



CALIFORNIA SUPREME COURT

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SCHEIBER

Constitutional Governance  
and Judicial Power

## Constitutional Governance and Judicial Power:

The History of the  
California Supreme Court



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Harry N. Scheiber, Editor

A 20-YEAR PROJECT NEARS COMPLETION WITH THE FORTHCOMING  
HISTORY OF THE CALIFORNIA SUPREME COURT. INSIDE: A PREVIEW.

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# Pioneers on the Bench

1849–1879

CHAPTER ONE | BY CHARLES J. McCLAIN\*

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## THE PERIOD AND THE COURT: SOME GENERAL OBSERVATIONS

THIS CHAPTER COVERS the first three decades of the California Supreme Court's history, from its inception through its November 1879 term, the last in the chief justiceship of William Wallace and the Court's last under the 1849 constitution. These were years of dramatic social, economic, and demographic change in the state of California. On January 24, 1848, roughly a week before Mexico ceded California to the United States, gold was discovered in the foothills of the Sierra Nevada mountains. News of the discovery spread rapidly throughout the world, and thousands of fortune hunters began pouring into what had previously been something of a backwater province of the Republic of Mexico, and California's population rose from about 26,000 to approximately 100,000 souls in a little over a year. An additional 300,000 would enter the state over the next decade, making it the fastest growing state in the Union during those years. With this huge influx of people from outside, California's demography changed significantly, with the original Mexican inhabitants of California, the *Californios*, soon constituting less than five percent of the state's total population.

Gold, and later silver, mining would dominate the California economy for the next decade and a half (not surprisingly, mining issues would crowd the Court's agenda during these years). By the 1870s, however, the California economy had become more diversified and farming had supplanted mining as its most important part. Economic development brought substantial wealth to the state. How equitably it was distributed is another matter. By 1870 California ranked fifth among the states in per capita wealth. By 1880 it ranked third. By that time, too, the state's population had risen to a million, with well over a third living in cities. It was a very different place from the somewhat rambunctious, frontier society that had sent the men to Monterey in 1849.

It goes without saying that these were years of enormous importance in the history of the California

Supreme Court. It is a period with its share of landmark cases. The dynamic society described above regularly brought before the tribunal public policy issues of large consequence that it had to resolve, often with little in the way of either legislative guidance or judicial precedent. It is the period in which the foundations of the state's common law jurisprudence were laid. Last, and not least, it is the period in which the Court began to carve out its own enduring place in the new state's scheme of government.

Perhaps the most striking institutional feature of the Court during this period is the rapid turnover of personnel. Twelve different men served as chief justice between 1850 and 1879. The longest-serving chief was William Wallace, who presided over the Court's affairs for almost eight years, from 1872–79. Royal Sprague, the shortest-serving, was chief for barely more than a month in 1872, though he served as a justice a total of four years. During these years, a total of 27 justices sat on what was until 1862 a three-member and after that date a five-member bench, with tenures varying greatly. Augustus Rhodes had the longest, serving for over almost 16 years, from 1867–80. E. B. Crocker had the shortest, sitting on the Court a scant seven months, though, one must hasten to add, these were seven months of prodigious output. To what extent the high turnover might have had an impact on the Court's decision making is a question difficult to resolve though one suspects it may have made it easier for the Court to do an about-face on previous decisions, as it did on several occasions, when the justices felt that was necessary.

The men who sat on the bench came from a range of backgrounds, but it was gold that had brought the largest number of them to California. Of the 27, 11 had come either to mine themselves or as officers of mining companies. Most of the justices had dabbled in some other line of work before taking up the law. As was typical of the American bench and bar at the time, virtually all of the justices had learned the law by apprenticing in a law office or judge's chambers. Only two, Jackson Temple and Oscar Shafter, had had any formal legal education, Temple at Yale, Shafter at Harvard. As was also typical of American lawyers at the time, few had attended college. A final comment on the justices: some of the most colorful and controversial judges to ever sit on an appellate bench peopled

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the California high court during this period. Their lives, personalities, and judicial philosophies, as well as those of the other justices who contributed significantly to the molding of California law in these years, are discussed at various points later in the chapter.

