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The Supreme Court of California, 1981-1982

Foreword: The Emerging Court

Stephen R. Barnett†

The California Supreme Court is emerging from a period of transition. During the two years 1981-82 the court experienced its greatest membership turnover in more than half a century, as four of its seven seats changed hands.¹ Justice Wiley W. Manuel died and Justices William P. Clark, Jr., Mathew O. Tobriner, and Frank C. Newman retired, to be replaced by Justices Otto M. Kaus, Allen E. Broussard, Cruz Reynoso, and Joseph R. Grodin. One wonders whether this majority of new justices will produce new directions for the court. While it is too early to know the full answer, the decisions of 1982 give a picture, albeit partial, of the emerging court. Two of the new members, Justices Kaus and Broussard, took office in July 1981 and hence participated extensively in the work of the court during 1982. Justice Reynoso, who joined the court in February 1982, did not have a full share of opinions to write in 1982, but did vote in more than three-quarters of the cases during the latter half of the year.² There remains one clean slate: The

1. Not since 1926-27 has there been such a turnover within a two-year period. On that occasion, and twice earlier since the court became a seven-justice court in 1879, five new justices were appointed within two years. The earlier occasions were 1923-24 and 1887-88.

2. Justice Reynoso wrote only five opinions in 1982 cases, see Table I, infra p. 1138, all decided during the latter half of the year. These five cases constituted less than seven percent of the cases decided with opinion during that six-month period. Yet Justice Reynoso voted in over 75% of the cases decided with opinion during that period. This discrepancy—the time lag before a new justice writes his share of opinions—is presumably due to the court's "calendar memorandum" system. Under this system a case is assigned to a justice soon after the court grants a hearing, and that justice prepares a "calendar memorandum" which is circulated among the justices before the oral argument. The justices vote on the merits of the case after the oral argument. That vote usually accords with the recommendation of the calendar memorandum, which is then

† Professor of Law, Boalt Hall School of Law, University of California, Berkeley. A.B. 1957, Harvard College; LL.B. 1962, Harvard Law School. Some of the material in this Foreword appeared in different form in Barnett, High Court Rulings Show Contrasting Attitudes, CAL. LAW., Oct. 1982, at 58, and Barnett, Three Philosophies on the High Court, CAL. LAW., Mar. 1983, at 52. I am grateful to Sho Sato for his penetrating and extremely helpful comments on drafts of this Foreword; to Paul Mishkin, David Oppenheimer, and Jan Vetter for helpful consultations; and to Joseph Hodges of the Berkeley Department of Statistics for advice from that realm. None of them is responsible for any of the statements made or opinions expressed. A number of Boalt Hall students provided valuable research assistance on various parts of this project, and I am grateful to all of them: David S. Carter, Kurt F. Eggert, Brian G. Geoghegan, William Rockne Hill, and Douglas D. Reichert. I also want to thank Alice Youmans, Ellen Jacobstein, and Philip Carrizosa.

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record for 1982 says almost nothing about Justice Grodin, who did not join the court until the last week of the year.\(^3\)

This Foreword is a study of the opinions of the California Supreme Court for the year 1982. Part I presents an overview of the opinion output of the court and its individual members during the year. Parts II, III, and IV discuss the three salient judicial philosophies that I find in the opinions, as illustrated by representative cases. I also offer my commentary on some of those cases. My conclusions about the strengths and weaknesses of the emerging court appear in Part V. The Appendix presents a statistical analysis of the court's voting alignments.

I

THE OPINION OUTPUT OF THE COURT

The output of the California Supreme Court, insofar as it consists of cases decided by written opinion,\(^4\) has varied widely over the past twenty-five years. The number of dispositions by written opinion rose from a low of 127 in fiscal year 1963-64 to a peak of more than 200 in the years 1968 to 1971. The number then declined to 130 in 1977-78, jumped back up to 187 in 1978-79, but fell again to 140 in 1979-80 and to a new low of 114 in 1980-81.\(^5\) Possible explanations for the recent drops include vacancies on the court, changes in the nature of the caseload (in particular the return of death penalty cases), the steady increase in the nonopinion workload of the court,\(^6\) and a rise in the converted into a proposed opinion of the court by the justice who authored the memorandum. See P. STOLZ, JUDGING JUDGES 197 (1981); Goodman & Seaton, The Supreme Court of California, 1972-1973—Foreword: Ripe for Decision, Internal Workings and Current Concerns of the California Supreme Court, 62 CALIF. L. REV. 309, 315 (1974); Johnson, The Supreme Court of California, 1975-1976—Foreword: The Accidental Decision and How It Happens, 65 CALIF. L. REV. 231, 249-50 (1977). Hence, though a new justice is on the court in time to hear argument and vote on the merits of a case, he has little chance of being assigned to write the court's opinion if he was not on the court when hearing was granted and the calendar memorandum assigned.


4. This is a partial and probably misleading measure of the court's output. Justice Grodin, in his first public speech after joining the court, said he was "somewhat surprised at how much time is spent on considering which cases to review, rather than actually writing court opinions," and that "[t]he one-half of the resources of the court are devoted to the Wednesday conference [at which decisions are made on which cases to review]." L.A. Daily J., Feb. 15, 1983 at 2, cols. 4-5. See also P. STOLZ, supra note 2, at 354 (testimony of Justices Tobriner and Richardson).

5. 1982 JUD. COUNCIL CAL. ANN. REP. 48 table II; 1974 JUD. COUNCIL CAL. ANN. REP. 96 table II.

6. The figure for "total business transacted" reported by the Administrative Office of the California Courts has increased from 4,673 in 1971-72 to 7,208 in 1980-81. 1982 JUD. COUNCIL CAL. ANN. REP. 48 table II.
In calendar year 1982 the number of cases decided by written opinion was again comparatively low: 129 cases. Under the circumstances, however, this appears to represent remarkable productivity. It was achieved despite numerous vacancies caused by the changes in the court's membership—vacancies that necessitated fifty-three assignments of pro tem justices in thirty-eight of the cases decided in 1982. Since pro tem justices rarely write opinions, the burden falls more heavily on the regular members of the court. Further, the court in 1982 decided eight death penalty appeals, which are automatic appeals direct from the trial court that require the supreme court to review the entire record.

Comparing the opinion output of the California Supreme Court with that of the United States Supreme Court is problematic, since the cases decided by the two tribunals may differ a great deal in difficulty. Still, it is interesting to note that the figure of 129 cases decided with opinion by the California court in 1982, multiplied by a factor of nine-sevenths to account for the difference in the number of justices, comes very close to the figure of 167 cases decided with opinion by the United States Supreme Court during its 1981 Term. And that Term, according to a majority of the United States Supreme Court Justices, was unacceptably overworked.

The California Supreme Court in 1982 was also a self-critical court, at least as measured by dissenting opinions. In this respect the court appears to have changed dramatically since 1975. Figures compiled by the California Law Review for that year showed that only thirty-four percent of the court's cases drew dissents. Professor Philip...
lip Johnson, writing this Foreword in 1977, complained that “[o]pinions of the California Supreme Court are frequently unanimous, even on controversial subjects.”

One would not say that today. Seventy-three of the 129 cases decided with opinion by the court in 1982 had dissents—a rate of 56.6%, more than half-again the 34% reported in 1975. In the United States Supreme Court, the dissent rate for the 1981 Term was 67.7%. If one adjusts for the different number of justices, the dissent rates for the two courts are remarkably similar.

Diligence of dissent is one of the striking features of the present California court. While seventy-three of the 129 cases decided in 1982

14. In this computation, opinions "concurring and dissenting" have been counted as dissents, as they were in the 1975 study. Id. at 251 n.65. Per curiam opinions have been counted; they were not in the 1975 study. Id.

Counting “concurring and dissenting” opinions as dissents overstates slightly the number of dissents. This is because some of the California justices have a rather loose habit of labeling their opinions “concurring and dissenting” when they agree fully with the majority’s disposition of the case and disagree only with some or all of the majority’s reasoning. E.g., City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 76, 646 P.2d 835, 845, 183 Cal. Rptr. 673, 683 (1982) (Bird, C.J., concurring and dissenting); Slaughter v. Friedman, 32 Cal. 3d 149, 159, 649 P.2d 886, 892, 185 Cal. Rptr. 244, 250 (1982) (Broussard, J., concurring and dissenting). But cf. Turpin v. Sortini, 31 Cal. 3d 220, 240, 643 P.2d 954, 966, 182 Cal. Rptr. 337, 349 (1982) (“dissenting” opinion by Justice Mosk should have been labeled “concurring and dissenting”).
15. The Supreme Court, 1981 Term, supra note 10, at 306. Opinions concurring in part and dissenting in part are counted as dissents in the Harvard statistics, id. at 304 n.c, as they are in our statistics, see supra note 14. In the United States Supreme Court opinions so labeled are true partial dissents, which is not always the case in California. See supra note 14.
16. The probability of a unanimous decision is given by

\[ u = p^n \]

where \( u \) = probability of unanimous decision,

\( p \) = probability of a specific justice joining the majority opinion in a particular case,

and \( n \) = number of justices.

This assumes (unrealistically) that \( p \) is identical for all justices and independent of any particular case. The dissent rate (\( r \))—i.e., the probability of there being at least one dissent—is therefore given by

\[ r = 1 - p^n \]

and thus

\[ p = (1 - r)^{1/n}. \]

For the California Supreme Court, the dissent rate in 1982 was 56.6%, i.e., \( r_{ca} = 0.566 \). Therefore

\[ p_{ca} = (1-0.566)^{1/7} = 0.888. \]

For the United States Supreme Court, the dissent rate in 1982 was 67.7%, i.e., \( r_{us} = 0.677 \). Therefore

\[ p_{us} = (1-0.677)^{1/9} = 0.882. \]

The two estimates are remarkably close.

Thus, the dissent rate for a hypothetical nine-member California Supreme Court, based on that court’s actual 1982 dissent rate, would be

\[ r = 1 - p_{ca}^9 = 65.8\%, \]

as compared with the United States Supreme Court’s actual dissent rate of 67.7%.
had at least one dissent, the total number of separate dissents was ninety. The dissenting roles of the justices can be seen in numerical terms from Table I, which tabulates the opinions written by each justice in 1982.

**Table I**

**Opinions Written by California Supreme Court Justices, 1982**

<table>
<thead>
<tr>
<th>Justice</th>
<th>Opinions of Court</th>
<th>Dissents</th>
<th>Concurrences</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bird</td>
<td>22</td>
<td>15</td>
<td>4</td>
<td>41</td>
</tr>
<tr>
<td>Mosk</td>
<td>17</td>
<td>14</td>
<td>3</td>
<td>34</td>
</tr>
<tr>
<td>Richardson</td>
<td>17</td>
<td>36</td>
<td>2</td>
<td>55</td>
</tr>
<tr>
<td>Newman</td>
<td>11</td>
<td>5</td>
<td>10</td>
<td>26</td>
</tr>
<tr>
<td>Kaus</td>
<td>16</td>
<td>16</td>
<td>10</td>
<td>42</td>
</tr>
<tr>
<td>Broussard</td>
<td>21</td>
<td>3</td>
<td>3</td>
<td>27</td>
</tr>
<tr>
<td>Reynoso</td>
<td>4</td>
<td>0</td>
<td>1e</td>
<td>5</td>
</tr>
<tr>
<td>The Court</td>
<td>18</td>
<td>0</td>
<td>0</td>
<td>18</td>
</tr>
<tr>
<td>Pro tems</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td><strong>129</strong></td>
<td><strong>90</strong></td>
<td><strong>34</strong></td>
<td><strong>253</strong></td>
</tr>
</tbody>
</table>

Notes:

a. "Lead" opinions that announce the judgment of the court are counted as opinions of the court.

b. A dissent is recorded as a written opinion whenever a reason, however brief, is given.

c. Opinions "concurring and dissenting" are counted as dissents, whether or not they disagree with the majority's disposition of the case.

d. A concurrence is recorded as a written opinion whenever a reason, however brief, is given.


f. This category contains Justice Grodin and the late Justice Tobriner. Both were members of the supreme court for less than a week during 1982; neither wrote an opinion in that capacity. Sitting pro tem with the court, Justice Tobriner wrote two opinions and one concurrence during 1982; Justice Grodin wrote one opinion.

As the table shows, by far the most prolific dissenter is Justice Frank K. Richardson, whose thirty-six dissents number more than twice those of anyone else. Justice Kaus is next with sixteen. His dissents, like those of Justice Richardson, reflect one of the distinct judicial philosophies that I find on the court. A third notable dissenter is

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17. See Table I, infra p. 1138. The rate of concurring opinions has also increased markedly since 1975, when Professor Johnson wrote that "a separate concurring opinion or two is something of an event." Johnson, *supra* note 2, at 251. The *California Law Review* computation for 1975 found that in 129 cases decided with written opinion, there were 16 concurring opinions, or 12%. 65 CALIF. L. REV. at 251 n.65. In 1982 there were 34 concurring opinions in 129 cases, or 26%—more than twice the 1975 rate. See Table I, *supra*. 
Chief Justice Rose Elizabeth Bird, whose fifteen dissents may be seen as extensions of the philosophy reflected in the court's majority position. A fourth is Justice Stanley Mosk, whose fourteen dissents were more eclectic in their points of view. With these justices on watch at their different posts, little gets by the dissenting eye. While Professor Johnson found unduly frequent unanimity on the 1975 court, I found only one 1982 case that was unanimous where it seemed to me that a dissent was clearly called for.

Diligence of dissent does not mean that the present court is fully self-critical in other ways. It does not mean that the majority always responds—though it usually does—to significant arguments in dissenting or concurring opinions. It does not mean that the majority is always receptive to criticisms by concurring judges of problematic dicta or other excesses in majority opinions, even when the criticism is valid and could readily be accommodated to make the opinion unanimous. Nor does the strength of the dissenting voices mean that the court is "balanced," in the sense of a rough equipoise of opposing points of view and a high frequency of close decisions. On the contrary, it is striking how seldom the present court decides a case by a vote of 4 to 3. Among the 129 decisions in 1982, the court divided 4 to 3 in only sixteen cases, or 12% of the total. This compares with 18% of the cases in the United States Supreme Court's 1981 Term that were decided 5 to 4.

II

VIEWS ON THE COURT: THE MAJORITY POSITION

I turn now from the court as a whole to the views within it. The court's opinions for 1982 reflect, in general, three salient positions or

18. See infra text accompanying notes 268-80.
judicial philosophies. These are (1) the "majority" position, which is primarily associated with Chief Justice Bird and usually draws at least three more votes from among Justices Mosk, Newman, Broussard, and Reynoso; (2) the dissenting position of Justice Richardson; and (3) the intermediate dissenting position of Justice Kaus. This threefold division may be seen statistically in the two Voting Alignment Tables included in the Appendix. It is even clearer in the opinions themselves.

In setting forth this kind of judicial taxonomy it is easy, of course, to oversimplify. Many of the court's decisions in 1982 did not reflect the threefold division. In many cases the court was unanimous, sometimes in ways that to a casual observer might seem surprising. A few cases produced truly unusual voting alignments. There were a number of cases in which one of the "majority" justices—most often Justice Mosk—dissented from the majority position. In general, however, the differing views on the court resolved into these three positions.

The majority position is primarily associated with Chief Justice Bird. She led the court in the writing of majority opinions, with twenty-two, and her point of view was further reflected in her fifteen

23. See infra pp. 1193-96. Table IV, "Voting Alignments (Results)," shows the voting alignments on the court, in the 129 cases decided with written opinion in 1982, on the basis of the results for which the justices voted, regardless of whether they joined the same opinion. For a full explanation of the Table's methodology, see infra p. 1193 n.a. Table V, "Voting Alignments (Opinions)," shows the voting alignments based solely on the joining of opinions. For a full explanation of the Table's methodology, see infra p. 1195 n.a. The threefold division is apparent in both Tables. For example, taking Chief Justice Bird as the benchmark, the rates of agreement with her in Table IV are 88.1% for Justice Broussard, 83.6% for Justice Reynoso, 80.4% for Justice Newman, and 77.5% for Justice Mosk, followed by 73.4% for Justice Kaus and 57.0% for Justice Richardson. In Table V, the comparable figures are 79.7% for Justice Broussard, 76.1% for Justice Reynoso, 68.3% for Justice Mosk, and 66.4% for Justice Newman, followed by 61.5% for Justice Kaus and 45.5% for Justice Richardson.


25. E.g., In re Estate of Black, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982) (Richardson majority opinion, joined by Chief Justice Bird and Justices Broussard and Tobriner (sitting pro tern), upholding holographic will; dissent by Justice Mosk, joined by Justices Newman and Kaus).

dissents. Labels are problematic, but Chief Justice Bird has described herself as a “liberal, progressive judge.”27 One might further describe the majority position as innovative and activist, sympathetic toward the poor, especially careful of the rights of civil plaintiffs and criminal defendants, inclined toward the expansion of individual rights against government and business enterprises, and less concerned about property and corporate rights. This Part of the Foreword will discuss cases illustrating the majority position (and also to some extent the Richardson and Kaus positions, through their dissents).28

A. The Tobriner Source

What is now the majority position on the court was long associated with the late Justice Tobriner.29 Not only did Justice Tobriner advance this point of view consistently during his twenty years on the court (1962 to 1982), but he expounded it in extrajudicial writings. In those writings can be found some of the wellsprings of the court’s decisions of 1982.

