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# The Liberal Court: Ascendancy and Crisis

1964–1987

CHAPTER FIVE | BY HARRY N. SCHEIBER\*

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## THE CHALLENGES OF SOCIAL AND POLITICAL CHANGE

**I**N THE QUARTER-CENTURY period of the liberal Court's ascendancy, as in virtually every previous era of the state's history, California society underwent significant economic, demographic, and political change. The rush of dramatic events in the Traynor, Wright, and Bird years was especially challenging, involving as it did a continuous—and volatile—element of racial tension and episodes of interracial violence, as well as angry, and often harshly oppressive, reactions by governmental leaders and law enforcement



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ROGER J. TRAYNOR

officials to increasingly radical protests against the Vietnam War and the famous “free speech movement” at the University of California, Berkeley, which were followed by similar activist movements on other college campuses throughout the state. The Watts riots in Los Angeles were the worst, but not the last, in a series of episodes that intensified already-strong polarization in the state's politics. Profound clashes of policy and legal confrontations over racial integration, with regard both to affirmative action policies and to the busing of students in pursuit of school desegregation, forced this heated racial issue into the very core of the California Supreme Court's case docket. Nationally, disillusionment with government's integrity would prove to be a long-enduring result of the Nixon Administration's violations of constitutional rights.

Roiling the waters in California state politics were yet other issues: a successful campaign for no-fault

divorce legislation; the intrusive surveillance of university campuses and classrooms; pressures for broad reform of criminal procedures and for ending the death penalty; and a controversial set of issues relating to regulatory agencies' jurisdiction, including control over rights of workers in the politically powerful agricultural sector. “Rights consciousness” became the seedbed of reform efforts—and also the target of organized reaction against reform—involving diverse interest groups and ideological factions. Major conflicts came to a focus on laws defining limits of private property rights in light of the public trust doctrine, zoning restrictions, racial discrimination prohibitions, and—not least important in economic and political impacts alike—the judicially promulgated reforms, so prominently associated with the California high court as a national leader, in the fields of tort liability and contract law.

Throughout the 1970s and 1980s, moreover, the environmental movement was producing a panoply of new legislation and the creation of new agencies that occupied an increasing role in the state courts' civil dockets, with an entirely new specialized bar emerging in environmental law. Running through the lines of decision handed down by the liberal California high court was the judiciary's deployment of state constitutional guarantees under the doctrine of “independent and adequate state grounds,” a theme that aroused the most intensely focused criticism from conservative quarters. Countervailing this pattern was another: the successful use of the direct ballot by a rebellious element of the California electorate to challenge and overturn key rulings by the high court, bypassing both the judiciary and the legislature with a conservative overhaul of the criminal code under the banner of what proponents advertised as “victims' rights,” and—in what was the first shot in a national anti-governmental campaign—the imposition by popular vote of rigid new limits on property taxation.

The tensions and challenges generated by these changes, cascading in great volume and with astonishing swiftness, left the California Supreme Court open to the perils associated with the need to function amidst raging cultural and political storms. That this treacherous equipoise of law and politics would create intractable political problems for the Court was inevitable, especially once the “battering ram” style and effects of the direct ballot came into play in so highly charged a political setting. Yet at one crucial juncture self-inflicted

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institutional wounds were incurred during an unprecedented commission investigation of the Bird Court in 1979. As a result, those political problems were vastly intensified. The ensuing travails would bring the Court's liberal ascendancy to an end in 1986.

