitutional amendments—for example, the measure reinstating the death penalty, and the multitude of constitutional changes contained in the 1982 Proposition 8 and in Proposition 115—that have diminished state constitutional rights of criminal defendants, as those rights had been interpreted in prior decisions of this court. Although a principal purpose of all constitutional provisions establishing individual rights is to serve as a counter-majoritarian check on potential actions that may be taken by the legislative or executive branches, our prior decisions—reviewed at length above—establish that the scope and substance of an existing state constitutional individual right, as interpreted by this court, may be modified and diminished by a change in the state Constitution itself, effectuated through a constitutional amendment approved by a majority of the electors acting pursuant to the initiative power.

Strauss, 207 P.3d at 450 (internal citations omitted).

²⁰⁸ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff’d sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

²⁰⁹ In *Perry*, a federal district judge declared that Proposition 8 violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution. *Id.* The U.S. Supreme Court declined to reach the merits of the appeal on the grounds that the proponents of the initiative lacked Article III standing to defend a citizen initiative where state officials refused to do so. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). After the Supreme Court’s 2013 decision in *Hollingsworth* and, more importantly, in *United States v. Windsor*, federal courts around the country began issuing decisions in cases challenging state marriage laws. *United States v. Windsor*, 133 S. Ct. 2675 (2013). When the issue reached the U.S. Supreme Court in *Obergefell v. Hodges*, the Court recognized a federal constitutional right of same-sex couples to marry, thus

As Table 7 indicates, during this period, public opinion continued to move toward acceptance of same-sex marriage to the point where it was likely that if the issue had been placed on the California ballot as early as 2010, and certainly by 2012, voters would have endorsed the right of same-sex couples to marry through the democratic process. According to an early 2013 Field Poll, California voters supported allowing same-sex couples to marry by a near two-to-one margin (61% to 32%).²¹⁰ Accordingly, the California Supreme Court could have avoided popular override of its judgment if it had stayed its hand and allowed the people to resolve the question by democratic means.²¹¹

C. Gay Rights Beyond Marriage

Proposition 8 left untouched an important feature of *In re Marriage Cases*, namely the court's ruling that, henceforth in California, all classifications based on sexual orientation will be considered suspect and will be subjected to strict judicial scrutiny.²¹² This standard extends the state constitution's equal protection guarantees for gays and lesbians beyond federal constitutional requirements. Although the U.S. Supreme Court has invoked federal equal protection principles to invalidate laws that draw distinctions on the basis of sexual orientation in cases such as *Romer v. Evans*²¹³ and *United States v. Windsor*,²¹⁴ the Court has never held that sexual orientation classifications are subject to strict judicial scrutiny. In *Marriage Cases*, the

foreclosing further state constitutional deliberation on the question. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

²¹⁰ RELEASE #2443, *supra* note 202, at 2.

²¹¹ In his dissenting opinion in *In re Marriage Cases*, Justice Marvin Baxter advanced this argument:

Left to its own devices, the ordinary democratic process might well produce, ere long, a consensus among most Californians that the term 'marriage' should, in civil parlance, include the legal unions of same-sex partners.

But a bare majority of this court, not satisfied with the pace of democratic change, now abruptly forestalls that process and substitutes, by judicial fiat, its own social policy views for those expressed by the People themselves.

In re Marriage Cases, 183 P.3d 384, 457 (Cal. 2008).

²¹² For establishment of the rule, see *id.* at 435–44. In *Strauss*, the court emphasized that the rule remains in place. Writing for the court, Chief Justice George declared:

As we have seen, in the *Marriage Cases* the majority opinion held that sexual orientation constitutes a suspect classification for purposes of analysis under the state equal protection clause and that statutes according differential treatment on the basis of sexual orientation are subject to the strict scrutiny standard of review. These general state equal protection principles established in the *Marriage Cases* are unaffected by the new section added to the California Constitution by Proposition 8.

Strauss, 207 P.3d at 411.

²¹³ *Romer v. Evans*, 517 U.S. 620 (1996).

²¹⁴ *Windsor*, 133 S. Ct. 2675 (2013).

California Supreme Court declared that the California Constitution mandates such scrutiny. Although the people, through Proposition 8, overturned that case's core holding that same-sex couples have a right to marry, they did not disturb the court's broader ruling imposing strict scrutiny for distinctions based on sexual orientation.²¹⁵

The court's decision to apply strict scrutiny to sexual orientation cases parallels its 1971 decision in *Sail'er Inn v. Kirby* to extend strict scrutiny to gender classifications.²¹⁶ And, just as the California electorate broadly supports gender equality, it also generally supports equal rights for gays and lesbians. Setting aside the specific controversy over the definition of marriage, there was no organized opposition to the court's extension of strict scrutiny to classifications based on sexual orientation.