In 1972, Justice Tobriner reviewed trends in the court’s decisions over the prior ten years.30 He expressed the view that our society “is becoming more and more integrated and collectivized at the same time that its economic imbalance becomes more acute.”31 He found that one response of the court to these societal changes “has been the development of the concept of status obligations”—obligations imposed on manufacturers or insurers, for example, “by reason of their role, their function, their status, in society.”32 Such developments in the court’s decisions illustrated, Justice Tobriner said, “the court’s reaction to the plight of the economically downtrodden” and “[t]he sensitivity of the

28. Justices Broussard, Reynoso, Newman, and Mosk, who generally supported the majority position, were not, of course, a monolithic phalanx, and each of their judicial positions had unique characteristics. Justice Reynoso’s position, moreover, had yet to be developed in opinions of his own authorship. See supra note 2. Still, the reader of the court’s opinions readily concludes that the similarities among these four justices and Chief Justice Bird were more important than the differences and that on the whole they shared the same judicial philosophy—conclusions one would not extend to Justice Richardson or Justice Kaus. These four justices are accordingly treated here as sharing the “majority” position, of which Chief Justice Bird is the exemplar, notwithstanding their individual variations.
31. Id.
32. Id. at 5-6.
33. Id. at 6.
Justice Tobriner had set forth and discussed his theory of "status obligations" more fully in a 1967 article coauthored with now-Justice Grodin. Tobriner and Grodin distinguished three kinds of legal change: statutory, constitutional, and common law. They recognized that "statutory change is far more pervasive and concededly more appropriate [than common law change] as a means of reflecting alterations in social conditions and public policy," while "shifts in constitutional doctrine are often more dramatic and more far-reaching in their impact." They recognized further that "[i]nvocation of new concepts inevitably provokes questions as to the role of the courts in bringing about legal change, and properly so—concededly, there are limits to the judicial function." Nonetheless, they argued that the common law also properly responds to societal changes. One way it has done so, they contended, is "by reformulating common law principles to impose duties and obligations on the basis of status or relationship," and one such reformulation "involves reviving early concepts of enterprises 'affected with a public interest.'"

In 1982 the majority position on the California Supreme Court often seemed to reflect the ideas advanced by Justices Tobriner and Grodin in these articles. Rather surprisingly, however, this was most notably true not in common law or constitutional cases, but in cases of statutory interpretation. The process of "statutory change" to which the Tobriner-Grodin article referred seemed to have been transplanted to the judicial arena.

34. Id. at 12.
36. Id. at 1248.
37. Id. at 1283.
38. Id. at 1248-49.
39. One exception was a common law decision written for the court by Justice Grodin himself as a pro tem justice: Keating v. Superior Court, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982), prob. juris. postponed to merits sub nom. Southland Corp. v. Keating, 103 S. Ct. 721 (1983) (No. 82-500). Harking back to a Tobriner-Grodin thesis about "contracts of adhesion" which are "imposed on a take-it-or-leave-it basis by the party possessing superior 'bargaining' strength," Tobriner & Grodin, supra note 35, at 1252, the court in Keating noted "the special problems of unfair advantage which may appear in an adhesion setting when individual arbitration agreements are invoked to block an otherwise appropriate class action," and reached the innovative conclusion that the trial court could order classwide arbitration. 31 Cal. 3d at 608-14, 645 P.2d at 1206-10, 183 Cal. Rptr. at 374-78. Justice Richardson dissented, joined by Justice Mosk. Id. at 614, 645 P.2d at 1210, 183 Cal. Rptr. at 378 (Richardson, J., concurring and dissenting).
40. Tobriner & Grodin, supra note 35, at 1248.
B. Cases on Statutory and Administrative Rights

I. Antidiscrimination Law

The 1982 cases that best illustrated the majority position were a series of decisions involving rights created by statutory and administrative schemes of California law. Fittingly, one of the most important of these decisions was the last case in which Justice Tobriner (sitting as a pro tem justice after his retirement) wrote the opinion of the court.41 No less fitting was Justice Tobriner's reliance in this case on "the common law doctrine which imposed [certain duties] upon certain enterprises affected with a public interest."42 The case was Marina Point, Ltd. v. Wolfson,43 in which the court held that the Unruh Civil Rights Act44 prohibits the owner of an apartment complex from refusing to rent to families with minor children.45

The Unruh Act provides:

All persons within the jurisdiction of this State are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.46

The court noted that it had held in In re Cox47 that sex, race, and the other bases of discrimination listed in the Act are "illustrative rather than restrictive" and that the Act bars "all arbitrary discrimination."48 In Cox, the court held that it would constitute "arbitrary discrimination" to exclude someone from a shopping center because he was with a friend who "wore long hair and dressed in an unconventional manner."49 Discrimination against children and families with children was likewise "arbitrary," the court held in Marina Point, because of "the individual nature of the statutory right afforded" by the Act.50 "[E]ven if children 'as a class' are 'noisier, rowdier, more mischievous and more boisterous' than adults,"51—as the trial court had found52—that did not justify a class exclusion. If a business wants to protect itself from dis-
ruptive behavior, it must proceed "directly by excluding those persons who are in fact disruptive."\textsuperscript{53}

\textit{Marina Point} is characteristic of the majority's proclivity for expanding individual rights\textsuperscript{54} through statutory interpretation. The court suggested that its decision was compelled by \textit{Cox}\.\textsuperscript{55} In a sense it was, since once the court had ruled that the Act was not limited by its language and included "all arbitrary discrimination," the court had a mandate to decide what was "arbitrary." But \textit{Marina Point} goes beyond the prior law. That law apparently included no court decisions in California supporting the court's key proposition that any exclusionary practice directed at a group or class is "arbitrary."\textsuperscript{56} Even if that proposition were established with respect to other groups, one wonders whether it would necessarily apply to children, a group whose special characteristics are well known and biologically defined.

The court relied on policy considerations, emphasizing that exclusion of families with children from rental housing is widespread in California's metropolitan areas.\textsuperscript{57} But one may ask which way this evidence cut. As the court acknowledged, a number of bills prohibiting age discrimination in housing had failed to pass the California Legislature in recent years.\textsuperscript{58} Landlords and other tenants have economic and social interests in excluding children, as Justice Richardson noted in dissent.\textsuperscript{59} One may question whether the existence of a problem of public policy, reflected in a widespread practice based on defensible interests which the legislature has failed to override, supports the court in undertaking a novel interpretation of a long-existing statute in order to prohibit the practice.

The court's policy-based interpretation of the statute required a policy-based limitation. The court invoked "[t]he special housing needs of the elderly"\textsuperscript{60} to limit its holding so as not to reach "retirement communities or housing complexes reserved for older citizens."\textsuperscript{61} This balancing of competing considerations in housing policy does not mesh

\textsuperscript{53}. \textit{Id.} at 740, 640 P.2d at 126, 180 Cal. Rptr. at 508.

\textsuperscript{54}. Of course, expansion of the "individual rights" of the plaintiff in such a case means contraction of the rights of the defendant, who may also be an individual.

\textsuperscript{55}. \textit{Id.} at 740, 640 P.2d at 126, 180 Cal. Rptr. at 508.

\textsuperscript{56}. The court relied on "a spate of decisions by the appellate courts and the opinions of the Attorney General" which had "established the act's application" to exclusionary policies directed against students, welfare recipients, persons of a particular occupation or marital status, and persons who associate with blacks. \textit{Id.} at 736, 640 P.2d at 124, 180 Cal. Rptr. at 505. But only the last ruling—involving discrimination based on race—was a judicial decision; the others were opinions of the Attorney General.\textit{Id.}

\textsuperscript{57}. \textit{Id.} at 728-29, 743, 640 P.2d at 119, 128-29, 180 Cal. Rptr. at 501, 510.

\textsuperscript{58}. \textit{Id.} at 735 n.7, 640 P.2d at 123 n.7, 180 Cal. Rptr. at 505 n.7.

\textsuperscript{59}. \textit{Id.} at 745, 640 P.2d at 130, 180 Cal. Rptr. at 511 (Richardson, J., dissenting).

\textsuperscript{60}. \textit{Id.} at 742, 640 P.2d at 127, 180 Cal. Rptr. at 509.

\textsuperscript{61}. \textit{Id.} at 743 n.12, 640 P.2d at 128 n.12, 180 Cal. Rptr. at 510 n.12.
easily with the Unruh Act’s prohibition of discrimination “in all business establishments of every kind whatsoever.”

Policy may require further limitations on the court’s holding. While the court’s discussion was framed mainly in terms of excluding children from “housing” or “shelter,” the Unruh Act, and hence the court’s holding, applies not only to housing but to “all business establishments.” One can think of various kinds of business establishments where admissions restrictions directed at children as a class—if not total exclusions, then restrictions on their presence after certain hours, in certain groups, or unaccompanied by adults—would seem undeserving of the stamp of illegality that Marina Point apparently puts on them.

Despite these problems, Marina Point was not a case in which the court’s majority and dissenting views were fundamentally at odds. The dissent by Justice Richardson, joined by Justice Mosk, relied on the trial court’s finding that the apartment complex was physically unsuitable for children, conceding that “[i]f the trial court liad found as a fact that the premises were designed for general use a different legal conclusion would follow.” The interpretation of the Unruh Act as ordinarily barring discrimination against children was thus the unanimous holding of the court.

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62. CAL. CIV. CODE § 51 (West 1982).
63. Middle-aged citizens may question the court’s apparent equation of “retirement communities” with housing facilities “designed for the elderly.” 30 Cal. 3d at 742, 640 P.2d at 127, 180 Cal. Rptr. at 509. Cf. San Francisco Chron., Apr. 29, 1983, at 22, col. 1 (advertisement for “adult communities” open to “adults over age 45”).
64. 30 Cal. 3d at 744, 640 P.2d at 129, 180 Cal. Rptr. at 511.
65. CAL. CIV. CODE § 51 (West 1982).
66. These are not limited to the “bars” and “adult bookstores and theaters” that the court mentioned. 30 Cal. 3d at 741, 640 P.2d at 127, 180 Cal. Rptr. at 509. One thinks, for example, of skating rinks, amusement parks or parlors, certain restaurants, and movie theaters. Movie theater listings in the newspaper—for theaters showing “regular” movies, not “adult” ones—sometimes carry the statement “No Infants” or “No Infants Please.” See, e.g., San Francisco Chron., May 21, 1983, at 37, cols. 1-2. These restrictions, if enforced, would seem to be illegal under Marina Point, which limits entrepreneurs to “excluding those persons who are in fact disruptive.” 30 Cal. 3d at 740, 640 P.2d at 126, 180 Cal. Rptr. at 508.
67. 30 Cal. 3d at 748, 640 P.2d at 132, 180 Cal. Rptr. at 513 (Richardson, J., dissenting) (emphasis in original).
68. But in the 1983 case of O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983), where the court extended the Marina Point ruling to condominium associations, Justices Richardson and Mosk took a different dissenting stance. In O'Connor, Justice Mosk, in a dissent joined by Justice Richardson, argued broadly that “age preference has consistently been recognized as valid rather than invidious discrimination.” Id. at 1235 (Mosk, J., dissenting). Neither of the dissenting justices acknowledged the change in their position since Marina Point.
being widely ignored.\textsuperscript{69}

In \textit{Commodore Home Systems, Inc. v. Superior Court},\textsuperscript{70} the court again gave an expansive interpretation to the state’s antidiscrimination laws. The question was whether punitive damages are available in a suit for employment discrimination under the California Fair Employment and Housing Act (FEHA).\textsuperscript{71} The Act requires the Department of Fair Employment and Housing to investigate a complaint filed with it.\textsuperscript{72} The Act further provides that if the Department deems the complaint valid, it must seek to resolve it by conciliation and persuasion.\textsuperscript{73} If that fails (or seems inappropriate), the Department may issue an accusation to be heard by the Fair Employment and Housing Commission.\textsuperscript{74} If an accusation is not issued within 150 days after the filing of a complaint, or if the Department earlier determines that no accusation will issue, it must give the complainant a “right-to-sue letter” authorizing him or her to bring a civil action in superior court “under” the Act.\textsuperscript{75} The plaintiffs in \textit{Commodore} received right-to-sue letters and brought suit, seeking back pay and punitive damages. The defendants sought to strike the claim for punitive damages.

It is an open question whether the Commission can award punitive damages under the Act. While Government Code section 12970(a) does not include punitive damages in the remedies it expressly authorizes the Commission to award, the Commission’s regulations interpret that section as permitting it to award punitive damages.\textsuperscript{76} The supreme court in \textit{Commodore} did not decide whether the Commission had the claimed authority. Rather, in an opinion by Justice Newman, the court assumed arguendo “that punitive damages are not available from the

\textsuperscript{69} See Bishop, \textit{Avoiding the Court’s Discrimination Ban: ‘Creative’ Rules for Adults-only Rentals}, 14 \textit{Cal. J.} 126, 126 (1983), reprinted in \textit{L.A. Daily J.}, Mar. 10, 1983, at 4, col. 4. The deputy director of the State Fair Employment and Housing Practices Commission was quoted as saying that “the court’s holding was so abundantly clear we hoped the industry would voluntarily comply, but we’ve had no evidence of it.” She said the FEPC lacked the staff and resources to process “the more than 1,300 cases charging discrimination against children in housing reported since last April.” She “thinks the situation will not change unless the public outcry convinces the Legislature to find funds for a ‘crash project’ against housing discrimination, or until some private attorneys decide to do some strategic pro bono litigation.” \textit{Id.; see also} \textit{San Francisco Examiner}, May 15, 1983, at 1, col. 2.

\textsuperscript{70} 32 Cal. 3d 211, 649 P.2d 912, 185 Cal. Rptr. 270 (1982).

\textsuperscript{71} \textit{Cal. Gov’t Code} \textit{§§} 12900-12996 (West 1980).

\textsuperscript{72} \textit{Id.} \textit{§} 12963.

\textsuperscript{73} \textit{Id.} \textit{§} 12963.7.

\textsuperscript{74} \textit{Id.} \textit{§} 12965(a).

\textsuperscript{75} \textit{Id.} \textit{§} 12965(b).

Commission," and held that they nonetheless may be recovered in court. The court rejected arguments that the statutory scheme of the FEHA indicates a legislative intent to withhold punitive damages. In particular, it rejected the claim that if judicial remedies were held to exceed administrative ones, claimants might desert the administrative process in the hope of a large recovery in court. The court relied on Civil Code section 3294(a), which authorizes punitive damages in actions "for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice."

In dissent, Justice Richardson, joined by Justice Kaus, stressed that the FEHA provides for the bringing of the court action "under" the statute, which in his view meant that the remedies available in court were only those provided in the Act. He argued that it would be anomalous if complainants "who have been unsuccessful administratively" had access to punitive damages in court, while those whose claims had been successfully established before the Commission could not get punitive damages. He therefore thought the court should not have decided whether punitive damages could be awarded in court without first deciding whether the Commission was authorized to award punitive damages. He concluded that the Commission had no such authority, noting that in housing discrimination cases, the FEHA expressly authorizes the Commission to award punitive damages ("in an amount not to exceed one thousand dollars.")

2. Employee Rights

The court's expansive treatment of statutory rights was continued in two other cases which, like Commodore, involved the employment relationship. In American National Insurance Co. v. Fair Employment and Housing Commission, the court held that high blood pressure is a
"physical handicap" and hence a prohibited basis for job discrimination under the FEHA. The Act's definition of "physical handicap" states that it "includes impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services." The court, in an opinion by Justice Newman, did not claim that this definition specifically covered high blood pressure, but emphasized the word "includes" and the fact that "high blood pressure is physical, and often it is handicapping." Justice Mosk's dissent, joined by Justice Richardson, emphasized that the Act's definition of "medical condition"—also a forbidden ground of discrimination—clearly does not include high blood pressure. Now that the court has cast off from the specific language of the "physical handicap" definition, it would seem that almost any medical condition may be considered a physical handicap—contrary to what the legislature apparently intended in limiting its definition of "medical condition."

The second case was Suastez v. Plastic Dress-Up Co. There, the employer-defendant had a vacation policy—fully communicated to its employees—that each employee was entitled to between one and four weeks of paid vacation annually, depending on the length of employment, but that an employee did not become eligible for a paid vacation until the anniversary of his employment. Hence if the employee quit or was terminated before the anniversary date, he received no vacation benefits for that year. The question was whether this policy violated section 227.3 of the Labor Code, which provides that a terminated employee must be paid for all "vested" vacation time.

The court's unanimous opinion, by Chief Justice Bird, stated that the only issue was "when vacation time becomes 'vested' under section

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84. CAL. GOV'T CODE § 12926(b) (West 1980).
85. 32 Cal. 3d at 608-10, 651 P.2d at 1154-56, 186 Cal. Rptr. at 348-50. Justice Newman's opinion was joined by Chief Justice Bird and Justices Kaus, Broussard, and Reynoso.
86. Id. at 614, 651 P.2d at 1158, 186 Cal. Rptr. at 352 (Mosk, J., dissenting); see CAL. GOV'T CODE § 12926(f) (West 1980) (defining "medical condition" as "any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured based on competent medical evidence").
87. 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982).
88. Section 227.3 of the Labor Code provides:

Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness.

and held that vesting occurs "as the labor is rendered." The court stressed that vacation pay "is not a gratuity or a gift, but is, in effect, additional wages for services performed." The court relied heavily on Miller v. State, a pension rights case arising from the reduction in the mandatory retirement age for California state employees from seventy to sixty-seven. Miller held that a long-term employee had no "vested contractual right" to work for the state until age seventy, and also that he had no "vested right" to earn a larger monthly pension based on continued service to age seventy. By way of background, the court in Miller stated that "the right to pension benefits vests upon the acceptance of employment," and that while "an employee does not earn the right to a full pension until he has completed the prescribed period of service . . . he has actually earned some pension rights as soon as he has performed substantial services for his employer."

The court in Suastez, after quoting these statements from Miller, declared that "[t]he right to some share of vacation pay vests, like pension rights, on acceptance of employment," so that the employee terminated in the middle of the year "has earned some vacation rights." Therefore the company's requirement of at least one year's employment was an attempted "forfeiture of vacation pay already vested," which section 227.3 forbids.