### THE CHALLENGES TO JUDICIAL ADMINISTRATION

That a heavy workload presented an immense day-to-day challenge is a common theme sounded in the memoirs recorded by the justices who served on the California Supreme Court during the Traynor, Wright, and Bird Court years, from 1964 to 1986. As noted in the previous chapters, the steady increase in California's population in virtually every period of the state's history, together with the successive shifts in the structure of the state's economy, were reflected in both rising numbers and also in the constantly increasing complexity of legal and policy issues in the cases on the high court's docket. From the 1960s to the end of the liberal Court's ascendancy, these trends underwent a dramatic new surge: Taking the decadal census years as the markers for our purposes here, the state population was 15.7 million in 1960, soared to 23 million in 1980, then continued rising, to reach nearly 30 million in 1990. Caseload in the municipal courts rose more than proportionally, going from 3.4 million nonparking filings to nearly 16 million in the 30-year period; and filings in the superior courts tripled, reaching more than 1 million by 1990. Ineluctably, there was a constant rise in the number of appeals

that swelled the caseloads of the Courts of Appeal and then of the Supreme Court: Filings in the Courts of Appeal underwent a spectacular increase, from 2,573 in 1960 to more than 10,000 in 1980, and then doubling again, to more than 20,000 by 1990.

This rising caseload was handled by an expanded cadre of Court of Appeal justices, who numbered only 21 at the beginning of our period, then 59 by 1980, increasing again to more than 100 in 1990. The legislature, under constant political pressure from local and regional interests, responded to caseload pressures by regularly authorizing the creation of new judicial positions in the trial courts as well during these years: Hence the increase from 302 to 789 judges in the superior courts, and a three-fold increase (reaching more than 600 positions) in the municipal courts.

The population data alone tell much of the story behind these statistics of increasing court business and institutional proliferation. An important element in this dynamic of change, however, was the changing content of the law—most prominently stemming from the reforms in tort law, the definition of new rights for defendants enmeshed in the criminal process, remedies for racial and gender discrimination, expansion of the number and jurisdiction of regulatory agencies, and the rising complexities of the law in the fields of taxation, corporations, property and contract. Also to be taken into account is the overarching tendency in the legal culture that Professor Robert A. Kagan has analyzed under the rubric of



### THE TRAYNOR COURT

CHIEF JUSTICE ROGER J. TRAYNOR (CENTER) AND (LEFT TO RIGHT) ASSOCIATE JUSTICES STANLEY MOSK, MATHEW O. TOBRINER, MARSHALL F. MCCOMB, RAYMOND E. PETERS, PAUL PEEK AND LOUIS H. BURKE



### THE WRIGHT COURT

CHIEF JUSTICE DONALD R. WRIGHT (CENTER) AND (LEFT TO RIGHT) ASSOCIATE JUSTICES LOUIS H. BURKE, MATHEW O. TOBRINER, MARSHALL F. MCCOMB, RAYMOND E. PETERS, STANLEY MOSK, AND RAYMOND L. SULLIVAN

“adversarial legalism, the American way of law,” in which multiple avenues (and targets) of litigation are available for both individual and group actions. The environmental regulatory regime that was created virtually *de novo* (both nationally and in California) during the 1970s and 1980s provides a vivid example of how newly created administrative agencies and procedures can impact judicial caseload: every initiative taken in the rules-making and enforcement processes can generate individual and class action filings to test newly minted legalities.

The demand thus created for legal expertise in government agencies and especially in the private sector, both for “ordinary business” and for litigation, was a consequent imperative. The size of the state’s bar membership and the organization of law practice in California underwent profound, even transforming, changes in many aspects, in response to this larger complex set of interrelated movements in the legal culture. Innovations in procedural rules and custom, for example, in regard to discovery in civil cases and in regard to tighter requirements of due process in criminal procedure, contributed importantly to the demand for lawyers and to the volume of court filings. Again, numbers alone provide a telling measure of the depth of change: The number of lawyers listed as “active” in the bar rose from fewer than 20,000 in 1960 to more than 68,000 in 1980, then rose at a spectacular rate in the next decade to more than 100,000.