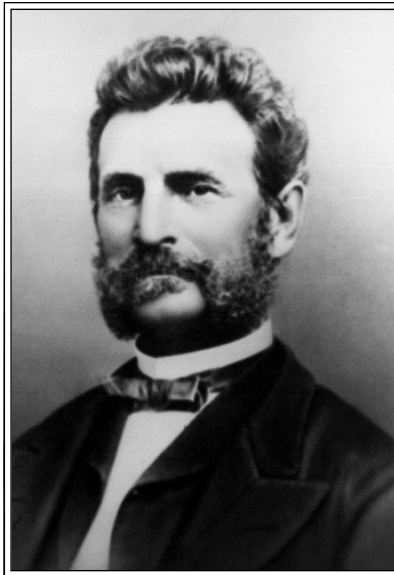
## JUSTICES OF THE FIRST COURT

Serranus Hastings, the state's first chief justice, and his associates took their oaths of office in January, and on March 4, 1850 the California Supreme Court began to hold sessions, opening for business in a former San Francisco hotel. California's first appellate tribunal, like the Monterey convention, was made up of young men. Hastings was only 36 when

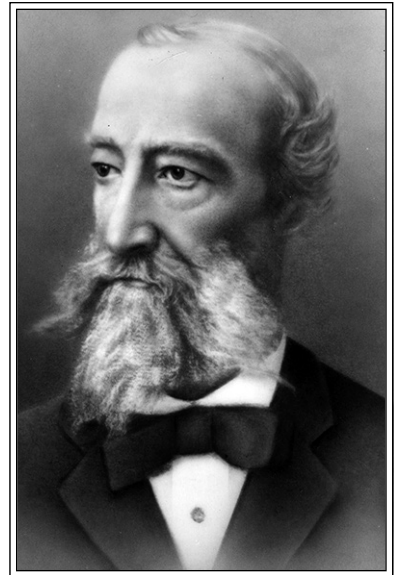
he took his seat on the bench. His associates, Nathaniel Bennett and Henry Lyons, were 34 and 40 respectively. Hastings hailed from New York but had moved to Iowa at an early age to practice law. He had a successful legal and political career there, winning election to Congress after Iowa became a state. In 1848 he was appointed chief justice of the Iowa Supreme Court but after losing an election for the U.S. Senate in 1849 he moved to California. Henry Lyons, the second justice selected for the Court and its second chief justice, had practiced law in Louisiana for many years before moving to California and retained strong southern sympathies after the move. (A nephew whom he raised served in the Confederate army during the Civil War.) He was the Court's first Jewish justice. Nathaniel Bennett was also originally from New York and had practiced law both there and in Ohio. On learning of the gold discovery he and several friends organized a mining company and traveled to California. They had some success in mining, but, for reasons that are not entirely clear, Bennett left the group to take up the practice of law again. He would be the dominant justice on the first Court. Even before taking his seat on the bench, he had played a crucial role in setting the direction of California law by his leadership in the campaign for the adoption of the common law.

## A NEW COURT

A constitutional amendment reorganizing the state judiciary was approved by the voters in 1863. It expanded the membership of the Supreme Court to five, consisting of a chief and four associate justices, and provided that the justices be elected at a special election where only can-



CALIFORNIA'S FIRST CHIEF JUSTICE,  
SERRANUS CLINTON HASTINGS

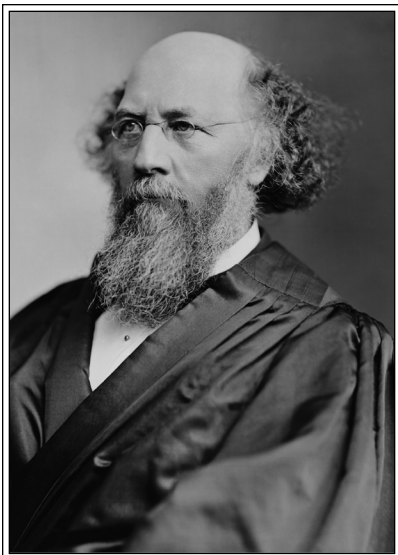


CALIFORNIA'S SECOND CHIEF  
JUSTICE, HENRY LYONS

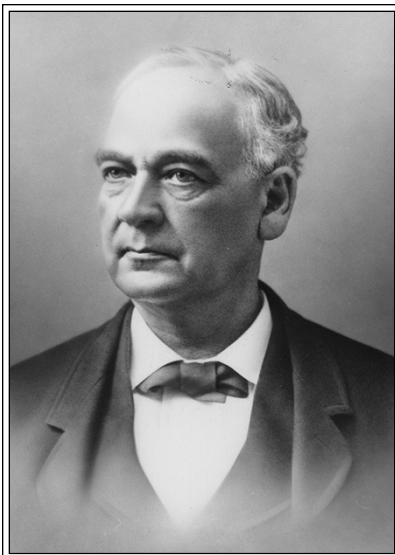
didates for judicial office and superintendent of public instruction should be on the ballot. (Justice W.W. Cope had argued in favor of just such a system for selecting judges.) The justices' terms of office were extended to ten years with a proviso that those elected at the first election should at their first meeting so classify themselves by lot that one justice would leave office every two years, the justice having the shortest term to be the chief. The Court's appellate jurisdiction was broadened to include equity cases and cases involving title to real estate irrespective of the damages sought. The amount in controversy necessary to invoke the Court's jurisdiction in all other damage actions was increased to three hundred dollars. In addition the Court was for the first time given original jurisdiction to issue writs of mandamus, prohibition, habeas corpus and certiorari. Such would be the composition and jurisdiction of the Court until the end of the period under consideration.