The court's reasoning, based almost entirely on the language in Miller stating that pension rights vest on acceptance of employment, seems formalistic and inadequate. The language of section 227.3, requiring pro rata payment of "vested vacation" when an employee is terminated "without having taken off his vested vacation time," can be

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89. 31 Cal. 3d at 778, 647 P.2d at 124, 183 Cal. Rptr. at 848.
90. Id. at 784, 647 P.2d at 128, 183 Cal. Rptr. at 852.
91. Id. at 779, 647 P.2d at 125, 183 Cal. Rptr. at 849.
92. 18 Cal. 3d 808, 557 P.2d 970, 135 Cal. Rptr. 386 (1977).
93. Id. at 813, 815-18, 557 P.2d at 973, 974-76, 135 Cal. Rptr. at 388, 390-92.
94. Id. at 815, 557 P.2d at 974, 135 Cal. Rptr. at 390.
95. Id. at 815, 557 P.2d at 974, 135 Cal. Rptr. at 390.
96. 31 Cal. 3d at 779, 647 P.2d at 125-26, 183 Cal. Rptr. at 849-50. The court failed to quote language in the same paragraph in Miller stating that payment of pension benefits "is subject to the condition that the employee continue to serve for the period required by statute." 18 Cal. 3d at 815, 557 P.2d at 974, 135 Cal. Rptr. at 390.
97. 31 Cal. 3d at 815, 647 P.2d at 125, 183 Cal. Rptr. at 850 (emphasis in original).
98. Id. at 781, 647 P.2d at 126, 183 Cal. Rptr. at 850. Nor was a different result supported, the court said, by the statutory language requiring payment of vested vacation time "in accordance with such contract of employment or employer policy respecting eligibility or time served." The court read this language as meaning only "that the amount of vacation pay . . . is to be determined with reference to the employer's policy." Id. at 782-83, 647 P.2d at 127, 183 Cal. Rptr. at 851 (emphasis in original). It added, "If the Legislature had intended the contract to control the time of vesting, it could easily have drafted the statute to compel such a result. It did not." Id. at 783, 647 P.2d at 127, 183 Cal. Rptr. at 851.
read as the court read it. But it is more plausibly read as indicating that not all the vacation time that may have been earned by an employee is "vested vacation time." If the court's reading had been intended, the legislature more likely would have used a term such as "earned" vacation time—as it did in section 201 of the Labor Code, which provides that "[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately . . . ."99

Indeed, the legislature probably would have been even more explicit if it had intended to override the common practice whereby vacations are not considered to be earned (especially in the first year of employment) until a specified period of service has been completed.100 Section 227.3 was apparently designed simply to assure that the terminated employee was paid for the vacation time to which he had become entitled under the employment contract or policy.101

The decision in Suastez recalls the Tobriner-Grodin concept of "status obligations," as well as Justice Tobriner's concern for "economic imbalances" in modern society.102 The court at the end of its opinion invoked "principles of equity and justice."103 Yet while the decision may seem economically "fair"—at least if it were limited to employees who have stayed more than a year—the court's reading of the statute was both problematic and surprising. It presents a question of equity and justice for employers, particularly in view of the ruling of the state Department of Industrial Relations that Suastez will be applied retroactively for up to four years.104

100. California cases enforcing this practice were dismissed by the Suastez court as having been decided before the enactment of § 227.3: 31 Cal. 3d at 782, 647 P.2d at 126-27, 183 Cal. Rptr. at 850-51. The court relied on cases from other jurisdictions, involving discharged or striking employees, as having "uniformly held that the right [to a pro rata share of vacation pay] vests as services are rendered." Id. at 781, 647 P.2d at 126, 183 Cal. Rptr. at 850. Those cases all involved interpretation of collective bargaining agreements, not statutes. One of the cases, while requiring pro rata vacation pay on the employer's discontinuance of business, did so only for those employees "who had been in the service of the appellee for not less than one year . . . ." Livestock Feeds, Inc. v. Local Union No. 1634, 221 Miss. 492, 503, 73 So. 2d 128, 132 (1954). Another case noted that vacation provisions "ordinarily require the fulfillment of various conditions tending to promote the employer's interest in continuity of employment." Valeo v. J.I. Case Co., 18 Wis. 2d 578, 584, 119 N.W.2d 384, 388 (1963).
101. No basis appears for the court's conclusion that the "contract of employment or employer policy" language applies only to the amount of vacation pay. See supra note 98.
102. See supra text accompanying notes 30-38.
103. 31 Cal. 3d at 784, 647 P.2d at 128, 183 Cal. Rptr. at 852.
3. Welfare Cases

The California Supreme Court's "sensitivity . . . to the plight of the poor," noted by Justice Tobriner,\textsuperscript{105} was reconfirmed in two cases expanding the rights conferred on applicants for, and recipients of, welfare benefits. One case makes important changes in California administrative law, and the other affects both administrative and criminal law.

In \textit{Frink v. Prod},\textsuperscript{106} the issue was whether administrative decisions denying applications for welfare benefits should be reviewed by courts under the "substantial evidence" standard, or rather under the "independent judgment" standard that is applied to administrative decisions terminating welfare benefits.\textsuperscript{107} Prior cases had held that independent judgment review was required if the right at stake was both "fundamental" and "vested."\textsuperscript{108} Under that test, administrative decisions terminating welfare benefits had required independent judgment review,\textsuperscript{109} but decisions denying applications for welfare benefits received only substantial evidence review because the benefits were not "vested."\textsuperscript{110}

Overruling two of its own precedents and disapproving eight court of appeal decisions,\textsuperscript{111} the court held in \textit{Frink} that the independent judgment standard will now apply to the review of application denials. Justice Broussard's lead opinion declared that "[t]he right of the needy applicant to welfare benefits is as fundamental as the right of a recipient to continued benefits,"\textsuperscript{112} and that "[w]hile the degree to which the right is vested may not be overwhelming, the degree of fundamentalness is."\textsuperscript{113}

employer groups estimated that back pay claims under the ruling could cost California employers up to $1 billion, exclusive of penalties. Employers' groups brought a suit in federal court claiming that the \textit{Suastez} decision was superseded or preempted by the federal Employee Retirement Income Security Act (ERISA). On February 25, 1983, a federal district judge in Los Angeles issued a preliminary injunction restraining the state from imposing penalties on employers who do not pay prorated vacation pay to terminated employees (but not from ordering employers to make the payments). \textit{Id.}; see Memorandum from Albert J. Reyff, Chief Deputy Labor Commissioner, to Personnel of the Department of Industrial Relations (Mar. 1, 1983) (on file with the California Law Review).

\begin{itemize}
  \item \textsuperscript{105} See supra text accompanying note 34.
  \item \textsuperscript{106} 31 Cal. 3d 166, 643 P.2d 476, 181 Cal. Rptr. 893 (1982).
  \item \textsuperscript{107} \textit{Id.} at 174, 643 P.2d at 479, 181 Cal. Rptr. at 896.
  \item \textsuperscript{108} \textit{E.g.}, Bixby v. Fierno, 4 Cal. 3d 150, 144, 481 P.2d 242, 252, 93 Cal. Rptr. 234, 244 (1971) (en banc).
  \item \textsuperscript{109} \textit{Harlow v. Carleson}, 16 Cal. 3d 731, 548 P.2d 698, 129 Cal. Rptr. 298 (1976).
  \item \textsuperscript{111} 31 Cal. 3d at 180, 643 P.2d at 484, 181 Cal. Rptr. at 901.
  \item \textsuperscript{112} \textit{Id.} at 179, 643 P.2d at 483, 181 Cal. Rptr. at 900.
  \item \textsuperscript{113} \textit{Id.} at 180, 643 P.2d at 484, 181 Cal. Rptr. at 901.
\end{itemize}
The decision was 4 to 3. Justice Broussard's opinion was joined by Chief Justice Bird and pro tem Justice Stephen Tamura. Justice Mosk concurred separately, joined also by Chief Justice Bird, while Justice Newman dissented, joined by Justices Richardson and Kaus.

The scope of the decision in Frink raises two sorts of questions. There is a question, first, about what the court held. Justice Broussard's opinion was not a majority opinion; it had only three votes, since Justice Mosk stated that he agreed with its "conclusion" and gave no indication that he was joining the opinion. To ascertain the court's holding, therefore, one must look to reasoning shared by the lead opinion and Justice Mosk's concurrence, as well as to the facts of the case. The facts involved an application for benefits under the Aid to the Totally Disabled program, and Justice Mosk concurred for reasons he said were applicable to "an allegedly permanently disabled person" applying for welfare assistance. Hence it would seem that the holding was limited to applications for welfare benefits based on total and permanent disability. Whether independent judgment review applies to decisions denying applications for other types of welfare benefits remains to be decided.

Other questions involve the impact of Frink—and its likely progeny—on judicial review of administrative decisions beyond the welfare context. The rationale of the lead opinion in Frink rubs out the bright line requirement of "vestedness"; and Justice Mosk joined that rationale, at least as applied to an applicant for welfare benefits based on total and permanent disability. Elimination of the vestedness requirement invites the argument that almost any right denied by an adjudicative decision of an administrative agency is "fundamental" enough to require independent judgment review. The question will arise most

114. Id. at 181, 643 P.2d at 484, 181 Cal. Rptr. at 901 (Mosk, J., concurring). Justice Mosk was thus apparently in error when he referred to "the conclusion of the majority." Id. So, apparently, was Justice Newman, who referred in his dissent to "this court's majority opinion." Id. (Newman, J., dissenting).

The court is often careless about such matters. Thus in City of San Francisco v. Farrell, 32 Cal. 3d 47, 52, 648 P.2d 935, 937, 184 Cal. Rptr. 713, 715 (1982), the opinion of the court by Justice Mosk relied for an important rationale on what "we held" in Los Angeles County Transp. Comm'n v. Richmond, 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982), although the cited opinion in Richmond (also by Justice Mosk) had only three votes. See infra text accompanying notes 216-21. See also, e.g., id. at 210, 643 P.2d at 948, 182 Cal. Rptr. at 331 (Richardson, J., dissenting); In re Pipinos, 33 Cal. 3d 189, 206, 654 P.2d 1257, 1269, 187 Cal. Rptr. 730, 742 (1982) (Bird, C.J., concurring); People v. Easley, 33 Cal. 3d 64, 93, 654 P.2d 1272, 1292, 187 Cal. Rptr. 745, 764 (1982) (Kaus, J., concurring), officially depublished pursuant to CAL. CT. R. 976(d) and reh'g granted, No. Crim. 21117 (Cal. Sup. Ct. Feb. 23, 1983); Bailey v. Loggins, 32 Cal. 3d 907, 928 n.2, 654 P.2d 758, 773 n.2, 187 Cal. Rptr. 575, 590 n.2 (1982) (Kaus, J., dissenting).

115. See Del Mar Water, Light & Power Co. v. Eshleman, 167 Cal. 666, 682, 140 P. 948, 948 (1914) (per curiam) (en banc).

116. 31 Cal. 3d at 169, 643 P.2d at 477, 181 Cal. Rptr. at 894.

117. 31 Cal. 3d at 181, 643 P.2d at 484, 181 Cal. Rptr. at 901 (Mosk, J., concurring).
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acutely with respect to the denial of a license to practice a trade or profession. In cases prescribing independent judgment review of license revocations, the court has emphasized the fundamental character of the right to practice one's trade or profession. Foreseeing this problem, the lead opinion in Frink suggested that in licensing cases there is greater justification for a substantial evidence standard of review, since the agency must engage in "the 'delicate task' of evaluating competence to engage in a broad field of endeavor." Yet the opinion itself limited this claim to "most" licensing cases. And Justice Mosk's concurrence, joined by Chief Justice Bird, expressed precisely the view that in the case of "a professional license . . . an applicant and a licensee should be measured by the same standard." Thus the road appears to be wide open for confusion and dispute over the extension of Frink to licensing cases and other administrative denials beyond the welfare context.

The decision in Frink thus creates the potential for a return to the "chaos" that once characterized the judicial review of administrative agency decisions in California. Especially in a time of overloaded court dockets, one wonders whether the gains secured for welfare applicants by the decision in Frink are worth the legal uncertainty and disruption that the decision seems likely to produce.

The second welfare case was People v. Sims. There, a county's Social Services Department accused a welfare recipient of fraudulently obtaining benefits and sought restitution from her. Meanwhile, the dis-

118. Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 75, 435 P.2d 553, 559, 64 Cal. Rptr. 785, 791 (1968); Bixby v. Pierno, 4 Cal. 3d 130, 144-45, 481 P.2d 242, 252, 93 Cal. Rptr. 234, 244 (1971) (en banc).
119. 31 Cal. 3d at 180, 643 P.2d at 484, 181 Cal. Rptr. at 901 (Broussard, J.).
120. Id.
121. Id. at 181, 643 P.2d at 484, 181 Cal. Rptr. at 901 (Mosk, J., concurring). Justice Mosk was repeating the position taken in his concurring opinion in Bixby v. Pierno, 4 Cal. 3d 130, 161, 481 P.2d 242, 264, 93 Cal. Rptr. 234, 256 (1971) (en banc) (Mosk, J., concurring). That opinion made it clear that his position applies to vocational as well as professional licenses. Id.
122. Justice Newman's dissent in Frink took a rather extreme position on the other side. 31 Cal. 3d at 181-83, 643 P.2d at 484-85, 181 Cal. Rptr. at 901-02 (Newman, J., dissenting). The dissenters would not have preserved the distinction between welfare applications and welfare terminations, but would have prescribed substantial evidence review for all welfare decisions, a result they thought was required by the language in § 10962 of the Welfare & Institutions Code providing for review "upon questions of law." CAL. WELF. & INST. CODE § 10962 (West 1980). Although the dissent did not squarely say so, this position would have required overruling Harlow v. Carleson, 16 Cal. 3d 731, 548 P.2d 698, 129 Cal. Rptr. 298 (1976), which required independent judgment review for welfare terminations. See 31 Cal. 3d at 183 n.1, 643 P.2d at 476 n.1, 181 Cal. Rptr. at 902 n.1. Since Justice Richardson wrote the opinion for the court in Harlow, it is curious that he joined (without explanation) the dissenting opinion in Frink.
124. 32 Cal. 3d 468, 651 P.2d 321, 186 Cal. Rptr. 77 (1982).
strict attorney filed a criminal complaint against her in municipal court for the same alleged fraud. She then requested a "fair hearing" on the administrative charges before a hearing officer of the state Department of Social Services (DSS). At the hearing the county declined to present evidence against her, contending that the pending prosecution deprived DSS of jurisdiction. The hearing officer accordingly cleared her of the charges; the director of DSS adopted this result, and the county did not seek judicial review. The welfare recipient then moved to dismiss the criminal charges pending against her (since increased to felony charges in superior court).

The supreme court, in an opinion by Chief Justice Bird with only Justice Kaus dissenting, held that the administrative decision acted as collateral estoppel to bar the prosecution. While noting that it had never before given an administrative determination binding effect on a subsequent criminal proceeding, the court found that the case law offered "no absolute bar" to that result. The court held that the DSS hearing was "a judicial-like adversary proceeding"; the different burdens of proof in the two proceedings were no bar to the application of collateral estoppel; and the county and the district attorney were "in privity with each other" for collateral estoppel purposes. The court found that as a matter of policy, giving conclusive effect to the DSS decision "would promote judicial economy by minimizing repetitive litigation" and would protect the integrity of both the judicial and administrative systems by avoiding inconsistent judgments. It would also promote an apparent legislative policy recognizing that, "since public assistance provides recipients with only the most minimal standard of living, recipients suspected of fraudulently obtaining benefits are entitled to some protection from criminal prosecution."

In dissent, Justice Kaus first argued that the majority was incorrect in applying collateral estoppel because the issue of the alleged fraud had not been "actually litigated" in the DSS hearing, the county having declined to present evidence. He then argued that the majority was...
wrong in any event. Its decision went far beyond prior law, no known case having held that a civil court judgment—let alone an administrative determination—barred a criminal prosecution. Justice Kaus noted that many administrative bodies—"[p]rofessional licensing boards, prison disciplinary panels, local school boards, the State Personnel Board, labor relations boards and the like"—often decide factual disputes concerning conduct that may also give rise to a criminal prosecution. He thought the practical consequence of the court's decision would be to transform the DSS hearings—designed to give welfare recipients a speedy and informal means to challenge administrative action threatening their benefits—into "the first stage of the criminal prosecution itself," with the prosecution compelled to marshal all its potential evidence in that hearing "[t]o insure that the People's opportunity to prove the criminal charges is not lost." Further, he thought the decision would force district attorney's offices "to allocate a greater proportion of their ever-decreasing resources to administrative matters," instead of reserving them for "the actual prosecution of serious criminal cases in court." The majority made no response to these arguments.

The decision in Sims, like that in Frink, appears to have been strongly influenced by the individual's status as a welfare client. Prefacing its holding with a reference to "the particular and special circumstances of this case," the court in Sims invoked a policy of giving welfare recipients suspected of fraud "some protection from criminal prosecution" and spoke of the problem of "planning a budget for limited resources" under the threat of having to return welfare benefits.

as Chief Justice Bird's opinion pointed out, the issue of the alleged welfare fraud was raised and determined in the administrative proceeding, even though the county put in no evidence. Id. at 484, 651 P.2d at 331, 186 Cal. Rptr. at 87; see RESTATEMENT (SECOND) JUDGMENTS § 27 comment d (1982), cited in 32 Cal. 3d at 484, 651 P.2d at 331, 186 Cal. Rptr. at 87.

133. 32 Cal. 3d at 492 & n.4, 651 P.2d 336 & n.4, 186 Cal. Rptr. 92 & n.4 (Kaus, J., dissenting).

134. Id. at 493, 651 P.2d at 336, 186 Cal. Rptr. at 92.

135. Id. at 494, 651 P.2d at 337, 186 Cal. Rptr. at 93.

136. Id.

137. Since many of the factfinders in administrative proceedings are not lawyers, the court in Sims might also have considered the relevance of its decision in People v. Uhlemann, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973). That decision reaffirmed the rule that a magistrate's dismissal of criminal charges following a preliminary examination does not prevent their refiling, in part for the reason that a magistrate need not be a lawyer and "there is some basis for reluctance to empower him with the authority to terminate forever proceedings against one accused of a criminal offense." Id. at 668, 511 P.2d at 613, 108 Cal. Rptr. at 661.

138. 32 Cal. 3d at 489, 651 P.2d at 334, 186 Cal. Rptr. at 90.

139. Id. (citing People v. McGee, 19 Cal. 3d 948, 963-65, 568 P.2d 382, 390-91, 140 Cal. Rptr. 657, 665-66 (1977)).

140. 32 Cal. 3d at 489, 651 P.2d at 334, 186 Cal. Rptr. at 90.
court's holding to the welfare context, the basic legal reasoning of the opinion is not thus limited. *Sims* may have a broad impact on law enforcement by California administrative agencies, deterring them from filing administrative complaints unless they are prepared to undergo an extensive hearing. It may also have a broad impact on criminal cases. In any criminal prosecution that was preceded by some form of administrative action not resulting in a complete "conviction," the court is likely to be confronted with a new defense of collateral estoppel, requiring a close inquiry into the legal and factual aspects of the administrative proceeding. In *Sims*, as in *Frink*, the court's "sensitivity . . . to the plight of the poor" appears to have produced a novel ruling whose unsettling impact is not limited to the welfare context.