There was ineluctably a severe impact on the docket of the California Supreme Court, and consequently on the organization of work in the chambers of the justices as they sought to adjust to the rising workload demands. Filings before the Court rose from 1,403 in 1960, more

than doubled by 1970, and reached 3,864 in 1980. The sum of “actions” taken, just under 2,000 in 1960, rose to over 7,000 in 1980. The Court thus felt the severe effects of a self-generating cycle of growth, as population and litigation rose apace, in both the judiciary’s institutional structure and caseload levels. As recalled by Peter Belton, a highly respected senior attorney and head of chambers on Justice Mosk’s staff, the Courts of Appeal “were getting overwhelmed,” and the trend did not abate:

In the early seventies the [California Supreme] Court began to feel itself overwhelmed by the number of petitions for [hearing] that were coming in. . . . The legislature responded by adding justices to the Court of Appeal, so that produced that many more C.A. opinions. In turn, each opinion had a disgruntled litigant—the person who lost in the Court of Appeal. He would petition our Court for a hearing so that petitions increased. . . . The Court was really left to its own devices to figure out how to solve the problem of this great influx of petitions for hearing.

One result was the need for the justices to rely increasingly on their staff attorneys at key steps in the process of evaluating petitions. A major problem administratively was the statutory requirement that the Court rule on all death penalty cases, which were automatically appealed directly, and which formed almost half the total workload at this threshold phase—representing what Justice Mosk called an intolerable “inundation” of the docket. The recommendations of staff as to acceptance or denial of petitions for hearing were then submitted to the individual justices.

As a result of the backlog of death penalty cases, the demands on the Court went over the years from heavy to onerous, and then to virtually unmanageable proportions. When Chief Justice Wright wrote the 1972 opinion that declared capital punishment to be unconstitutional, he had been deeply troubled by the large number of prisoners languishing on death row awaiting the disposition of appeals that typically took many years to work their way up to the high court. What Prof. Gerald Uelmen has termed “the crushing backlog” of death penalty appeals did not abate, and in the Bird Court years it rose from 25 in 1979 to 144 in 1983, then more than 170 in 1986.

Various proposals were floated, most notably in a proposal by the State Bar in 1992 calling for creation of a new “Court of Review” that would share workload with the Supreme Court, divided by the degree of the social or political importance of issues involved; and some leading figures in the California bar and bench called for the state to create separate courts of final review for criminal and civil cases. These proposals for providing caseload relief came to little, however.

Of more significance and impact were some innovations in trial and Court of Appeal case scheduling and management, sponsored by the Judicial Council (which in the 1970s and 1980s became an increasingly large and active, expertly staffed organization). The conceptualization and implementation of such administrative reforms were spearheaded by Ralph Kleps, the long-time and widely respected director of the Administrative Office of the Courts (AOC), on whom Chief Justices Gibson, Traynor, and Wright depended heavily for administrative leadership in fulfilling their responsibilities as chief executive of the state’s judicial system. Kleps, who served from 1962 until the beginning of Bird’s tenure as chief justice, was a strong advocate of professionalization of court management. The Judicial Council’s responsibilities for general court administration, collection and analysis of statistics, liaison with the legislature, training programs, public information, court security, and other functions expanded throughout the Wright and Bird Court years. By the late 1980s the 10 operating units in the administrative apparatus had 561 full-time staff, including 261 professionals (lawyers, statisticians, research staff, and management and business officers), and an annual budget of \$27 million.

For the California Supreme Court’s justices, the first avenue of relief from case overload was the success of the chief justices and the AOC in lobbying for state appropriations for additional staff. When Traynor became chief justice, each of the Court’s justices was authorized to hire two “law clerks,” ordinarily recent law school graduates, who would serve for a single year and then move on to their careers in the bar. The legislature’s funding of long-term professional staff had inau-

gurated a transformation in structure of the justices’ staff organization. Thus at the time when Governor Edmund Brown appointed Stanley Mosk to the Court, the newly minted associate justice inherited authorization for a staff of at least three professionals, including Justice Schauer’s long-time chief staff attorney Peter Belton. In subsequent years, the chief justices and the Judicial Council obtained legislative appropriations for additional staff-attorney appointments—two additional positions for the chief justice’s chambers and one each for the associate justices. In addition, however, the Court had begun by the early 1970s to rely on the services of “externs,” that is, law students not yet credentialed with the degree or bar membership, who were nominated by their law school faculties and served without pay. Externships were choice appointments for law students, a financial boon to the justices’ chambers, and a source of well-advertised prestige for the students’ law schools.