## A NEW STATE ECONOMY AND A NEW DOCKET

By 1864 the economy and society of California had changed enormously. Its population had more than tripled since admission to the union. The state's economy, once so dominated by gold mining, had become much more diversified, with agriculture assuming an increasingly important role. The numbers tell the story of farming's dramatic rise. The value of farm implements, a broad measure of agricultural activity, stood at about \$3.8 million in 1850. By 1860 it had increased more than thirty-fold to about \$141 million. Production of wheat and barley, two mainstays of the national agricultural economy, had risen dramatically.



CHIEF JUSTICE  
STEPHEN J. FIELD



ASSOCIATE JUSTICE SOLOMON  
HEYDENFELDT

California produced about 17,000 bushels of wheat in 1850. By 1860 the figure had risen to six million, and by 1870 California would be the fourth leading wheat-producing state in the nation. Barley production stood at a mere 9,700 bushels in 1850. By 1860 California's farmers were growing more than 4,400,000 bushels of barley, much more than was being produced in any other state.

By the mid-1860s the docket of the California Supreme Court had itself undergone some important changes. Great issues of water and mining law no longer dominated the Court's agenda as once they had. The Court had said about as much as it would ever have to say about the largest Spanish and Mexican land grant questions. (Water, mining and Mexican land grant cases would continue to come the Court's way for many years, but they on the whole involved subsidiary matters.) Other issues of consequence were facing the Court, however, some of the most important lying at the intersection of law and the economy.

#### CODA

Thomas Green, himself a member of the body, famously labeled California's first legislature "the legislature of a thousand drinks," a reference to the alcohol that, legend has it, flowed freely during its sessions. The name stuck, and for a long while the image that prevailed both in popular and scholarly history was of an assembly lacking in work ethic and seriousness of purpose. But as Gerald Nash was one of the first to point out, this characterization is wide of the mark. The output of the 1850 legislature was prodigious and of a generally high quality. The same may be said of its immediate successors, and within a few years a large,

comprehensive, and serviceable legal framework was in place. Subsequent legislatures would add to it. Still, even with all this legislative activity, the framework had many gaps, and the way was open for the judiciary to become a partner in lawmaking. The California Supreme Court moved to the task with alacrity, taking the lead in forging legal doctrine in many areas of both public and private law.

Until a body of local case law had been able to accumulate, the Court naturally relied heavily on existing precedents from other states and to some extent from Britain. It also made large use of the main legal treatises, digests, and practice tools, American and

British, employed in all state courts during the nineteenth century. There was also regular citation of Spanish, Mexican, and civil law works. The Court, however, showed a real concern for local conditions and when it seemed warranted changed the received law to suit the needs of the growing state of California. As Justice Solomon Heydenfeldt put it in the early case of *Irwin v. Phillips*: "Courts are bound to take notice of the political and social condition of the country which they judicially rule." Throughout the period, 1849–79, but especially in its first half, the justices were conscious of being engaged in a pioneering legal enterprise, of molding a body of law that was rooted in the American common law tradition but that spoke as well to the peculiar requirements of the frontier state. One sees this most noticeably in fields like mining and water law, but the spirit of accommodation to local needs is detectable in other areas of law as well.

What can one say about the quality of the Court's output during this period? Several opinions stand out for the trenchancy of their legal analysis or for the sensitive and sensible way in which they addressed major issues of public policy. Others seemed too heavily influenced by the judge's personal values. These were at the time and remain today extremely controversial. A few opinions—*Perkins*, *Hall*, and *Archy* come prominently to mind—stand out as large blots on the Court's escutcheon. On the whole it seems reasonable to say that in terms of competence and legal acumen the Court's work compares decently with that of other American state appellate courts during the period. It is unquestionably true that many of the main lines of California's later jurisprudence were sketched out during these early years. ★