C. Common Law and Constitutional Decisions

While the court in 1982 produced considerable legal change through the interpretation of statutes, it was less creative in the other two areas noted in the Tobriner-Grodin article, common law and constitutional decisionmaking. Only one case, *Turpin v. Sortini*,141 dealing with "wrongful life," notably advanced the frontiers of substantive common law, and it was a limited, compromise decision written by Justice Kaus over the dissent of Justice Mosk and Chief Justice Bird.142 Aside from *Turpin*, probably the most significant tort decision was *Peterson v. Superior Court*.143 The court there continued its campaign against drunken driving by holding that its decision in *Taylor v. Superior Court*,144 making punitive damages available in a personal injury or wrongful death suit against an intoxicated driver, applied retroactively.145 A more important holding in *Peterson* was disclosed almost

141. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982), discussed at infra text accompanying notes 374-77.
143. 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982).
145. Justice Broussard wrote for the majority in *Peterson*, with only Justice Richardson dissenting. To the defendant's argument that the punitive damages imposed by *Taylor* could not have their desired deterrent effect on conduct already complete, the court responded that each defendant held liable for punitive damages under *Taylor* "will serve as an example to others," and
incidentally. Citing a court of appeal decision, the court announced that "California has adopted" the rule that public policy prohibits insurance coverage of punitive damages.

In constitutional law (outside the criminal area), the court, on the whole, was also rather restrained. In two cases the court avoided constitutional decisions by resting on statutory grounds. Some constitutional decisions the court did make were limited and uncertain. In Bailey v. Loggins, a 4-to-3 decision with no majority opinion, the court held that the federal and state Constitutions limit the power of the State Department of Corrections to regulate the content of a prison newspaper; but the court left considerable room for that power to operate. A bolder ruling was Fullerton Joint Union High School District v. State Board of Education. There the court held 4 to 2, again with no majority opinion, that "the equal protection of the laws" requires strict scrutiny of a decision to deny the residents of an affected geographical area the right to vote on a governmental annexation or secession, and that the school board secession in that case therefore was invalid. Justice Broussard's lead opinion did not say which constitu-

that "[t]he sooner knowledge of the potential liability saturates the collective consciousness of the driving public, the better the deterrent purpose of the rule is served." 31 Cal. 3d at 156, 642 P.2d at 1309-10, 181 Cal. Rptr. at 789. Another part of the court's deterrence campaign was the 1981 decision in People v. Watson, 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981).


147. 31 Cal. 3d at 156-57 & n.4, 642 P.2d at 1310 & n.4, 181 Cal. Rptr. at 789 & n.4. Although noting that "the authorities are split" on the question, the court did not itself consider the opposing views, but treated the court of appeal decision as having settled the law in California. Id.

148. In De Lancie v. Superior Court, 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982), the court held that a county jail's alleged practice of monitoring and recording conversations of pretrial detainees violated § 2600 of the Penal Code, CAL. PENAL CODE § 2600 (West 1982), unless it was necessary for security purposes. In John A. v. San Bernardino City Unified School Dist., 32 Cal. 3d 875, corrected, 33 Cal. 3d 301, 654 P.2d 242, 187 Cal. Rptr. 472 (1982), the court held that a high school student had a right under § 48914(f) of the Education Code, CAL. EDUC. CODE § 48914(f) (West Supp. 1983), to confront and cross-examine the witnesses whose written statements were used as the basis for expelling him from school.

149. 32 Cal. 3d 907, 654 P.2d 758, 187 Cal. Rptr. 575 (1982).

150. Justice Broussard's lead opinion stated that the department retains power "to regulate and censor" the paper not only for reasons of "institutional security" but also for "other legitimate penological objectives," adding that "in all such matters, the courts give deference to determinations by prison officials that restrictions are essential to protect a legitimate state interest." Id. at 922, 654 P.2d at 768, 187 Cal. Rptr. at 585 (Broussard, J.). Chief Justice Bird and Justice Reynoso joined the Broussard opinion, while Justice Newman concurred in the result. Justice Richardson dissented, joined by Justice Mosk, while Justice Kaus dissented separately.


152. Id. at 806, 654 P.2d at 187, 187 Cal. Rptr. at 417 (lead opinion by Broussard, J.).

153. Id. at 805, 654 P.2d at 186, 187 Cal. Rptr. at 416 (lead opinion by Broussard, J.). The lead opinion by Justice Broussard was joined by Chief Justice Bird and Justice Mosk, while Justice Newman concurred reluctantly in the result. Id. at 807, 654 P.2d at 187-88, 187 Cal. Rptr. at 417-18 (Newman, J., concurring). Justice Kaus dissented, joined by Justice Richardson. Id. at 808, 654 P.2d at 188, 187 Cal. Rptr. at 418 (Kaus, J., concurring and dissenting).
tion, state or federal, he was invoking. In a companion case, *Citizens Against Forced Annexation v. Local Agency Formation Commission*, the court cushioned the impact of *Fullerton*. *Citizens* held that a statute limiting the franchise in an annexation election to the residents of the territory to be annexed passed the strict scrutiny test.

One constitutional advance that garnered a majority opinion, but only with four votes, was *In re Jerald C*. There the court, citing “the basic constitutional guarantee of equal protection of the law,” struck down section 903 of the California Welfare and Institutions Code insofar as it required the parents of an incarcerated minor to reimburse the county for his care and support. The court’s opinion, by Justice Broussard, did not say which constitution it was invoking.

Deviating from the pattern of constitutional restraint, the court in two cases reached out for constitutional grounds of decision where common law or statutory grounds would have sufficed. In *City of Long Beach v. Bozek*, defendant Bozek had previously sued the city and two of its police officers for false arrest and related torts arising out of alleged police misconduct. After a jury found for the city and the officers, all three sued Bozek for malicious prosecution. The supreme court, relying on constitutional principles, held that a city may not sue for malicious prosecution. The opinion was by Justice Mosk; Justice Kaus dissented, joined by Justice Richardson.

Citing both the United States and California Constitutions, Justice Mosk reasoned that the act of filing a lawsuit against the government constitutes an exercise of the constitutionally protected right to petition the government for redress of grievances, a right “of parallel

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155. The court reasoned that restricting the franchise in that way was “necessary to serve a compelling state interest,” since otherwise unincorporated areas “might be unable to obtain the benefits of municipal government and services if annexation was unattractive to the residents of neighboring cities.” Id. at 824, 654 P.2d at 198-99, 187 Cal. Rptr. at 428. Justice Broussard’s opinion was joined by Chief Justice Bird and Justices Mosk and Reynoso; Justice Kaus dissented, joined by Justices Richardson and Newman. That Justice Reynoso joined the Broussard opinion may indicate that, had he participated in the *Fullerton* case, he would have made the Broussard opinion there a majority opinion.
156. 33 Cal. 3d 1, 654 P.2d 745, 187 Cal. Rptr. 562 (1982), officially depublished pursuant to CAL. CT. R. 976(d) and reh’g granted, No. S.F. 24392 (Cal. Sup. Ct. Mar. 10, 1983).
158. 33 Cal. 3d at 5, 654 P.2d at 747, 187 Cal. Rptr. at 564.
159. Indeed, it avoided mention of either one. Nor did the court specify what standard of equal protection review it was applying, or weigh the interests that might justify the statute. Justice Broussard was joined by Chief Justice Bird and Justices Mosk and Newman. Justice Kaus, joined by Justice Reynoso, concurred in the judgment, while Justice Richardson dissented.
161. He was joined by Chief Justice Bird and Justices Newman and Broussard.
162. 31 Cal. 3d at 532, 645 P.2d at 139, 183 Cal. Rptr. at 88.
importance to the right of free speech." He concluded that "the bringing of suits against the government is absolutely privileged and cannot form the basis for imposition of civil liability for malicious prosecution." Justice Mosk took note of two new California statutes empowering courts to award attorneys' fees for the purpose of discouraging frivolous litigation; one specifically authorizes fee awards in suits charging police misconduct which were "not filed or maintained in good faith and with reasonable cause." Fee awards under these statutes, together with a possible criminal prosecution for filing false claims and possible malicious prosecution actions by the police officers themselves, adequately protect the city's interests, the court found. "From a constitutional standpoint," these alternatives are "clearly preferable remedies" to a municipal action for malicious prosecution.

Justice Kaus found the majority's "novel constitutional thesis" to be "riddled with fundamental and fatal flaws." Noting that the right-of-petition cases relied on by the majority involved lawsuits against private parties as well as against the government, Justice Kaus argued that under the majority's theory "all malicious prosecution actions would be unconstitutional, not only those actions brought by a governmental entity." He further argued that if suing the government was "absolutely privileged" as the majority held, it would follow that suits against the government were constitutionally protected not only against countersuits for malicious prosecution, but also against other sanctions such as the attorneys' fee awards on which the majority relied.

Justice Kaus' first argument seems answerable. Even if suits against private parties are protected by the right of petition, that right might well be considered to be more directly implicated in suits against the government, warranting a higher degree of protection. Justice Kaus' second argument, however, is persuasive.

The result in Bozek may be sound. In view of the new attorneys' fee statutes, California cities have little apparent need for a newly asserted power to sue for malicious prosecution. The court could have

163. Id. at 535, 645 P.2d at 141, 183 Cal. Rptr. at 90.
164. Id. at 539, 645 P.2d at 143, 183 Cal. Rptr. at 93.
165. Id. at 537, 645 P.2d at 142-43, 183 Cal. Rptr. at 92 (quoting CAL. CIV. PROC. CODE § 1021.7 (West Supp. 1983) (granting court discretion to award attorneys' fees for bad faith suits arising out of conduct of peace officer); see also CAL. CIV. PROC. CODE § 128.5(a) (West 1982) (granting court discretion to award fees and expenses resulting from frivolous actions or delaying tactics).
166. 31 Cal. 3d at 538, 645 P.2d at 143, 183 Cal. Rptr. at 92.
167. Id. at 539, 645 P.2d at 144, 183 Cal. Rptr. at 93 (Kaus, J., dissenting).
168. Id. at 540, 645 P.2d at 144, 183 Cal. Rptr. at 93 (Kaus, J., dissenting) (emphasis in original).
169. Id. at 542-43, 645 P.2d at 146, 183 Cal. Rptr. at 95 (Kaus, J., dissenting).
reached its result, however, without resting on the far-reaching and uncertain constitutional claim that suits against the government are "absolutely privileged." The court could have held, in the light of the new attorneys' fee statutes but solely as a matter of judge-made tort law, that suits by the government are not within the tort of malicious prosecution in California. The decision then would have been subject to legislative revision if desired—if, for example, the attorneys' fee statutes prove inadequate to protect cities against frivolous litigation.

The other unnecessary constitutional adjudication occurred in *Moles v. Regents of the University of California.* That case held that it was improper for a court of appeal justice to participate in the decision of a case when he had not heard the oral argument. Square support for this decision was provided, as the court recognized, by the right to oral argument set forth in the California Rules of Court. It was therefore unnecessary for the court also to hold, as it did, that the right to oral argument in the court of appeal, in both civil and criminal cases, is guaranteed by the California Constitution. As Justice Newman has pointed out, the caseload problem in the courts of appeal may well call for "needed experiments and reforms," which could be stymied by the supreme court's enthronement of oral argument as a constitutional right.

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171. The United States Supreme Court granted a petition for certiorari in *Bozek,* vacated the judgment, and remanded the case to the California Supreme Court "to consider whether its judgment [was] based upon federal or state constitutional grounds, or both." 103 S. Ct. 712 (1983). In response, the California court certified that its judgment was "based on both the First Amendment to the United States Constitution and article I, section 3, of the California Constitution; accordingly, the latter provision furnishes an independent ground to support the decision." 33 Cal. 3d at 727, 661 P.2d at 1073, 190 Cal. Rptr. at 919. The court deemed "it unnecessary to modify [its] prior opinion" and therefore "reiterate[d] that opinion in its entirety." *Id.*


173. The opinion was by Chief Justice Bird, with Justice Richardson concurring in the result (without opinion).

174. *Id.* at 871, 654 P.2d at 742, 187 Cal. Rptr. at 559.

175. Rule 22 provides: "Unless otherwise ordered: (1) counsel for each party shall be allowed 30 minutes for oral argument . . . ." *Cal. Ct. R.* 22.

176. The relevant constitutional language provides only that "[c]oncurrence of 2 judges present at the argument is necessary for a judgment." *Cal. Const.* art. VI, § 3. To be sure, the court in *Moles* relied on its 1979 decision in *People v. Brigham,* 25 Cal. 3d 283, 599 P.2d 100, 157 Cal. Rptr. 905 (1979). *Brigham* held that the right of oral argument in the court of appeal in a *criminal* case was recognized not only by the Rules of Court and the applicable sections of the Penal Code, but also by the state constitution. 25 Cal. 3d at 285-88, 599 P.2d 102-04, 157 Cal. Rptr. at 907-09. The constitutional ground in *Brigham* was similarly unnecessary, but *Moles* took a further step by extending it to civil cases.

FOREWORD

D. Corporate and Property Rights Cases

While the court's majority position was characterized by an inclination to expand individual rights, particularly in cases involving statutory and administrative schemes, in other cases the majority emerged as less favorably inclined toward corporate and property rights. These cases involved a novel application of eminent domain, a tax on insurance companies, application of the "public trust" doctrine to certain tidelands, and interpretation of the property tax limitation added to the state constitution in 1978 by Proposition 13.

In City of Oakland v. Oakland Raiders, the court held unanimously that a city may be able to acquire by eminent domain the web of contract rights and other intangible property that constitutes a professional football team. Justice Richardson wrote the court's opinion, while Chief Justice Bird filed a "concurring and dissenting" opinion in which she reluctantly agreed with the result.

Although the court did not say so, it is common knowledge, and the court of appeal below had found, that Oakland sought to condemn the Raiders in order to prevent the team from moving to Los Angeles. Nevertheless, the supreme court found nothing in the state or federal constitution to prevent such a taking, so long as Oakland paid "just compensation" and could demonstrate that the taking was for a valid "public use." The "public use" question was left open for trial.

Despite the outrage generated by the Raiders decision, the court was on solid ground in finding no constitutional barrier to the proposed taking so long as the "just compensation" and "public use" requirements were met. True, the precedents cited by the court for the taking of intangibles all involved tangible property as well. But if the taking of intangibles is constitutionally permissible, one cannot plausibly devise a constitutional principle to limit that power to cases where tangible property is also being taken. In contrast to the statutory

178. See supra notes 41-140 and accompanying text.
179. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).
180. The Richardson opinion was joined by Justices Mosk, Newman, and Kaus, and court of appeal Justice Reynoso (sitting pro tem). Another pro tem justice, Sidney Feinberg, concurred only in the judgment, noting that he agreed with much of the chief justice's opinion.
181. 123 Cal. App. 3d 422, 425, 176 Cal. Rptr. 646, 647 (1981), officially depublished pursuant to CAL. CT. R. 976(d); see also City of Oakland v. Oakland Raiders, 32 Cal. 3d at 77, 646 P.2d at 845, 183 Cal. Rptr. at 683-84 (Bird, C.J., concurring and dissenting).
182. 32 Cal. 3d at 64, 72, 646 P.2d at 838, 843, 183 Cal. Rptr. at 676, 681.
183. Id. at 76, 646 P.2d at 845, 183 Cal. Rptr. at 683.
185. See City of Oakland v. Oakland Raiders, 32 Cal. 3d at 66-68, 646 P.2d at 839-40, 183 Cal. Rptr. at 677-78 (citing Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), and other cases).
decisions noted earlier (and to the Bozek case), the court's mode of decisionmaking in the Raiders case—if not the tone of its opinion—was essentially narrow and restrained. The court found nothing in the state or federal constitution to block Oakland's proposed taking; it relied on the broad definition of "property" in the state's eminent domain law, and it stressed judicial deference to the legislature's language.

It was not so clear, however, that California's eminent domain law had to be read as authorizing the condemnation of purely intangible property. The court might have considered the argument accepted by the court of appeal in the Raiders case. It might also have given further thought to the statute limiting a city's condemnation power to "property within its territorial limits." The court found it unlikely that this statute would prevent Oakland from taking intangible property rights of the Raiders that might not be "located" in Oakland. It was "at least arguable," the court said, "that this section was intended to apply only to property which can and does have some situs, such as land and the rights related thereto." It would seem equally arguable, however, that intangible property, since it has no situs, cannot be

186. See supra text accompanying notes 41-140 & 160-71.
187. The opinion as originally issued was rather aggressive and left little doubt that the taking would be upheld. On petition for rehearing, the opinion was softened and thoroughly rewritten, with 62 separate changes. See No. S.F. 24563 (Cal. Sup. Ct. June 21, 1982), modified, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).
188. See 32 Cal. 3d at 65-66, 76, 646 P.2d at 838-39, 845, 183 Cal. Rptr. at 677-78, 683 (citing CAL. CIV. PROC. CODE § 1235.170 (West 1982)).
189. 32 Cal. 3d at 73, 76, 646 P.2d at 843, 845, 183 Cal. Rptr. at 681, 683. Perhaps the majority should have paused to consider, as the chief justice urged, the "ultimate consequences of their expansive decision," particularly as it involved the condemnation of a business to keep it from moving and the condemnation of rights under personal employment contracts. Id. at 76-77, 646 P.2d at 845-46, 183 Cal. Rptr. at 683-84 (Bird, C.J., concurring and dissenting). But that would not have changed the constitutional law. It seems ironic that the court was attacked for refusing to make new constitutional law in the Raiders case—for refusing to devise a new constitutional limit on the eminent domain power—by voices in the press and elsewhere who are often the first to criticize the court for excessive constitutional creativity.
190. In relying on the broad definition of "property" in the 1975 revision of the eminent domain statutes, see supra text accompanying notes 41-140 & 160-71, the supreme court did not consider the argument that the court of appeal had found controlling against Oakland. The court of appeal noted that the specific types of condemnable property listed in the pre-1975 law had not included intangibles, see Act of Mar. 22, 1872, ch. 350, § 13, 1872 Cal. Stat. 481, 482, so that Oakland plainly could not have condemned the Raiders under that law. And since nothing said by the Law Revision Commission in 1975 indicated that the law was being changed to allow the condemnation of intangibles, the court of appeal concluded that the legislature's intent was to revise and codify and not to work "so drastic a departure from the prior law." 123 Cal. App. 3d 422, 429-30, 176 Cal. Rptr. 646, 650, officially depublished pursuant to CAL. CT. R. 976(d). Cf. Assembly v. Deukmejian, 30 Cal. 3d 638, 656, 639 P.2d 939, 950, 180 Cal. Rptr. 297, 308 (1982) (making a similar argument).
191. CAL. CIV. PROC. CODE § 1240.050 (West 1982).
192. 32 Cal. 3d at 74, 646 P.2d at 844, 183 Cal. Rptr. at 682.
within a city’s “territorial limits,” and hence that the statute prevents a city from taking wholly intangible property.