In sum, the George court (1997–2011) can be characterized as relatively centrist in the arena of rights. Although it issued progressive, rights-expanding decisions in the areas of abortion and gay rights (and, thus, was less conservative than the Lucas court), it did not establish new rights with the same frequency as the Wright and Bird courts. The people overturned the George court's rights decisions only once, narrowly, through Proposition 8 of 2008, and never mounted an effective campaign to remove its members from the bench.

VI. THE NEW COURT

A. Transition to a More Progressive Court

When Chief Justice George announced his retirement in 2010, Governor Schwarzenegger nominated as his replacement Tani Cantil-Sakauye, a respected state appellate judge generally considered to be a moderate-conservative.²¹⁷ Upon Chief Justice Cantil-Sakauye's selection, Republican governors had made sixteen of the last seventeen nominations to the court, including two nominations each of Malcolm Lucas and Ronald George. The only exception was Democratic Governor Gray Davis' nomination of Justice Carlos Moreno in 2001. The long stretch of Republican nominees came to an end in 2010, however, with Democrat Jerry Brown's election to a third term.

²¹⁵ *Strauss*, 207 P.3d at 396.

²¹⁶ See *Sail'er Inn v. Kirby*, 485 P.2d 529, 539 (Cal. 1971).

²¹⁷ Maura Dolan, *Gov. Chooses Moderate for Chief Justice*, L.A. TIMES (July 22, 2010), <http://articles.latimes.com/2010/jul/22/local/la-me-0722-chief-justice-20100722> [perma.cc/M6CN-JWLX].

Between 2011 and 2014, Brown nominated three new justices to the court—Goodwin Liu (2011–present), Mariano-Florentino Cuéllar (2015–present), and Leondra Kruger (2015–present).²¹⁸ These new justices are progressive, academically oriented, and—by supreme court standards—young (all three were born in the 1970s). None had prior judicial experience before joining the court. Due to their elite academic credentials and youth some observers believe that each of them has the potential to be nominated to the U.S. Supreme Court.²¹⁹

The new generation of Brown justices does not yet constitute a majority of the court, but in the short term they can be expected to form coalitions with centrist colleagues, especially Justice Werdegar, on some issues.²²⁰ Moreover, future nominations by Jerry Brown or his successors may soon produce a progressive majority to rival the one that dominated the court in the 1970s and early 1980s.

B. Prospects for a Renewed New Judicial Federalism in California

As the California Supreme Court enters a transition to a new era, the prospects for a revival of a 1970s-style new judicial federalism remains uncertain. Although the court has an opportunity to pursue that goal, it will face obstacles if it chooses to do so.

First, it seems that the opportunity for revival of a progressive, rights-expanding jurisprudence is real. California's ongoing partisan realignment should give Democrats control of the Governor's office for the foreseeable future, and Democratic governors can be expected to create on the court a dominant left-leaning majority. If so, it is possible that the California's high court will become substantially more progressive than the U.S. Supreme Court in its thinking about rights—thus creating the type of gaps between a state supreme court and the U.S. Supreme Court that fuels the new judicial federalism.

Moreover, new theories of rights can be expected to emerge in the near term, creating fresh opportunities for the court to innovate by establishing new rights at the state level. While some potential new rights may now seem implausible or remote, others are knocking at the door.

²¹⁸ *California Supreme Court Justices*, *supra* note 9.

²¹⁹ See, e.g., Oren Kerr, *The State Court Bench as SCOTUS Farm Team*, WASH. POST: THE VOLOKH CONSPIRACY (Dec. 23, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/23/the-state-court-bench-as-a-scotus-farm-team/> [http://perma.cc/R KX8-T49U].

²²⁰ See Gerald F. Uelman & Kyle Graham, *A Shifting Balance on the California Supreme Court?: A Look at the State Supreme Court's Newest Justices*, CAL. LAW., Sept. 2015.

One example is the asserted right to personal autonomy at the end of life. In 1997, the U.S. Supreme Court held in *Washington v. Glucksberg* that the U.S. Constitution does not protect a right to physician-assisted suicide, or physician aid-in-dying.²²¹ In recent years, a national movement has grown to establish that right on a state-by-state basis. California law long treated the aiding of suicide, by a physician or anyone else, as a felony. After a long struggle, in 2015 proponents of “death with dignity” persuaded the California Legislature to adopt, and Governor Brown to sign, A.B. 15, a bill that liberalizes the restrictions on physician aid-in-dying.²²² The new law expands the ability of certainly terminally ill adults to receive physician assistance in terminating their lives, but includes various qualifications and restrictions that limit access and choice. As the movement for greater end-of-life autonomy gains force, advocates may argue that these types of limitations burden constitutional rights. In the same manner that the California Supreme Court held that the Legislature’s early adoption of liberalized abortion laws in the late 1960s failed to satisfy the constitutional requirements, so, too, could a progressive court rule that the state constitution demands greater personal autonomy for persons at the end of life than the Legislature has endorsed.²²³ The issue of aid-in-dying has not yet reached the California Supreme Court, but it may eventually present the court’s progressive justices an opportunity to expand rights in this contested area.