Belton recalled that in allocating working time, the staffs of each justice necessarily gave priority to evaluating petitions for hearing because they were subject to strict jurisdictional deadlines (90 days), and all proceedings in any individual petition (and there was a backlog of hundreds of cases) would be in abeyance until a decision on its acceptance or denial was made. Hence “the [cases] that were the most important, visible output of the Court—got left behind.” It was a situation that prompted



CHIEF JUSTICE  
DONALD R. WRIGHT

the justices to introduce the engagement of the student externs, as mentioned above, with a total of 21 serving in the chambers at any one time. In the early 1970s, the Court obtained appropriations to hire attorneys for service on a 12-person “central staff” (organized as a separate group, administered by the chief justice, not reporting to an individual justice) that was given responsibility for evaluating all criminal and habeas corpus petitions. Their memoranda, with recommendations for approval or denial, were then sent to the individual chambers.

During Justice Frank Newman’s five and a half years of tenure as associate justice, the total number of staff in his chambers had thus numbered in aggregate 80, of whom 70 had been student externs. Newman had to prepare each week to discuss the average of 80 to 90 cases scheduled to be acted upon preliminarily by the justices

in the Court's Wednesday "petition" conferences; it was in these conferences that the selection of cases for preparation of full opinions was made. It proved essential to Newman to assign to his staff—including externs—at least the initial systematic reading and preparation of recommendations for further action versus rejection; this was in addition to the writing of relatively brief memos in civil petitions for hearing, generally five to ten pages on each specific case assigned to him and other associate justices through the court clerk's office.

Once the justices had agreed, in the weekly conference, upon which specific cases should be accepted for hearing and eventually scheduled for oral argument, the chief justice assigned responsibility to individual



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chambers for the preparation of a "calendar memorandum." These memoranda, of much greater length and detail than conference memos, were essentially fully documented draft opinions that were distributed to other justices prior to oral argument. Following oral argument, in further confidential meetings, the justices exchanged views. If there was agreement on the calendar memorandum, with sug-

gested revisions, the justice who had written it would proceed to incorporate any changes needed and write a polished draft opinion for further circulation. It would be circulated along with supportive documents in a carton—famously, the "box"—to the other chambers in the final round of a process leading to disposition of the case. Throughout the course of this procedure, the possibility remained open for shifts of opinion (and votes); and if the justice who authored the draft lost a four-vote majority and declined to "flip" the matter to reflect the majority, the chief justice would reassign the opinion to one of the new majority justices. Once a majority of four or more justices was in agreement, with concurring opinions as required, and the dissenting opinions also ready, the Court would file and publish its judgment.

The pressure of caseload volume was of great importance at every step in the process of adjudication, as many of the justices have stressed in their candid recollections. The heavy involvement of staff expertise came into play in the crafting and refinements of prose and argument in the Court's decisions, not only in the memoranda and draft opinions prior to the final round

of circulation and individual chambers' inputs. Justice Grodin recalled his own practice in use of expert staff, as follows:

There [had been] occasions on the Court of Appeal when I would write an opinion from scratch, but I found that on the Supreme Court I simply did not have time to do that. . . . Often, after I received the draft [from staff], I would make extensive revisions. . . . The degree of my personal participation in the opinion-writing process varied from case to case, but my goal was to make sure that everything in the opinion ultimately reflected my own thoughts, and I believe the other justices tried to do the same. . . .