In three other cases involving corporate or property rights, the court was characteristically split, with the majority ruling against the asserted right. Metropolitan Life Insurance Co. v. State Board of Equalization was a technical but revealing tax case, involving the definition of the “gross premiums” that measure the franchise tax imposed on insurance companies by the state constitution. The insurer, Metropolitan, offered an employee group medical plan under which employers paid aggregated employee claims up to a certain “trigger point”—defined as the actuarially predicted monthly amount of aggregate employee claims—and Metropolitan paid claims in excess of that amount. The Insurance Commissioner levied a tax that defined Metropolitan’s “gross premiums” to include not only the premiums the employers paid to Metropolitan for the coverage of claims above the trigger point amount, but also “the aggregate yearly claims paid to employees from employers’ funds.” In a 4-to-3 decision, the court upheld the tax.

The majority, in an opinion by Justice Mosk, posited that “[t]he presence or absence of insurance risk on the part of employers is not alone determinative of Metropolitan’s tax liability.” The proper inquiry was “whether the purpose of the taxing provisions can best be fulfilled” by including the amounts paid on the pre-trigger-point claims within the “gross premiums” on which Metropolitan was taxed. In answering affirmatively, the majority reasoned that “[i]n financing payment of pre-trigger-point claims, the employers act as mere agents of Metropolitan, accumulating funds to be disbursed in a manner inuring to the economic benefit of Metropolitan.”

Justice Kaus, in dissent, remarked that while the constitution imposed the tax on premiums received by insurers, the majority was imposing it on losses paid to doctors and hospitals. He noted that there was no evidence that the plan was “just a bookkeeping trick by which Metropolitan intercepts 90 percent of the premiums at the source” and has the employers pay out money for which Metropolitan would other-

194. CAL. CONST. art. XIII, § 28.
195. 32 Cal. 3d at 653, 652 P.2d at 427, 186 Cal. Rptr. at 579.
196. Id. at 654-55, 652 P.2d at 428, 186 Cal. Rptr. at 580.
197. He was joined by Chief Justice Bird, Justice Broussard, and pro tem justice John Miller. Justice Kaus dissented, joined by Justice Reynoso and pro tem justice Betty Barry-Deal.
198. Id. at 656, 652 P.2d at 430, 186 Cal. Rptr. at 582.
199. Id.
200. Id. at 661, 652 P.2d at 433, 186 Cal. Rptr. at 585.
201. Id. at 662, 652 P.2d at 433, 186 Cal. Rptr. at 585 (Kaus, J., dissenting).
wise be liable. Rather, he pointed to the fact—"not mentioned in the majority opinion"—that the actual payments by the employers often did not reach the trigger point, so that the employers—not Metropolitan—received the economic benefit of the claims' shortfall. Justice Kaus persuasively found the plan "quite similar to the deductible collision coverage most of us carry on our automobiles. If a motorist carries $100 deductible collision coverage and pays out $85 for a minor repair, no one can rationally claim that he is paying a premium, rather than a loss." The next case, City of Los Angeles v. Venice Peninsula Properties, involved tidelands in Los Angeles on which the city wanted to dredge and build seawalls without exercising its power of eminent domain. Instead, the city claimed a public easement based on the "public trust" doctrine. These tidelands, like much of the land on southern California's coast, had been part of Mexican ranchos. The tidelands were originally acquired by private persons from the Mexican government before California was ceded to the United States, and then were patented to the owners by the federal government as required in the treaty of cession. The key question was the effect of those patents, which did not expressly reserve any public rights. In an opinion by Justice Mosk, the court held that the federal government nonetheless "retained an interest in the tidelands in question when it issued the patent . . . and that this interest was acquired by California upon its admission to statehood." Otherwise, the court said, the state would have a "Mason-Dixon coastline," with the public trust doctrine applying in the north but not in the south.

Justices Richardson and Kaus dissented. While Justice Richardson also made a broader argument, both justices argued that the majority was ignoring the clear effect of the federal patents under federal law, as established by United States Supreme Court cases. Certiorari has been granted.

The final case involving property rights was City of San Francisco v. Farrell. The court there interpreted the section of article XIII

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\[202. \text{Id. at 662, 652 P.2d at 433-34, 186 Cal. Rptr. at 585-86.}\]

\[203. \text{Id. at 662-63, 652 P.2d at 434, 186 Cal. Rptr. at 585-86.}\]

\[204. \text{Id. at 663, 652 P.2d at 434, 186 Cal. Rptr. at 586.}\]


\[206. \text{Id. at 302, 644 P.2d at 801, 182 Cal. Rptr. at 608.}\]

\[207. \text{Id. at 303, 644 P.2d at 801, 182 Cal. Rptr. at 608.}\]

\[208. \text{Id. at 308-15, 644 P.2d 804-09, 182 Cal. Rptr. 611-16 (Richardson, J., dissenting); id. at 315-17, 644 P.2d at 809-10, 182 Cal. Rptr. at 616-17 (Kaus, J., dissenting).}\]

\[209. \text{Summa Corp. v. California ex rel. State Lands Comm'n, 103 S. Ct. 1425 (1983) (No. 82-708).}\]

\[210. 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982).}\]
the state constitution—enacted by the voters in 1978 as Proposition 13—which provides that "special taxes" may be imposed by local governments only by a two-thirds vote of the qualified voters.211 The court held that "special" does not mean "additional," "extra," or "supplemental" taxes enacted to replace the property tax revenues lost through Proposition 13, but rather taxes "levied for a specific purpose."212 Therefore the two-thirds vote requirement does not apply to ordinary revenue-raising taxes levied for general municipal purposes, such as a city's payroll and gross receipts taxes. The court's opinion was by Justice Mosk, with Justices Richardson and Kaus dissenting.

As Justice Richardson pointed out, Farrell may go a long way toward defeating the tax limitation purpose of Proposition 13, since it allows local governments to replace lost property tax revenues by adopting new general revenue taxes approved by a majority, but not two-thirds, of the electorate.213 Justice Kaus acknowledged the imprecision of the phrase "special taxes," but reasoned that the drafters of Proposition 13 most likely intended the two-thirds vote requirement to limit cities' power to impose new taxes to replace the property tax revenues lost under the Proposition.214 The court itself had read Proposition 13 this way in upholding its constitutionality.215 In rejecting this view, the majority declared that the two-thirds vote requirement "must be strictly construed and ambiguities therein resolved so as to limit the measures to which the two-thirds requirement applies."216 It so ruled because the requirement is an "inherently undemocratic" limit, "imposed by a simple majority" of the state's voters, on the ability of a simple majority of local voters to tax themselves for local purposes.217 This rule of strict construction had been broached earlier in the year in another Proposition 13 case, Los Angeles County Transportation Commission v. Richmond.218 But the rule was not, as the court said in Farrell, part of what the court had "held" in Richmond;219 the cited opinion in Richmond, also by Justice Mosk, had only three votes and was not a majority opinion.220 The court in Farrell was thus breaking new ground in announcing a "rule of strict con-

211. CAL. CONST. art. XIIIA, § 4.
212. 32 Cal. 3d at 54, 57, 648 P.2d at 938-39, 940, 184 Cal. Rptr. at 717, 718.
213. Id. at 58, 648 P.2d at 941, 184 Cal. Rptr. at 719 (Richardson, J., dissenting).
214. Id. at 58-59, 648 P.2d at 941-42, 184 Cal. Rptr. at 719-20 (Kaus, J., dissenting).
216. 32 Cal. 3d at 52, 648 P.2d at 937-38, 184 Cal. Rptr. at 715-16.
217. Id. at 52, 57, 648 P.2d at 937-38, 940, 184 Cal. Rptr. at 715-16, 718.
219. 32 Cal. 3d at 52, 648 P.2d at 937-38, 184 Cal. Rptr. at 715-16.
220. 31 Cal. 3d at 208, 643 P.2d at 947, 182 Cal. Rptr. at 330 (lead opinion by Mosk, J.); see
struction of provisions which require extraordinary majorities for the enactment of legislation.”

No legal basis was offered for this rule in either Farrell or Richmond. In a 1970 case, Westbrook v. Mihaly, the court had held that the state constitution’s two-thirds vote requirement for the approval of certain local bonds violated the equal protection clause of the federal Constitution. That decision was overturned by the United States Supreme Court. The doctrine announced in Farrell appears to be a reincarnation of Westbrook in the form of a rule of construction. Since the rule cannot be based on the federal Constitution, perhaps it now rests on the state constitution, although the court said nothing about its source. In any event, the rule raises the problem of justifying a judicial doctrine based on the “inherently undemocratic” objection to supermajority vote requirements when such requirements exist in the Constitutions of both the United States and California. And insofar as the court’s objection was directed to Proposition 13’s effect of limiting local autonomy, the same objection would seem to apply to any state law limiting the governing or taxing power of local entities.

While the term “special taxes” in Proposition 13 is indeed ambiguous, that was the beginning, not the end, of the interpretative task. That task normally is to determine the drafters’ purpose. In Farrell, under ordinary principles of interpretation, that purpose was rather clear: it was to limit the ability of local governments to levy new taxes to replace the lost property tax revenues. The court reached a different conclusion by declaring a new “rule of strict construction” whose legal foundation is not apparent. The inference arises that the decision was animated simply by its result—that the court wished to restrict the impact of Proposition 13 and help local governments replace the revenues they had lost. Even if the new rule of construction reflects more general preferences of the court for simple-majority rule and local autonomy, those are policy preferences which are opposed to the evident purpose of article XIIIA, and for which no legal justification was offered or appears. It is hard not to conclude that the court’s decision

Del Mar Water, Light & Power Co. v. Eshleman, 167 Cal. 666, 682, 140 P. 948, 948 (1919) (per curiam) (en banc).

221. 32 Cal. 3d at 57, 648 P.2d at 940, 184 Cal. Rptr. at 718.


224. E.g., U.S. CONST. art I, § 3, cl. 6 (impeachment); id. art II, § 2, cl. 2 (ratification of treaties); see Gordon v. Lance, 403 U.S. 1, 6 (1971).

225. E.g., CAL. CONST. art IV, § 10(a) (veto override); id. art XVI, § 18 (certain local bonds).

226. Justice Richardson, dissenting in Richmond, suggested that the new rule of construction “has been adopted more as a means to an end than to vindicate any principle, democratic or otherwise.” 31 Cal. 3d at 210, 643 P.2d at 949, 182 Cal. Rptr. at 332 (Richardson, J., dissenting).

227. In another case the court gave rather short shrift to local autonomy, holding that a state
in *Farrell* was unduly influenced by a desired result.228

### E. Criminal Cases

In criminal cases the divisions within the court shifted somewhat. Justice Kaus tended to move closer to the majority's position—characterized by concern for the rights of criminal defendants—and away from the dissenting view of Justice Richardson.229 But Justice Mosk, at the same time, agreed less often with the majority and more often with Justice Richardson.230 These variations on the basic threefold division were played out in the shadow of the death penalty, which dominated the court's criminal docket. Receiving its first appeals from judgments of death imposed under the 1978 Death Penalty Initiative (Briggs Initiative),231 the court decided eight of these appeals.232 In seven it reversed the death penalty. One reversal was unanimous,233 while in all the others there was a dissent by at least Justice Richardson. In the eighth case, *People v. Easley*, the court affirmed the death penalty by a 4-to-3 vote, but it has since granted a rehearing.234

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228. I was originally of the view that the rule of strict construction applied in *Farrell* was "far from indefensible in this context." Barnett, *Three Philosophies on the High Court*, CAL. LAW., Mar. 1983, at 53. On further consideration, I am unable to see any legal defense for it.


234. 33 Cal. 3d 65, 654 P.2d 1272, 187 Cal. Rptr. 745 (1982), officially depublished pursuant to CAL. CT. R. 976(d) and reh'g granted, No. Crim. 21117 (Cal. Sup. Ct. Feb. 23, 1983). Justice Richardson's lead opinion was joined by Justices Newman and Kaus, while Justice Mosk concurred in the result.
In one of the reversals, *People v. Ramos*, the court held unconstitutional the Briggs Initiative requirement that the jury in the penalty phase of a death case be instructed that a life sentence without the possibility of parole may be commuted or modified by the governor. Another constitutional decision involving the death penalty, *People v. Superior Court (Engert)*, was written for the court by Justice Kaus. It struck down as unduly vague the “special circumstance” authorizing the death penalty in a case where “the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity,” which was defined as “a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.” Justice Kaus’ reasoning seemed uncharacteristically technical. He argued, for example, that “[a]s ‘unnecessarily’ torturous assumes the existence of conduct that is necessarily torturous, so a conscienceless or pitiless first degree murder assumes the existence of such murder performed with conscience or pity.” In both *Ramos* and *Engert*, Justice Richardson was the only dissenter.

Apart from death penalty cases, the major criminal law decision of the year, and a characteristic display of the basic opposing positions on the court, was *People v. Shirley*. There the court held, in a lengthy opinion by Justice Mosk, that “the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those

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236. *Id.* at 590-91, 639 P.2d at 929, 180 Cal. Rptr. at 287. The 6-to-1 opinion was by Justice Tobriner (sitting pro tem); Justice Richardson dissented from the reversal of the penalty.

237. 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982).

238. He was joined by Chief Justice Bird and Justices Mosk and Broussard, while Justice Newman concurred in the result. Justice Richardson dissented.


240. 31 Cal. 3d at 803, 647 P.2d at 78, 183 Cal. Rptr. at 802.

241. *Engert* seems the more vulnerable decision. But while certiorari was granted in *Ramos*, California v. Ramos, 103 S. Ct. 49 (1982) (No. 81-1893), *Engert* is insulated from United States Supreme Court review because the California court was careful to rest its holding on the state as well as the federal Constitution. 31 Cal. 3d at 806, 647 P.2d at 81, 183 Cal. Rptr. at 805. In *Ramos*, in contrast, the court relied on the federal Constitution and expressly left open whether the Briggs Initiative instruction also violates the California Constitution. 30 Cal. 3d at 600 & n.24, 639 P.2d at 936 & n.24, 180 Cal. Rptr. at 294 & n.24.

242. 31 Cal. 3d 18, 181 Cal. Rptr. 243 (1982), *modifying* 641 P.2d 775 (1982), cert. denied, 103 S. Ct. 133 (1983). The opinion was originally issued on March 11, 1982, and was modified on June 4, 1982. The original opinion appears at 641 P.2d 775. The modified opinion appears at 31 Cal. 3d 18, 181 Cal. Rptr. 243. Cites to the *Pacific Reporter* are to the March 11th opinion; cites to the *California Reports* and *California Reporter* are to the modified opinion. Citations to material appearing in both the original and modified opinions are to all three reporters. See 31 Cal. 3d 918a, 918a n.* (1982) (appearing only in the California Official Reports Advance Sheets).

243. He was joined by Chief Justice Bird and Justices Newman, Broussard, and Tobriner (sitting pro tem).
Justices Richardson and Kaus each wrote separately, concurring in the exclusion of the witness' testimony on the facts of the case, but disagreeing with the majority's per se rule against post-hypnosis testimony.245

Justice Kaus wrote the fuller opinion. He stressed "the varied contexts in which hypnosis may take place," such as "when a victim or a witness to a crime is hypnotized shortly after the offense to aid a police artist [to] compose a sketch of the suspect,"246 and protested that the testimony of that victim or witness would be totally excluded by the majority's rule.247 Justice Kaus also criticized the majority's decision to make its ruling retroactive,248 thus "rendering incompetent virtually all witnesses who have been hypnotized at any time in the past without regard to the circumstances of the hypnosis."249

The majority did not respond to Justice Kaus' point about retroactivity, but nearly three months later it modified its opinion to leave the question open.250 The modification also dealt with another problem not considered in the original majority opinion, though mentioned by Justice Kaus:251 What happens when the defendant has been hypnotized and wants to testify? The modified opinion stated that "the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf."252 Justice Kaus responded that this exception was unsupportable if the majority opinion was correct, since "there can be no right to offer testimony which suffers from all of the potential vices which have triggered the majority's total ban on the testimony of hypnotized witnesses."253

While the per se rule of Shirley seems unduly broad,254 the case also raises questions about the court's decisionmaking process. It is un-

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244. 31 Cal. 3d at 66, 641 P.2d at 804, 181 Cal. Rptr. at 273.
245. Id. at 72, 641 P.2d at 808, 181 Cal. Rptr. at 276 (Richardson, J., concurring in the judgment); id. at 74, 641 P.2d at 809, 181 Cal. Rptr. at 277 (Kaus, J., concurring and dissenting).
246. Id. at 74, 75, 641 P.2d at 809, 810, 181 Cal. Rptr. at 277, 278 (Kaus, J., concurring and dissenting).
247. Id. at 75, 641 P.2d at 810, 181 Cal. Rptr. at 278.
248. The majority stated that the ruling would apply to all cases not yet final as of the date of this decision. 641 P.2d at 804 n.53.
249. 641 P.2d at 811 (Kaus, J., concurring and dissenting).
250. 31 Cal. 3d at 67 n.53, 181 Cal. Rptr. at 273 n.53: "The principles stated in this opinion will govern the admissibility of the testimony of any witness who submits to pretrial hypnosis after the date of this decision. We take no position at this time as to the application of those principles to witnesses hypnotized before the date of this decision."
251. 641 P.2d at 811 (Kaus, J., concurring and dissenting).
252. 31 Cal. 3d at 67, 181 Cal. Rptr. at 273.
253. Id. at 77, 181 Cal. Rptr. at 280 (Kaus, J., concurring and dissenting).
fortunate that the court's original opinion did not consider and discuss the problem of post-hypnosis testimony by the defendant. Had the court initially focused on the double standard its decision would create—barring post-hypnosis testimony by the victim and all other witnesses, but permitting it by the defendant—the court might have reached a different decision. Further, it seems poor judicial practice to lay down a rule going so far beyond the facts of the chosen case. The court should either have decided the case more narrowly, or chosen a post-hypnosis case presenting closer facts than those of Shirley, where all agreed that the testimony should not have been admitted. A rule to govern a range of cases should be developed and justified in the most difficult case, not in the easiest.