Advocates of other emerging claims in the areas of personal autonomy and equality can be expected to set their sights on California’s high court and encourage it to reassert its leadership in the expansion of the frontiers of rights.

Such opportunities are matched by limiting factors. First is the legacy of the court-constraining amendments California voters enacted in response to Wright and Bird court decisions. While the new court may creatively expand state constitutional rights in some areas, in others, especially criminal law, it is

²²¹ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

²²² A.B. 15, 2015–2016 Leg. Sess., Spec. Sess. (Cal. 2015). For many years, California Penal Code section 401 read: “Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony.” CAL. PENAL CODE § 401 (West 2015). In 1992, proponents of physician-assisted suicide qualified Proposition 161, known as the “Aid-in-Dying Act” for the California statewide ballot. The measure failed on a vote of 46% yes to 54% no. *California Proposition 161, the Aid-in-Dying Act (1992)*, BALLOTEDIA, [http://ballotpedia.org/California_Proposition_161_the_Aid-in-Dying_Act_\(1992\)](http://ballotpedia.org/California_Proposition_161_the_Aid-in-Dying_Act_(1992)) [<http://perma.cc/5NVE-MS4B>]. Attempts to pass a similar law through the Legislature also failed until 2015.

²²³ See *People v. Barksdale*, 503 P.2d 257, 276 (Cal. 1972).

constrained by the restrictions the people placed in the state constitution decades ago. A second potential limiting factor is the Legislature. Today, the California Legislature is one of the most progressive lawmaking bodies in the nation and is less likely than its predecessors to take a back seat to the court in pursuing a progressive vision of equality and personal autonomy. As the aid-in-dying bill shows, rights activists can choose to go to the Legislature to achieve their aims, and an ambitious court might find itself competing with the political branches for leadership in the expansion of rights. A third potential limiting factor is the U.S. Supreme Court. The new judicial federalism has flourished where state supreme courts are more progressive than the U.S. Supreme Court and have expanded rights beyond where the U.S. Supreme Court is willing to go. If new progressive justices cause the U.S. Supreme Court to begin aggressively expanding federal constitutional rights, that Court will dominate the field and create fewer opportunities for the California Supreme Court, or other state supreme courts, to assert leadership.

Finally, it is uncertain how the California electorate would respond to a revival of the new judicial federalism. During the Wright-Bird era, the electorate accepted some of the court's rights-expanding decisions, but overwhelmingly repudiated the court's jurisprudence in the areas of criminal law and mandatory desegregation. The electorate of the 1970s and 1980s was considerably more conservative than the court on these issues, and that chasm between their respective values led the public to adopt court-constraining amendments and, eventually, to remove three progressive justices. Today, the California electorate is more liberal than it was then and thus, in theory, should be more inclined to embrace new rights-expanding decisions in a range of areas. How the public would actually respond remains to be tested.

CONCLUSION

The new judicial federalism flourished in California during the 1970s and 1980s as the state supreme court became the national leader in expanding state constitutional rights beyond federal minimums. Many of those rights remain in place today. Yet, in its enthusiasm to align California's constitutional law with the values of modern liberalism, the court distanced itself too far from the public's deeply held convictions in certain areas, including busing, capital punishment, and criminal procedure. In those cases, the court's pursuit of a highly counter-majoritarian progressive agenda was unsustainable—it resulted in the wholesale reversal of decisions through state

constitutional amendments, the removal of most of the court's progressive members, and their replacement with a new conservative majority.

Since the crisis of the 1986 election, the California Supreme Court has been more cautious in its approach to the new judicial federalism. While in the post-Bird era the court defended the concept of independent state constitutionalism, it showed restraint in exercising that power. This self-restraint helped produce a period of stability on the court, with few attempted court-constraining amendments and no serious challenges to the justices in retention elections.

The state has now entered an era in which Democratic governors can be expected to nominate progressive justices for the foreseeable future. As a new progressive majority emerges, it has the opportunity to revive the court's leadership in establishing new rights. The prospect undoubtedly has appeal. State supreme courts receive respect and affirmation from the community of progressive legal academics and practitioners by expanding the frontier of rights through expansive interpretations of state constitutions. Moreover, as social change creates new conceptions of rights, the court will have many invitations to innovate.

If it seeks to expand rights, however, the new court will face some limitations, including potential opposition from the contemporary electorate. As the experience of the past several decades demonstrates, the California Constitution gives the people, not the court, the last word on the definition of contested state constitutional rights. While this majoritarian check may limit the new court's ability to expand rights, it will also provide greater legitimacy to any new state constitutional rights the court establishes and the people accept. The California electorate's increasingly progressive orientation means that it is now more likely to embrace rights-expanding decisions, at least on some issues, than voters were a generation ago. But when contemplating their future course, the new justices cannot forget the fate of the Bird court, which will always serve as a cautionary reminder that the California Constitution's majoritarian features limit how far an ambitious court can veer from the popular will.