My proposed opinion then circulated to all justices and their staffs. . . [who] would communicate their objections, reservations, or suggestions. . . through memoranda or conversation, or more formally through a dissenting or concurring opinion. My own practice upon receiving a proposed opinion from another justice was to assign it to one of my staff attorneys to read it and give me his or her thoughts. After my own reading and further discussion I might then instruct a staff attorney to talk with the author's staff attorney about some problem, or I might go talk with the author himself, depending on what I thought would be the most effective approach under the circumstances.

A widely discussed criticism of the Court's basic procedure, in this regard, was that the justices worked "in substantial isolation from each other"—but especially so in the Bird Court period, after 1977, when the strong personal bonds of collegiality that had prevailed in the prior years manifestly weakened. Chief Justice Bird was by all reports much less interested in, let alone comfortable with, the kind of informal interchange that her predecessors had encouraged. Regarding the relative rarity of face-to-face discussions of their draft opinions among his Bird Court fellow justices, Justice Kaus commented in an oral history that "lobbying" was generally unacceptable, even when a justice might want support from others for selecting a case in the Wednesday petition conference or for some further action on a case. "Once you start lobbying," Kaus stated, "you loosen the hounds of hell, so to speak." As it happened, Kaus resided part-time in Berkeley, from where he commuted with Justice Grodin to the Court in San Francisco. "So we discussed a lot of cases when there was no one in the car that wasn't on the Court and we tried to convince each other an awful lot," he recalled. That personal contact was very different, however, from "going into justices' chambers and taking them by the throat; no, there was very, very little of that, and it would be terrible,"



#### THE BIRD COURT

CHIEF JUSTICE ROSE ELIZABETH BIRD (CENTER) AND (LEFT TO RIGHT) ASSOCIATE JUSTICES STANLEY MOSK, MALCOLM M. LUCAS, CRUZ REYNOSO, JOSEPH GRODIN, EDWARD PANELLI AND ALLEN BROUSSARD

Kaus said, and “if there were more of it, life wouldn’t be worth living.”

A contrary view with regard to the alleged isolation of the justices was voiced, however, in his oral history by Justice Newman (an individual, it should be said, well remembered for his gregariousness and affability). Newman averred that at least in his Bird Court service “there wasn’t a problem of being out of touch. As a judge I spent a lot of time in others’ offices, talking with each one, and I learned to respect every colleague for ability, honesty, and drive. . . . We worked with each other’s staffs constantly, too.” Justice Grodin has also recalled an underlying collegiality among Bird Court justices, but his emphasis was on the collegial interactions with the other justices, holding widely varied views, in the formal setting of the regular Wednesday conferences.

Beyond the daily demands on the justices for engaging in petition review, supervising research and writing on calendar and conference memoranda, and their writing of opinions, their work in chambers was complicated by other challenges to their time and energy. The oral arguments were held mainly in the San Francisco courtroom, but on a rotating schedule in Los Angeles and Sacramento as well. Unlike many appellate bodies around the country, the California Supreme Court did not schedule long recesses; the Wednesday

conferences went on regularly throughout the year; and when individual justices were allowed time away, they would return to find all the materials relating to cases assigned to their chambers while they were absent awaiting their attention. Since the mid-1920s the chief justice had exercised explicit constitutional authority to appoint pro tem justices, usually selecting judges of long experience from the Courts of Appeal, to consider and participate fully in cases when one of the seats on the Court was temporarily vacant due to retirement, incapacitation, or death. Most of what one can learn from the contemporary statistical data and from analysis by commentators on the Court’s workload reinforces the impression that the time pressures on the justices were often unremitting. In that light, one can appreciate all the more the Court’s record of producing so many carefully crafted opinions, including some notable dissents and concurrences, and its influence on the nation’s law during the years of the liberal ascendancy. Political turmoil, the pressures of racial conflict, and the other external factors that we have mentioned made it increasingly difficult, however, for the Court to withstand attacks on its liberal jurisprudence and on its institutional prestige, as these attacks mounted in scope and intensity during the years of the Traynor, Wright, and Bird Courts. ★