F. Reapportionment—Assembly v. Deukmejian

The judicial neutrality of the court's majority was tested in the decade's reapportionment case, Assembly v. Deukmejian. The 1981 legislature (controlled by Democrats) had passed, and the governor (a Democrat) had signed, statutes redistricting the state's congressional, senate, and assembly districts to conform to the 1980 census. The Republicans then filed referenda to be voted on in the June 1982 election, challenging each of these statutes. The court held that the filing of a valid referendum stays implementation of the challenged statute until after the vote of the electorate. It also held that the referenda were valid. The court thus faced the question of what districts should be used temporarily for the primary and general elections in 1982: the old scheme based on the 1970 census, or the legislature's new plan which the referenda had stayed. The court unanimously held that the new plan should be used for the congressional elections, in part because of the need to accommodate two new congressional seats. It split 4 to 3 over the state legislative districts. In an opinion by Chief Justice Bird, the majority held that the legislature's 1981 plan should be used. Justice Richardson dissented, joined by Justices Mosk and Kaus, each of whom also dissented separately.

The court had faced a similar problem a decade before, when the Democratic legislature had adopted a new redistricting plan but the Republican governor had vetoed it. The court then had unanimously held (Reinecke I) that the old legislative districts should be used for

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256. Id. at 654-57, 639 P.2d at 943-48, 180 Cal. Rptr. at 301-06.
257. Id. at 646-54, 639 P.2d at 943-48, 180 Cal. Rptr. at 301-06.
258. She was joined by Justices Newman and Broussard and pro tem Justice Tamura.
two more years. In Assembly v. Deukmejian, Chief Justice Bird distinguished Reinecke I on the basis that the redistricting bill there had been vetoed by the governor, whereas here the statutes had been signed by the governor and had “never been rejected by any governmental entity.”

In considering which of the two alternatives would cause less disruption of the state’s electoral and political processes, Chief Justice Bird stated:

The referenda may be voted up or down. Both possibilities must be considered in fashioning a temporary remedy that will do least violence to the orderly conduct of the 1982 elections, regardless of the ultimate result of the referenda.

She proceeded to consider the possibility that the redistricting statutes would be sustained by the voters:

If the reapportionment statutes are ratified by the voters at the primary, use of them now will cause no disruption at all. The 1982 elections will proceed according to the new plan—a statute approved by the Legislature, the Governor, and the people of the state.

Chief Justice Bird then responded to the argument “that use of the old legislative districts would cause less disruption.”

That conclusion, however, rests on an implicit and impermissible assumption—that the referenda will result in the rejection of the Legislature’s reapportionment statutes. That is an assumption this court cannot legally make. To do so would thrust the court into the political realm, prejudging an issue which is exclusively for the voters of the state to decide.

The court thus did not consider “[b]oth possibilities.” It considered the possibility that the redistricting statutes would be sustained by the voters, but not the possibility that they would be rejected. The court thereby avoided considering what Justice Richardson pointed out: that if the statutes were rejected, the result of the majority’s decision would be to switch from the preexisting districts to the 1981 plan for the 1982 elections alone, and then “to a third plan for the 1984 elections. Thus, each voter will have voted, and candidates will have run, in three differently constituted districts in the space of four years and one day. That is real disruption.”

It is hard not to agree with the dissenters in Assembly v.

260. 30 Cal. 3d at 671, 639 P.2d at 959, 180 Cal. Rptr. at 317.
261. Id. at 668, 639 P.2d at 957, 180 Cal. Rptr. at 315 (emphasis in original).
262. Id. (emphasis in original).
263. Id.
264. Id.
265. Id. at 692, 639 P.2d at 972, 180 Cal. Rptr. at 330 (Richardson, J., concurring and dissenting) (emphasis in original).
Deukmejian. Justice Kaus in his one-paragraph dissent captured the two considerations that should have governed: "First, simple adherence to precedent should make us follow Reinecke I. Second, it seems clear to me that the course chosen by the majority involves greater judicial intrusion into the legislative process laid out by the California Constitution." The majority's decision in Assembly v. Deukmejian seems a regrettable departure from the judicial neutrality one expects of the court.

G. The Chief Justice's Dissents

A description of the majority position is not complete without noting the frequent role of Chief Justice Bird as a dissenter. Her dissents may be viewed as an extension of the majority's philosophy, carrying it beyond the point where three other justices will follow. Often no other justice will follow: The chief justice was alone in seven of her fifteen dissents. Whether or not they deserved to command a majority, the chief justice's dissents sometimes had notable value, advancing in a resolute fashion unbending but tenable positions.

For example, the chief justice dissented in American Civil Liberties Union Foundation v. Deukmejian, a case under the California Public Records Act. She alone objected to the court's compromise ruling insofar as it denied disclosure of certain Law Enforcement Intelligence Unit (LEIU) cards on the ground of the expense and inconvenience of separating the exempt and nonexempt material on the cards. In People v. Mayberry, where the court held that the use of dogs to sniff baggage at an airport did not constitute a "search" invoking constitutional limitations, the chief justice alone presented the respectable op-

266. Id. at 694, 639 P.2d at 973-74, 180 Cal. Rptr. at 331 (Kaus, J., concurring and dissenting). Justice Kaus added in a footnote: "I pity the 1992 Supreme Court which will have to break the tie between Reinecke I and Assembly v. Deukmejian." Id. at 694 n.1, 639 P.2d at 973 n.1, 180 Cal. Rptr. at 331 n.1.

267. A comparable departure was apparent in the attorneys' fees case of Serrano v. Unruh, 32 Cal. 3d 621, 642, 652 P.2d 985, 999, 186 Cal. Rptr. 754, 768 (1982), where the court stated: "If on occasion to compensate legal services organizations at prevailing rates seems to give them a 'windfall,' it is one that accrues to the benefit of public-interest litigation. It thus warrants less judicial scrutiny than would a comparable 'windfall' to defendants."

268. See Table I, supra p. 1138. "Alone" means that no other justice either joined her opinion or wrote a separate dissent taking a similar position on at least one issue.

269. 32 Cal. 3d 440, 651 P.2d 822, 186 Cal. Rptr. 235 (1982).


271. 32 Cal. 3d at 455, 651 P.2d at 831, 186 Cal. Rptr. at 244 (Bird, C.J., concurring and dissenting). As is not infrequently the case, the chief justice's rhetoric seemed extreme. She called the majority's conclusion "patently absurd," id. at 463, 651 P.2d at 836, 186 Cal. Rptr. at 249, and spoke of "the roughshod manner in which the majority ride over the commands of the Legislature," Id. at 467, 651 P.2d at 838, 186 Cal. Rptr. at 251.

posing view. The chief justice again showed her fortitude in *People v. Romero*. There the defendant had been charged with two counts of burglary, the jury had found him guilty on count one but not guilty on count two, and later six jurors (including the foreman) submitted affidavits stating that the jury had unanimously intended to acquit on count one and convict on count two. The court, in an uneasy opinion by Justice Mosk, refused to let the guilty verdict on count one be impeached, in part because “[t]here was no miscarriage of justice.” The chief justice alone dissented, with a sound, if rigid, legal argument.

Among her nonsolitary dissents, the chief justice made useful contributions in *Odle v. Superior Court*, where the majority tightened the standards for granting a change of venue; and in *Kilgore v. Younger*, where the chief justice argued that the state attorney general had lost his absolute privilege against liability for defamation because he was violating certain nondisclosure laws and therefore not acting in “the proper discharge of an official duty.” Since the chief justice’s dissents often make useful arguments, one wonders whether they might not be more effective, both with her fellow justices and with the court’s audience, if their deep feeling were not so often reflected in excessive rhetoric.

III

THE RICHARDSON POSITION

Opposed to the position of the court’s majority, as a mirror image, is the position of Justice Richardson. Although he wrote a full share of majority opinions during 1982, and although he had a special role in

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273. *Id.* at 343, 644 P.2d at 815, 182 Cal. Rptr. at 622 (Bird, C.J., dissenting).
274. 31 Cal. 3d 685, 646 P.2d 824, 183 Cal. Rptr. 663 (1982).
275. *Id.* at 696, 646 P.2d at 831, 183 Cal. Rptr. at 669.
276. But again the rhetoric was unfortunate, as the chief justice declared, “[a] greater miscarriage of justice is scarcely imaginable,” *id.* at 700, 646 P.2d at 834, 183 Cal. Rptr. at 672 (Bird, C.J., dissenting), and suggested that since the majority (in her view) thought the two counts were fungible, “[p]erhaps the majority subscribe to the idea that if you’ve seen one redwood you’ve seen them all.” *Id.*
278. 30 Cal. 3d 770, 640 P.2d 793, 180 Cal. Rptr. 657 (1982).
279. *Id.* at 783, 640 P.2d at 800, 180 Cal. Rptr. at 664 (Bird, C.J., concurring and dissenting).
281. *See Table I, supra* p. 1138.
writing 4-to-3 opinions,\textsuperscript{282} it was Justice Richardson's unremitting dissents that marked his position on the court. He dissented in thirty-six cases, more than twice the number of any of his colleagues and more than a quarter of all the cases that the court decided with opinion.\textsuperscript{283} Like the chief justice, he was alone in almost one-half of his dissents (16 of the 36).\textsuperscript{284}

The views of Justice Richardson collide consistently with those of Chief Justice Bird and the court's majority.\textsuperscript{285} Where the majority inclines toward the expansion of individual rights against government and business enterprises, he tends to sympathize with the position of those entities. Where the majority is less solicitous of private property rights, he is more so. Where the majority tends to be creative in its interpretation of statutes and constitutional provisions, Justice Richardson tends to be restrained, championing a strict deference to the product of the legislature or the electorate. Where the majority worries particularly about the rights of criminal defendants and civil plaintiffs, he worries particularly about the rights of the prosecution and civil defendants. And just as the majority sometimes lets its policy preferences show through the judicial fabric, so does Justice Richardson—his preferences, not surprisingly, being the political opposite of the majority's.

In manner and style, the Richardson opinions are on the whole thorough, well-argued, and professional. He misses little, analyzes issues thoroughly, and usually respects the limits of the legal materials. His opinions are written in a solid, workmanlike prose that tends to be too emphatic, and sometimes takes on a moralistic or partisan tinge, but generally is clear, simple, and effective. With occasional exceptions, his votes are consistent and explained.

\textbf{A. Richardson Dissents}

A number of Justice Richardson's dissents have already been noted. In the \textit{Marina Point}\textsuperscript{286} and \textit{Commodore}\textsuperscript{287} cases, he opposed the court's expansive interpretations of antidiscrimination statutes. In \textit{Ven-
ice Peninsula, he thought the court was interpreting the "public trust" doctrine too broadly, adding, "I confess to a growing unease about what I view as an accelerating erosion of private property rights of California citizens." In Jerald C., Justice Richardson would have upheld the law requiring parents to pay for the support of incarcerated minors. In the Farrell case on Proposition 13, where for once it was the majority that favored "strict construction," Justice Richardson objected to this deviation from normal principles of constitutional interpretation.

In criminal cases, Justice Richardson dissented consistently. He voted to affirm the death penalty in six of the seven cases where the court reversed it. Defending the constitutionality of the "Briggs Instruction" in People v. Ramos, Justice Richardson objected that the court's holding would require the reversal of "scores" of death sentences and argued that "we should resolve all doubts in favor of the initiative process if we can reasonably do so." In Engert, he dissented from the court's invalidation of the "especially heinous" special

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289. Id. at 304, 315, 644 P.2d at 801, 809, 182 Cal. Rptr. at 608, 616 (Richardson, J., dissenting). This view may seem inconsistent with Justice Richardson's opinion for the court in the Oakland Raiders case, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982), discussed at supra notes 179-92 and accompanying text. Of course, his position in Venice Peninsula was that if the government wants to exercise dominion over the property, "let it frankly, fairly and openly exercise its eminent domain power," 31 Cal. 3d at 315, 644 P.2d at 809, 182 Cal. Rptr. at 616—the power upheld in Raiders. But at least the tone of the Raiders opinion—especially as originally issued, No. S.F. 24363 (Cal. Sup. Ct. June 21, 1982), modified, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982); see supra note 187—was hard to reconcile with the Richardson regard for property rights.
292. See supra text accompanying notes 216-21.
293. See also Los Angeles County Transp. Comm'n v. Richmond, 31 Cal. 3d 197, 210, 643 P.2d 941, 948-49, 182 Cal. Rptr. 324, 331-32 (Richardson, J., dissenting).
296. Id. at 602, 639 P.2d at 937, 180 Cal. Rptr. at 295 (Richardson, J., dissenting) (emphasis in original).
circumstance. In yet another capital case, *Keenan v. Superior Court*, he disagreed with the majority’s view that the defendant had shown a need for a second court-appointed attorney at public expense. In several noncapital cases where the majority reversed convictions, Justice Richardson either denied that there was error or found it harmless. Other decisions, however, showed that he was not impervious to constitutional or procedural claims.

Justice Richardson’s concern for governmental interests in the criminal justice area was also seen in his dissents in three “civil liberties” cases. In *Bailey v. Loggins*, he thought that “prison authorities should have broad discretion” to regulate the content of a prison newspaper. In *De Lancie v. Superior Court*, where the court barred the monitoring of jail conversations unless done for security purposes, Justice Richardson dissented on the rather dogmatic ground that “as a matter of law” and of “common sense,” such monitoring was necessarily done for security purposes. And in *American Civil Liberties Union Foundation v. Deukmejian*, where the court ordered disclosure under the Public Records Act of some but not all the materials sought by the plaintiffs concerning criminal intelligence operations of the California Department of Justice, Justice Richardson dissented on the ground that all the materials sought were “absolutely exempt” from disclosure.
under the Act.306

In civil cases Justice Richardson counter-balanced the majority’s support for plaintiffs’ interests. In *Peterson*307 he dissented alone, but persuasively, from the retroactive application of the *Taylor* decision allowing punitive damages for drunken driving.308 He also dissented in two cases involving the role of juries. In *Juarez v. Superior Court,*309 the court held that in a personal injury case, where the votes of only nine jurors are necessary for a verdict, special verdicts apportioning damages among the negligent parties under the rule of comparative negligence “are valid so long as they command the votes of any nine jurors,” including jurors who voted against the negligence findings.310 But the court said it remains the law that the same nine jurors must agree both “that a party is negligent and that such negligence is the proximate cause of the other party’s injuries.”311 As Justice Richardson pointed out, the majority opinion, by Justice Mosk, offered no rationale for departing from the “consistency” requirement on the apportionment issue but not on the issues of negligence and proximate cause.312 In *Hasson v. Ford Motor Co.,*313 the court upheld an award of compensatory and punitive damages totalling more than $9 million in a products liability case against Ford despite evidence, which the court accepted as true, that one juror was reading a novel and three or four others were doing crossword puzzles for extended periods while testimony was being presented at the trial. The majority, through Justice Mosk, conceded that this was juror “misconduct,” but found that Ford had not shown prejudice. Justice Richardson argued that, given the misconduct, the plaintiff had the burden of disproving prejudice.314

In accord with his general strictness, Justice Richardson takes a rather stern stance in matters of professional ethics. This is one view he
shares with Chief Justice Bird. In two disciplinary cases where the court ordered a lawyer's suspension, Justice Richardson argued in dissent for disbarment, joined in each case by Chief Justice Bird and one other colleague.  

Justice Richardson's traditional view of the legal profession also led him to dissent in the difficult case of Maxwell v. Superior Court. The court held there that a defendant charged with ten counts of murder, and facing the death penalty, could keep his retained counsel with whom he had signed a fee contract giving his counsel the right to exploit the defendant's "life story" and waiving any conflict of interest. While the justices took varying positions, Justice Richardson alone opposed any toleration of such a contract. He stated: "Defendant faces the most serious of criminal charges with the gravest of possible consequences. He requires counsel, not only of unquestioned professional competence . . . but also counsel whose allegiance to him is total and unalloyed, free of the subtle, opposing magnetic pull of self-interest or adverse pecuniary advantage."  

Sometimes Justice Richardson gives undue rein to his policy predilections. This happened in In re Cummings, where he wrote the lead opinion for a decision holding that prison officials were not required to allow inmates overnight visits with persons not in their "immediate family." Justice Richardson opined that "such a program would represent both social folly and fiscal extravagance." In People v. Barrick, while dissenting from the majority's refusal to let the prosecutor impeach the defendant by using a prior felony conviction in "sanitized" form, Justice Richardson offered the view that Proposition 8 would change that result, a gratuitous reference to an issue that may well come before the court. And in the politically charged case of Brown v. Superior Court, where the court on November 1, 1982, upheld the 1981 legislation creating eighteen new judgeships on the court of appeal, and on November 18 made its decision "final forthwith," Justice Richardson's dissents on both occasions had an undue political

316. 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982).  
317. Id. at 627, 639 P.2d at 261, 180 Cal. Rptr. at 190 (Richardson, J., dissenting).  
318. 30 Cal. 3d 870, 640 P.2d 1101, 180 Cal. Rptr. 826 (1982).  
319. Id. at 874, 640 P.2d at 1103, 180 Cal. Rptr. at 828 (lead opinion by Richardson, J.).  
321. Id. at 136, 654 P.2d at 1256, 187 Cal. Rptr. at 729 (Richardson, J., dissenting). Justice Kaus agreed with Justice Richardson on the merits but disassociated himself from the Proposition 8 remark. Id. at 137, 654 P.2d at 1257, 187 Cal. Rptr. at 730 (Kaus, J., dissenting).  
B. Justice Richardson for the Majority in 4-to-3 Decisions

Although characteristically a dissenter, Justice Richardson had a decisive role in some close cases. On the relatively few (sixteen) occasions when the court split 4 to 3, it was most often (four times) Justice Richardson who wrote the prevailing opinion.324

By far the most important of Justice Richardson’s 4-to-3 opinions was Brosnahan v. Brown.325 The court there upheld Proposition 8, the “Victims’ Bill of Rights” initiative adopted at the June 1982 election, against the claim that it violated the constitutional provision that “[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”326

323. In his dissent on the merits, Justice Richardson—in contrast to his usual stance of judicial restraint—argued that the legislation was unconstitutional on technical and flimsy grounds based on concern for “sound public policy” and adoption of “a prophylactic rule.” Id. at 254-255, 655 P.2d at 1268, 188 Cal. Rptr. at 433 (Richardson, J., dissenting). In his dissent from the majority’s making the decision “final forthwith” (in time for the outgoing governor to appoint the new judges), Justice Richardson inaccurately stated that the court had taken such expediting action in the past “only rarely and under exigent circumstances.” Id. at 259, 655 P.2d at 1271, 188 Cal. Rptr. at 436. See id. at 256, 260, 655 P.2d at 1269, 1272, 188 Cal. Rptr. at 434, 437 (Justice Reynoso’s response, filed January 12, 1983, to Justice Richardson’s November 18, 1982 dissent). See also Barnett, Brown v. Superior Court: New Charges of Politics at the California Supreme Court, L.A. Daily J., Dec. 20, 1982, at 4, col. 3.

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325. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982). The other three were People v. Snyder, 32 Cal. 3d 590, 652 P.2d 42, 186 Cal. Rptr. 485 (1982) (reasonable belief that prior conviction was a misdemeanor is no defense to charge of possession of a concealable firearm by a convicted felon), Estate of Black, 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982) (upholding holographic will), and Kilgore v. Younger, 30 Cal. 3d 770, 778-83, 640 P.2d 793, 797-800, 180 Cal. Rptr. 657, 661-64 (1982) (state attorney general protected from defamation liability by absolute privilege provided by Civil Code § 47 for statement made “in the proper discharge of an official duty,” CAL. CIV. CODE § 47 (West 1982), notwithstanding claim that his action was not proper because he was releasing information in violation of nondisclosure statutes).

326. CAL. CONST. art. II, § 8(d). Joining the Richardson opinion were Justices Newman, Kaus, and Reynoso. Chief Justice Bird and Justice Mosk dissented separately, the latter joined by Justice Broussard. Earlier in the year, in Brosnahan v. Eu, 31 Cal. 3d 1, 641 P.2d 200, 181 Cal. Rptr. 100 (1982), also a 4-to-3 decision, the court had allowed Proposition 8 to be placed on the ballot, reserving constitutional challenges for after the election if it should pass. The majority
Justice Richardson prefaced and concluded his opinion with bows to the people's "precious" power of initiative.\textsuperscript{327} The opinion was essentially an interpretation of precedent. Past decisions had reached increasingly liberal results under the "single-subject" rule, but had debated whether to apply a "reasonably germane" standard or a stricter "functional relationship" test which would require that the provisions of a measure be "interdependent."\textsuperscript{328} In the 1978 \textit{Amador Valley} case\textsuperscript{329} upholding Proposition 13, the court had invoked the reasonably germane test, had "note[d] also the existence" of the functional relationship test, and had held that the provisions of Proposition 13 "satisfy either standard."\textsuperscript{330} A year later, in \textit{Fair Political Practices Commission v. Superior Court (FPPC)},\textsuperscript{331} upholding the Political Reform Act, the court's lead opinion rejected other tests and applied only the reasonably germane test.\textsuperscript{332} In \textit{Brosnahan}, the court rejected the functional relationship test and held that an initiative's provisions need only be reasonably germane to a single subject.\textsuperscript{333} The court further held that the provisions of Proposition 8—including "truth in evidence," restrictions on bail, abolition of the diminished capacity de-

\begin{footnotesize}

\textsuperscript{327} 32 Cal. 3d at 241, 262, 651 P.2d at 277, 289, 186 Cal. Rptr. at 33, 45. The usefulness of this principle in \textit{Brosnahan} might seem questionable, since the single-subject rule was itself adopted by initiative. \textit{See} Brosnahan v. Eu, 31 Cal. 3d at 7, 641 P.2d at 203, 181 Cal. Rptr. at 103 (Mosk, J., concurring and dissenting).

\textsuperscript{328} The reasonably germane standard had been applied in Perry v. Jordan, 34 Cal. 2d 87, 92-94, 207 P.2d 47, 50 (1949), and Evans v. Superior Court, 215 Cal. 58, 63, 8 P.2d 467, 469-70 (1932). The functional relationship test was proposed in the dissenting opinion of Justice Manuel in Schmitz v. Younger, 21 Cal. 3d 90, 100, 577 P.2d 652, 657-58, 145 Cal. Rptr. 517, 522-23 (1978).


\textsuperscript{330} \textit{Id.} at 230, 583 P.2d at 1290, 149 Cal. Rptr. at 248.


\textsuperscript{332} \textit{Id.} at 40-41, 599 P.2d at 49-50, 157 Cal. Rptr. at 858-59. The lead opinion was by Justice Clark, joined by Justices Richardson and Mosk. In a concurring opinion, Justice Tobriner embraced the functional relationship test but thought the Political Reform Act met that test. \textit{Id.} at 50, 599 P.2d at 55-56, 157 Cal. Rptr. at 864-65 (Tobriner, J., concurring). Justice Manuel, the originator of the functional relationship test, dissented on the ground that the Act did not meet it. \textit{Id.} at 55-57, 599 P.2d at 63-65, 157 Cal. Rptr. at 872-74 (Manuel, J., dissenting). The other two members of the court, Chief Justice Bird and Justice Newman, did not indicate the theory on which they voted to uphold the Political Reform Act under the single-subject rule. \textit{See id.} at 58-64, 599 P.2d at 58-62, 157 Cal. Rptr. at 867-71 (Bird, C.J., dissenting in part); \textit{id.} at 50, 599 P.2d at 56, 157 Cal. Rptr. at 865 (Newman, J., concurring and dissenting).

\textsuperscript{333} 32 Cal. 3d at 248-49, 651 P.2d at 281-82, 186 Cal. Rptr. at 37-38.

\end{footnotesize}
fense, restrictions on plea bargaining, and a right to "safe schools"—were all reasonably germane to one subject, namely "promoting the rights of actual or potential crime victims."\(^3\)

In a lengthy dissent, the chief justice argued that Amador Valley had adopted the functional relationship test and that FPPC had not abandoned it.\(^3\) She went on to argue, not without force, that Proposition 8 was more "multifarious" than any initiative previously upheld by the court and violated the single-subject rule even under the reasonably germane test.\(^3\) Justice Mosk, in his dissent, argued that Proposition 8 violated the single-subject rule under either the reasonably germane or the functional relationship test, and viewed the latter test as having been "endorsed by this court in Amador Valley."\(^3\)

This debate involved overstatement on both sides,\(^3\) but Justice Richardson's rejection of the functional relationship test was not unfaithful to precedent. That test had been no more than an alternative holding in Amador Valley,\(^3\) and it fell back from even that status when only two justices in FPPC invoked it. If the functional relationship test is the best approach to the single-subject problem and should have been applied to Proposition 8, then the fatal mistake was made in FPPC in failing to apply that test to the Political Reform Act.\(^3\)

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\(^{334}\) See id. at 242-45, 651 P.2d at 277-79, 186 Cal. Rptr. at 33-35.

\(^{335}\) Id. at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36.

\(^{336}\) Id. at 269-70, 651 P.2d at 294-95, 186 Cal. Rptr. at 50-51 (Bird, C.J., dissenting). She argued that FPPC had not abandoned the test because, among other reasons, "only three justices joined in the lead opinion" in that case. Id. at 270, 651 P.2d at 294-95, 186 Cal. Rptr. at 51. Compare Justice Mosk's opinion for the court in Farrell, joined by Chief Justice Bird, which relied on what a three-justice lead opinion had "held" in the Richmond case. 32 Cal. 3d at 52-53, 648 P.2d at 937, 184 Cal. Rptr. at 715 (citing Los Angeles County Transp. Comm'n v. Richmond, 31 Cal. 3d 197, 203-05, 643 P.2d 941, 944-45, 182 Cal. Rptr. 324, 327-28 (1982) (Mosk, J.). See supra notes 218-21 and accompanying text.

\(^{337}\) 32 Cal. 3d at 277-78, 651 P.2d at 299-300, 186 Cal. Rptr. at 55-56 (Bird, C.J., dissenting).

\(^{338}\) Id. at 299, 651 P.2d at 313, 186 Cal. Rptr. at 69 (Mosk, J., dissenting). Justice Mosk did not cite FPPC, in which he joined the lead opinion by Justice Clark which rejected other tests and applied only the reasonably germane test. 25 Cal. 3d 33, 40-41, 599 P.2d 46, 49-50, 157 Cal. Rptr. 855, 858-59 (1979), cert. denied, 444 U.S. 1049 (1980).

\(^{339}\) The court's statement in Amador Valley that the provisions of Proposition 13 "satisfy either standard," 22 Cal. 3d at 230, 583 P.2d at 1290, 149 Cal. Rptr. at 248; see supra text accompanying note 330, seems most accurately viewed as an alternative holding that the functional relationship test had to be met. Justice Richardson said in Brosnahan that while the court in Amador Valley had acknowledged that Proposition 13 met the functional relationship test, "we did not suggest that any such relationship was essential to the measure's validity." 32 Cal. 3d at 249, 651 P.2d at 281, 186 Cal. Rptr. at 37 (emphasis in original). This claim went too far; the court would hardly have invoked and applied the functional relationship test in Amador Valley if it did not mean at least to "suggest" that the test had to be met. On the other hand, the chief justice was also overstating when she claimed that Amador Valley "held that compliance with the single subject rule requires" that the functional relationship test be met. Id. at 269, 651 P.2d at 294, 186 Cal. Rptr. at 50 (Bird, C.J., dissenting).

\(^{340}\) See supra note 339.

\(^{341}\) Both Chief Justice Bird and Justice Mosk, who supported the functional relationship test
Given *FPPC*, the court in *Brosnahan* was making no turnabout in declining to test Proposition 8 by the functional relationship standard.

Under the reasonably germane test, while it would have been reasonable enough for the court to draw a line between the Political Reform Act considered in *FPPC* and the more multifarious Proposition 8, it was defensible for the court not to try to stop on the slippery slope on which it found itself. Still, not much is left of the single-subject rule after *Brosnahan*. The best hope for its resuscitation may lie in a greater readiness of the court to conduct pre-election review of compliance with that rule.\(^3\) This would squarely respect the constitutional language\(^3\) and would also take more realistic account of the political environment in which the court decides these questions. The court is in a better position to weigh the merits of competing approaches such as the reasonably germane and functional relationship tests, and to apply the appropriate legal rule to an initiative freely and dispassionately, when it is not faced with the prospect of invalidating a measure the electorate has already approved.

### IV

**The Kaus Position**

The third salient position on the court in 1982 was that of Justice Kaus. He too was primarily a dissenter, but much less consistently than Justice Richardson.\(^3\) Ideologically, Justice Kaus stands between Justice Richardson and the majority, but his position tends to be more pragmatic, fact conscious, and dispassionate than either of theirs. In the two cases involving the two-thirds vote requirement of Proposition 13, for example, Justice Kaus was the only justice to conclude that the requirement applied in one case but not in the other.\(^3\)

The centrist position of Justice Kaus may contribute, along with the generally high quality of his opinions, to the high degree of "followership" he seems to enjoy on the court. Of the sixteen opinions he wrote for the court in 1982, ten were unanimous, the highest ratio

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\(^3\) CAL. CONST. art. II, § 8(d), quoted at supra text accompanying note 326.

\(^3\) See Table I, supra p. 1138.

The Kaus dissents also drew a high following, albeit mainly by Justice Richardson. Justice Kaus was alone in only two of his sixteen dissents, and was joined or supported by Justice Richardson in eleven.  

A. Justice Kaus Dissenting and Concurring

It is in his dissenting and concurring opinions that Justice Kaus' voice is most distinctive. In contrast to the lengthy dissents sometimes filed by other justices, Justice Kaus' opinions are remarkably concise, often no more than a page long. They are lucid and their tone is low key, down-to-earth, often witty and wry, again a contrast to the high-pitched rhetoric that sometimes emanates from other chambers.

Justice Kaus' critique of the majority position has several strands. One is a skepticism toward legal theories or pronouncements that are novel, far-reaching, or more than what is necessary to decide the case. This debunking attitude was seen in the Kaus dissents already noted in Sims (administrative collateral estoppel in a criminal prosecution), Bozek (malicious prosecution action by a city), and Shirley (post-hypnosis testimony). It was seen also in the prison newspaper case, Bailey v. Loggins. In his dissent there, Justice Kaus argued that if the majority's decision had any practical effect, it would be likely to

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<td>The Court</td>
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a. "Unanimous" means that all the sitting justices joined the opinion of the court.
b. As in Table I, supra p. 1138, "lead" opinions that announce the judgment of the court are counted as opinions of the court.

347. See Table I, supra p. 1138; see also supra note 268. That is, Justice Richardson either joined the Kaus dissent or wrote separately taking a similar position on at least one issue. "Concurring and dissenting" opinions are counted as dissents.

348. 32 Cal. 3d 468, 651 P.2d 321, 186 Cal. Rptr. 77 (1982), discussed at supra notes 124-40 and accompanying text.

349. 31 Cal. 3d 527, 645 P.2d 137, 183 Cal. Rptr. 86 (1982), vacated, 103 S. Ct. 712, reiterated mem., 33 Cal. 3d 727, 661 P.2d 1072, 190 Cal. Rptr. 918 (1983), discussed at supra notes 160-71 and accompanying text.


351. 32 Cal. 3d 907, 654 P.2d 758, 187 Cal. Rptr. 575 (1982), discussed at supra notes 149-50 and accompanying text.
undercut the first amendment principles on which the majority relied.\textsuperscript{352} Justice Kaus was also skeptical of the new constitutional departure in the \textit{Fullerton} case,\textsuperscript{353} where the majority applied equal protection and strict scrutiny to decisions denying the vote to affected neighboring areas in municipal reorganization elections.

Another strand in the Kaus stance is its moderateness. This often places him on a middle ground in a particular case between the majority and Justice Richardson. Thus, in \textit{In re Jerald C.},\textsuperscript{354} where the majority struck down entirely the requirement of parental reimbursement for the support of an incarcerated minor, and where Justice Richardson would have upheld it entirely, Justice Kaus would have put the burden on the county to show that its charges were limited to basic support costs.\textsuperscript{355} In the \textit{Venice Peninsula} case, Justice Kaus did not disparage the majority's policy concern about a "Mason-Dixon coastline," but thought it was "probably overstated" and that in any event it could not override governing federal law.\textsuperscript{356}

Many of Justice Kaus' dissents have a surgical quality, designed to excise errors in the majority's opinions. He seems unwilling to let anything get by. In \textit{Baggett v. Gates},\textsuperscript{357} while agreeing with the principal holding concerning the Public Safety Officers' Procedural Bill of Rights Act,\textsuperscript{358} Justice Kaus dissented from the gratuitous ruling that the trial court had abused its discretion in declining to award attorneys' fees.\textsuperscript{359}

\textsuperscript{352} The department is under no compulsion to permit the publication of newspapers within our prisons. It has, however, made a stab in that direction but, for its pains, has been subjected to a rolling barrage of First Amendment artillery. If the department can live with the guidelines pronunciated in this opinion... no harm will be done. On the other hand, if it finds the guidelines intolerable, it will simply have to discontinue a worthwhile educational and vocational training program.


\textsuperscript{354} 33 Cal. 3d 1, 654 P.2d 745, 187 Cal. Rptr. 562 (1982), officially depublished pursuant to CAL. CT. R. 976(d) and reh'g granted, No. S.F. 24392 (Cal. Sup. Ct. Mar. 10, 1983), discussed at supra notes 156-59, 290 and accompanying text.


\textsuperscript{356} 32 Cal. 3d at 128, 649 P.2d 874, 185 Cal. Rptr. 232 (1982).

\textsuperscript{357} CAL. GOV'T CODE \S\S 3300-3311 (West 1980). Justice Richardson dissented—rather persuasively—from the holding that the Act applies to chartered cities. 32 Cal. 3d at 146, 649 P.2d at 885, 185 Cal. Rptr. at 243 (Richardson, J., dissenting).

\textsuperscript{358} \textit{Compare} 32 Cal. 3d at 142-43, 649 P.2d at 881-83, 185 Cal. Rptr. at 239-41 (Bird, C.J.,
In People v. Pic'l, where the court upheld the prosecution of an attorney on counts of bribing a prospective complaining witness in a criminal prosecution, Justice Kaus dissented (joined by Chief Justice Bird and Justice Broussard) from the court’s unabashed revision of the Penal Code to sustain a count charging compounding a felony.

Justice Kaus’ concurring opinions exhibit, among other things, an unusual readiness to assume personal responsibility for a court decision and to explain why he came out that way. In People v. Hogan, where the court reversed a death penalty conviction, Justice Kaus explained why his own listening to the taped confession convinced him it was involuntary. In People v. Easley, the case in which the court affirmed a death penalty, Justice Kaus explained his own position on the basic constitutional question. And in In re Stevens, where the court censured a judge for repeatedly making racial and ethnic remarks, and Justice Mosk dissented on first amendment grounds, Justice Kaus answered the dissent in a withering opinion joined by Chief Justice Bird and Justices Newman, Broussard, and Reynoso.

B. Justice Kaus for the Majority

Justice Kaus’ opinions for the court tend to be at once knowledgeable and readable, even when dealing with rather technical subjects.
His preference for narrow, fact-conscious decisions was seen in *Agricultural Labor Relations Board v. California Coastal Farms, Inc.* a farmworkers strike access case, and in *Odle v. Superior Court* declining to order a change of venue in a capital prosecution.

Justice Kaus seems especially knowing about the ways of lawyers. In *Hartman v. Santamarina*, he wrote for a unanimous court in upholding the hoary practice of impaneling and then discharging a jury to avoid mandatory dismissal of a case not brought to trial within five years. On the other hand, in *Carroll v. Abbott Laboratories, Inc.*, he wrote for a six-justice majority holding (over Chief Justice Bird's dissent) that the "positive misconduct" by counsel which is severe enough to relieve the counsel's client of a judgment under section 473 of the Code of Civil Procedure must involve a "de facto severance of the attorney-client relationship . . . ."  

Finally, the centrist approach of Justice Kaus was seen in his lead opinion in the most notable common law case of the year, the "wrongful life" case of *Turpin v. Sortini*. The court there made new law in a limited, compromise way. It became the first state supreme court to allow recovery for "wrongful life" by a child afflicted with a hereditary ailment who alleges that, but for the defendant physician's negligence in diagnosing the ailment in the child's sibling, the child would not have been born. But the decision allowed recovery only of special damages, consisting of the expenses associated with the child's ailment. The court denied recovery of general damages, with Justice

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368. 31 Cal. 3d 469, 645 P.2d 739, 183 Cal. Rptr. 231 (1982).  
370. 30 Cal. 3d 762, 639 P.2d 979, 180 Cal. Rptr. 337 (1982).  
371. *See Cal. Civ. Proc. Code § 583(b) (West 1976)*. Justice Kaus observed that while the practice might originally have been "a mere professional courtesy to comatose counsel," today's overcrowded dockets may make it a necessary legal fiction. 30 Cal. 3d at 766, 639 P.2d at 981, 180 Cal. Rptr. at 339.  
372. 32 Cal. 3d 892, 654 P.2d 775, 187 Cal. Rptr. 592 (1982).  
373. *Id.* at 901, 654 P.2d at 780, 187 Cal. Rptr. at 597. Otherwise, "negligent attorneys [would] find that the simplest way to gain the twin goals of rescuing clients from defaults and themselves from malpractice liability, is to rise to ever greater heights of incompetence and professional irresponsibility while, nonetheless, maintaining a beatific attorney-client relationship." *Id.* at 900, 654 P.2d at 779, 187 Cal. Rptr. at 596.  
374. 31 Cal. 3d 220, 643 P.2d 954, 182 Cal. Rptr. 337 (1982) (Kaus, J.). While the vote was 4 to 2, the Kaus opinion was not an opinion for the court, since Justice Newman concurred only in the result.  
375. *Id.* at 239, 643 P.2d at 966, 182 Cal. Rptr. at 349.
Kaus reasoning that it was impossible to determine whether the child "has in fact suffered an injury in being born impaired rather than not being born," and that in any event it would be impossible to assess general damages in a fair and nonspeculative manner.\textsuperscript{376}

This attempt at Solomonic compromise cannot be considered a success. Justice Kaus was on firm ground in denying general damages because of the impossibility of proving injury, but that impossibility should have defeated the recovery of special damages as well. The rationales the opinion offered for allowing special damages while denying general damages do not stand up very well.\textsuperscript{377} Still, the decision represents an inventive judicial compromise and may claim support in pragmatic justice if not in strict logic. It typifies the practical, factual, problem-solving bent of Justice Kaus—and also shows that he is not always averse to making new law—but it lacks the insistence on reasoned principle that makes many of his opinions so impressive.

\section*{V \space Conclusions}

The California Supreme Court has often been regarded as one of the best in the country. The court's opinions for 1982, reviewed in this Foreword, show that the court has a number of strengths. Despite its membership changes, the court was productive. In its 129 decisions it appears to have discharged well its increasingly difficult task of imparting doctrinal unity to California's proliferating decisional law. The court took in its stride the new wave of death penalty cases. It faced up with courage to even the most explosive issues: The court took over from the court of appeal and rapidly decided the Proposition 8 case, Brosnahan v. Brown,\textsuperscript{378} prior to the November election at which four of the court's justices were on the ballot for confirmation.\textsuperscript{379} This court remains, as Professor Johnson found it in 1977, "a highly confident Court."\textsuperscript{380}

A majority of the court's decisions were sound and professional. While this Foreword has focused on the divisions in the court, it should

\textsuperscript{376} Id. at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346. Justice Mosk and Chief Justice Bird would have allowed full recovery, chiding the majority for its "modest compassion." Id. at 240, 643 P.2d at 966, 182 Cal. Rptr. at 349 (Mosk, J., dissenting).


\textsuperscript{378} See supra text accompanying notes 325-43.

\textsuperscript{379} See 32 Cal. 3d at 236, 651 P.2d at 274, 186 Cal. Rptr. at 30. The four were Justices Richardson, Kaus, Broussard, and Reynoso. All were confirmed, by votes of 76.2\%, 57.0\%, 56.2\%, and 52.4\%, respectively. \textit{California Secretary of State, Statement of the Vote} (General Election Nov. 2, 1982).

\textsuperscript{380} Johnson, supra note 2, at 249.
not be forgotten that some forty percent of the court's decisions were unanimous. All the unanimous decisions, with the single exception of Suastez, seem to have been correctly decided, and the opinions in many of them were well crafted. Meanwhile, in nonunanimous cases the court's combined opinions—if not the majority opinion alone—usually dealt with all the pertinent arguments on either side. This thorough exploration of the issues is due in large part to the frequency of dissents, which have increased substantially since 1975. The result is an improved debate not only in the court's opinions but in the legal profession and the press after the case is decided. One of the main strengths of the present court lies in its dissents.

Further, the emerging California court of 1982 had not just two competing judicial philosophies—as is largely true, for example, of the present United States Supreme Court—but three. In addition to the "liberal" and "conservative" viewpoints—represented by the majority and by Justice Richardson—there was the pragmatic middle position of Justice Kaus. If Justice Richardson's philosophy resembles that of Justice Rehnquist on the present United States Supreme Court, Justice Kaus' position recalls that of the late Justice Harlan during the tenure of Chief Justice Earl Warren. To be sure, the conservative "wing" of the present California court consists only of Justice Richardson, and the court consequently lacks the voting "balance" of the present United States Supreme Court. But the continuing intellectual contest among its three points of view—the confrontation of the majority position by two dissenting critiques—disciplines its decisions and enriches its product. Time will tell what impact Justice Grodin will have on the court's diverse but imbalanced viewpoints.

While the present California court thus has notable strengths, "[t]hose who write about the court have a responsibility to remind it of its deficiencies as well as its virtues." The court's record for 1982 reveals many deficiencies, some relating to its decisionmaking process and others to the substance of its decisions.

On a professional level, there were numerous lapses that seemed unworthy of good lawyers, let alone justices of the California Supreme Court. Individual justices should not—as several of them did—take inconsistent positions in successive cases without explanation. The jus-
tices should know the difference between a majority and a nonmajority opinion of their own court, and should not rely on language from a nonmajority opinion as something that the court "held." The justices know the difference between resting a decision on the federal Constitution and on an "independent state ground"; it therefore seems unprofessional of them to fail to specify which they are doing, and especially to invoke "equal protection of the law" without mentioning either constitution. The court should not rely on inapposite precedents, lay down a general rule going far beyond the facts of the case before it, overlook an important impact of a decision it is rendering, issue opinions that are unprofessional in their reasoning or rhetoric, or be compelled to rewrite an opinion extensively on petition for rehearing.

A more pervasive problem involves inconsistencies in the court's use of precedent. Perhaps every American court is subject to this complaint, but the California court in 1982 was exceptionally free in deciding what weight to give to decisional authority. In one case the court overruled two of its own decisions and disapproved eight decisions of the courts of appeal; in another it relied on statutory interpretations "established" by opinions of the attorney general. In numerous cases the court disapproved decisions of the courts of appeal. In another the court treated an important and controversial issue as concluded—saying "California has adopted" a rule—because one court of appeal had decided it one way. The weight given precedent varied widely and often appeared to depend mainly on the result the court wished to reach.

With respect to the substance of the decisions, it is striking that the California Supreme Court's tradition of innovation and creativity—and Chief Justice Bird's self-described philosophy as a "liberal, pro-

386. The number of opinion modifications seems high. According to Lexis, modifications have been issued in 19 of the court's 129 cases.
387. Frink v. Prod, 31 Cal. 3d 166, 180, 643 P.2d 476, 484, 181 Cal. Rptr. 893, 901 (1982); see supra text accompanying note 111.
388. Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 736, 640 P.2d 115, 124, 180 Cal. Rptr. 496, 505-06 (1982); see supra note 56 and accompanying text.
390. Peterson v. Superior Court, 31 Cal. 3d 147, 156-57 & n.4, 642 P.2d 1305, 1310 & n.4, 181 Cal. Rptr. 784, 789 & n.4 (1982); see supra note 147 and accompanying text.
391. The use of precedent in the California Supreme Court in 1982 often resembled the use of legislative history in the United States Supreme Court as described in a recent study: "the various approaches to statutory construction are drawn out as needed, much as a golfer selects the proper club when he gauges the distance to the pin and the contours of the course." Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 215-16 (1983).
gressive judge"—were manifested in 1982 not nearly so much in common law or constitutional decisions as in decisions interpreting statutes. The process of "statutory change" to which Justices Tobriner and Grodin had referred in their 1967 article seemed to have shifted from the legislative to the judicial branch. The court's decisions construing the antidiscrimination laws in *Marina Point* and *Commodore*, interpreting the statutory rights of employees in *American National Insurance* and *Suastez*, and expanding the rights of welfare beneficiaries in *Frink* and *Sims* seemed to go beyond the traditional judicial function of statutory interpretations. These decisions produced "statutory change" of a magnitude that would have amounted to major (and controversial) legislation if enacted by the legislature.

The role of a court in creatively interpreting legislation, as distinguished from the more traditional (if often equally controversial) judicial role of producing common law or constitutional change, presents some interesting questions. Inasmuch as statutory interpretations are subject to change by the legislature, this judicial role may be considered less imperious—less intrusive on the democratic process—than constitutional adjudication. In practice, however, the issue the court decides is often the subject of a legislative stalemate, with one side having lacked the votes to write the statute the way the court interprets it, and the other side lacking the votes to override that interpretation. Hence the court's decision decisively tips the legislative balance and fixes the statute's form.

There are ways, moreover, in which "statutory change" wrought by the judiciary may be more intrusive, and less legitimate, than constitutional or common law change. The very notion of "change" or "growth" in the law, while essential to common law decisionmaking and often appropriate to constitutional interpretation as well, seems basically inapplicable to the interpretation of statutes. The task of writing and revising statutes to reflect "alterations in social conditions and pub-

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392. *See supra* text accompanying note 27.
393. Tobriner & Grodin, *supra* note 35, at 1248; *see supra* text accompanying notes 35-38.
394. *See supra* text accompanying notes 43-69.
395. *See supra* text accompanying notes 70-82.
396. *See supra* notes 83-86 and *accompanying text*.
397. *See supra* text accompanying notes 87-104.
398. *See supra* text accompanying notes 106-23.
400. Thus, the court's decision in *Bozek* seemed objectionable because it placed on constitutional grounds, and hence beyond legislative revision, what could have been a common law ruling. *See supra* text accompanying notes 160-71.
401. This was apparently true in *Marina Point*. 30 Cal. 3d at 735 n.7, 640 P.2d at 123 n.7, 180 Cal. Rptr. at 505 n.7; *see supra* text accompanying note 58.
lic policy belongs to the legislature. Creative statutory interpretations by a court may therefore fail to command the credibility and respect on which the court draws when it performs its traditional roles of updating the common law and declaring constitutional rights. Further, statutory changes—even the supposedly marginal ones brought about by judicial interpretation of existing statutes—will often have a broader impact than common law changes, and they may exceed the effect of constitutional changes as well. Constitutional rules usually apply only to relations between individuals and the government, while statutory rules may affect, for example, all employment relationships, or the relations of all persons in California with “all business establishments of every kind whatsoever.” For these reasons, notwithstanding the legislature’s power to override its decisions, the extent to which the court in 1982 rewrote statutes to reflect its own policy views provides cause for concern.

The court’s decisions generally were too much animated by the majority’s view of desirable public policy. These policy preferences were clear enough. The court retained what Justice Tobriner had called its “sensitivity . . . to the plight of the poor,” continued to respond to “the economic imbalance in our society,” and followed also the “liberal, progressive” sentiments acknowledged by Chief Justice Bird. These views were particularly evident in the antidiscrimination cases, the welfare cases, the employment cases, in cases evincing the court’s special concern for the rights of civil plaintiffs and criminal defendants, and also in the court’s expressed support for “public interest” litigation. They were further evident in the majority’s lesser concern for corporate and property rights, as seen in decisions such as Metropolitan Life and Farrell.

In indulging its policy predilections, the court often seemed to disregard the broader legal implications of its decisions. In Frink and Sims, for example, the court seemed intent on advancing the rights of welfare beneficiaries and unconcerned about the unsettling impact

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402. Tobriner & Grodin, supra note 35, at 1248; see supra text accompanying note 36.
403. This consideration may help to explain the widespread noncompliance with the Marina Point decision. See supra note 69 and accompanying text.
404. CAL. CIV. CODE § 51 (West 1982).
405. Tobriner, supra note 30, at 12.
406. Id. at 10-11.
407. See supra text accompanying note 27.
409. See supra text accompanying notes 193-204.
410. See supra text accompanying notes 210-28.
411. See supra text accompanying notes 106-23.
412. See supra text accompanying notes 124-40.
its decisions would have on broad areas of California law. The 
Bozek"413 and Shirley"414 decisions evidenced a comparable judicial adventurism, with the court apparently seeking to make new law as broadly as possible.

The court's policy bent signifies a lack of judicial neutrality. The 
court becomes not an umpire but a player in the game. The court's 
lack of neutrality was seen in the reapportionment case, Assembly v. 
Deukmejian,415 and in Farrell,416 where the court devised a new rule of 
"strict construction" to limit the impact of Proposition 13. An undue 
concern with results was also apparent in Brosnahan and its predecessor cases, where justices' views concerning the single-subject rule seemed to vary with the particular initiative under challenge.417 It was 
not entirely uncommon for justices to take inconsistent positions in successive cases which suggests that results count for too much and reason for too little.

In her September 1982 address on the State of the Judiciary to the 
State Bar Conference of Delegates, Chief Justice Bird expressed concern about "outright assaults throughout the country on judicial institutions themselves—assaults that display either a complete misunderstanding of, or a reckless disrespect for, the principle of the rule of law and the role of courts in our democratic society."418 She noted that the drafters of the national and state Constitutions "took 
great care to protect courts and judges from such pressures," as indicated in California by the longer terms of office for judges, by their 
nonpartisan status, and by "the fact that it is not the role of judges to 
represent a specific constituency."419 She asked for the bar's support against attacks and pressure on the judiciary and the rule of law, and 
expressed pride that "[w]e have a judicial system that has steadfastly 
upheld the rule of law."420

The judiciary indeed deserves and needs sanctuary from political 
attack. But it cannot expect that protection unless it observes the limits 
of the judicial function and adheres to "the rule of law." The decisions 
of the California Supreme Court in 1982 were creditable in a number of 
ways, but they also give reason for concern that the court is inviting 
the attacks of which the chief justice complains.

413. See supra text accompanying notes 160-71.
414. See supra text accompanying notes 242-53.
415. See supra text accompanying notes 255-67.
416. See supra text accompanying notes 210-28.
417. See supra text accompanying notes 325-43.
419. Id. at 8, cols. 1-2.
420. Id. col. 2.
### Table IV

**Voting Alignments (Results)**

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<th></th>
<th>Bird</th>
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a. Table IV is based on the 129 cases decided with written opinion by the California Supreme Court in 1982. It records the number of times that one justice voted with another on the basis of the results for which they voted, regardless of whether or not they joined in the same opinion. "T" represents the number of times that the two justices agreed; "N" represents the number of cases in which both justices participated and thus the number of opportunities for agreement; and "P" represents the percentage of times that the two justices agreed, calculated by dividing "T" by "N" and multiplying by 100. In this Table two justices were considered to have agreed whenever (1) they joined in the same opinion, as indicated either by the Summary preceding the reported decision and the concurrence line following each opinion, or by a justice's explicit statement in the body of an opinion that he or she concurred in or agreed with another justice's opinion; (2) one justice joined in a majority or lead opinion, and the other joined in a separate concurring opinion (or brief statement) concurring in the court's result (i.e., its judgment); (3) the justices joined in separate opinions concurring in the court's result; or (4) the justices dissented separately and neither stated that he or she agreed with the other, but the two opinions substan-
tially agreed on at least one significant ground or issue. Where an opinion was labeled “concurring and dissenting,” it was treated as a concurring opinion if the writer agreed fully with the court’s result, see supra note 14; if the writer disagreed with the court’s result in any significant respect, the opinion was treated as a dissent. Where the same justice joined in more than one opinion in a case, only one “agreement”—defined by the result reached in both opinions—was recorded in this Table.
### Table V

**Voting Alignments (Opinions)**

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*a. Table V, like Table IV, is based on the 129 cases decided with written opinion by the*
California Supreme Court in 1982. This Table is modeled on the “Voting Alignments” table that appears in the statistics on the United States Supreme Court published annually in the Harvard Law Review. See, e.g., The Supreme Court, 1981 Term, 96 Harv. L. Rev. 305 (1982). This Table records the number of times that one justice voted with another on the basis of whether or not they joined in the same opinion. Two justices are considered to have joined in the same opinion when this is indicated either by the Summary preceding the reported decision and the concurrence line following each opinion, or by a justice’s explicit statement in the body of an opinion that he or she concurs in or agrees with another opinion. “O” represents the number of times the two justices agreed in opinions of the court or in lead opinions announcing the judgment of the court. “S” represents the number of times the two justices agreed in separate opinions, including both concur- rences and dissents (and opinions “concurring and dissenting”). “T” represents the total of “O” and “S,” and thus the total number of times the two justices agreed. “N” represents the number of cases in which both justices participated and hence the number of opportunities for agreement. “P” represents the percentage of times that the two justices agreed, calculated by dividing “T” by “N” and multiplying by 100.

Slight distortion may be present in this Table because of the method used to record agree- ments in separate opinions. When the same justice joined in more than one concurrence or dissent, or when two or more justices joined in the same separate opinion and also joined the opinion of the court, each separate agreement is noted in “O” and “S,” but only one decision is counted in “N.” Thus, it is theoretically possible in this table, unlike Table IV, for two justices to have agreed more times than the number of decisions in which they participated together. On the other hand, this Table, also unlike Table IV, does not treat two justices as having agreed if they did not join in the same opinion, even if they agreed in the result of the case and wrote separate opinions that reveal little difference in reasoning.