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# Creating a Court System

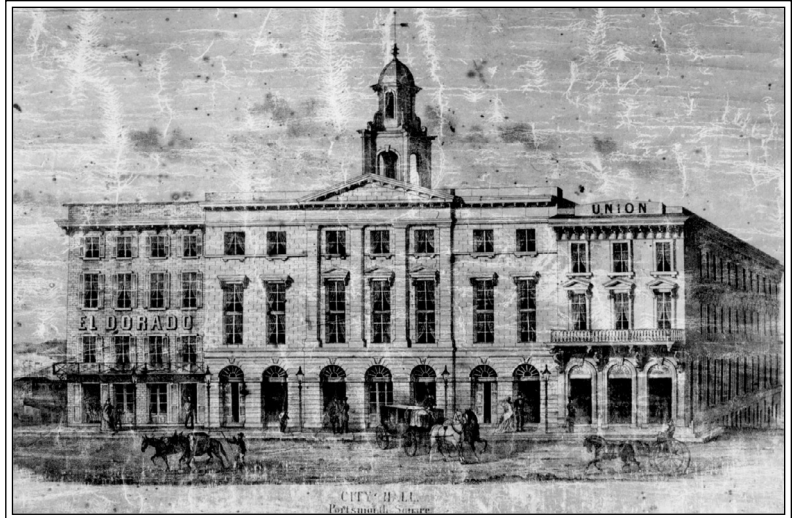
1880–1910

CHAPTER TWO | BY GORDON MORRIS BAKKEN\*

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## THE 1879 CONSTITUTION

CALIFORNIA'S 1878–79 CONSTITUTIONAL CONVENTION created a court system with the traditional American pattern of trial and appellate courts, and a revised fundamental law. The delegates focused more on the business of courts than their structure. In fact, the delegates spent far more time discussing constitutional law, criminal justice administration, and the costs of litigation than the structure of courts. In the process of debating the nature of California's court system and the function of judges, the delegates said much about our state and our nation's legal system.



THE CALIFORNIA SUPREME COURT HEARD ORAL ARGUMENTS IN SAN FRANCISCO'S CITY HALL (CENTER) UNTIL MARCH 1854, WHEN THE COURT MOVED TO SAN JOSE FOR NINE MONTHS, AND THEN TO SACRAMENTO FOR THE NEXT TWO DECADES.

## CONSTITUTIONAL LAW AND THE STRUCTURE OF THE JUDICIARY

The debates regarding the judiciary in 1878–1879 were qualitatively more sophisticated than in 1849, in that constitutional issues evoked pointed debate of a legally informed nature. The delegates discussed many landmark United States Supreme Court decisions including *Munn v. Illinois*, *Dartmouth College v. Woodward*, *The Passenger Cases*, *The Slaughterhouse Cases*, *State Tax on Foreign-Held Bonds*, *Baron v. Baltimore*, and *Calder v. Bull*. In addition, they offered opinions on jurisprudence; *stare decisis*; state constitutional change; state case law from Wisconsin, Illinois, New York, and California; the national treaty power; eminent domain; state police power; federalism; the law of the land; the extent of the power of Congress; due process; and the uniform law movement. Many of these issues flowed from the duty to write a constitution, but the extent of debate and the level of argument on point were significantly higher than in 1849.

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\* The late Gordon Morris Bakken (1943–2014) was Professor Emeritus of History at California State University, Fullerton. [Editor's Note: This article is excerpted, without endnotes, from the Society's forthcoming history of the California Supreme Court.]

For many of the delegates, the 1877 decision in *Munn v. Illinois* was of central importance. The United States Supreme Court had held that state legislatures had the authority to regulate businesses affected with a public interest. This put on the legislative agenda a vast array of opportunities to use legislation to regulate rates charged to consumers. The regulatory agenda confronted the vested rights of private property so dear to conservative Americans, making *Munn* even more of a prime focus for debate for delegates and the nation. What were the implications of allowing states to regulate business?

Constitutional argument of high order was offset by overtly racist attacks upon the Chinese. On a plane higher than racism, some delegates felt that the federal government did not have an effective immigration policy, and as a result, they contended, California was being swamped with cheap immigrant labor to the detriment of working men. In the end, delegates would petition Congress for federal legislation that would exclude the Chinese.

## THE SUPREME COURT AND ITS JUSTICES

The report of the Committee on the Judiciary generated a discussion of whether the Supreme Court should hold sessions in places other than Sacramento, the election of judges, the term of office, and the costs

of justice. Regarding the length of terms for Supreme Court justices, Samuel M. Wilson of San Francisco, the law partner of Joseph P. Hoge, the president of the convention and founder, with Hoge, of the San Francisco Bar Association, wanted long terms for judges. A long term was necessary to attract the best legal talent, he argued, and “the continual changing of Judges is certainly one of the worst things in our system.” Horace C. Rolfe, representing San Bernardino and San Diego counties, warned the convention of judicial elections and politics. “This idea of a Justice of a Supreme Court being re-elected in consequence of having been a good and efficient Judge, is all a delusion,” he asserted. George V. Smith agreed, cautioning that politics could “make the office of Supreme Judge merely a political office.” Others saw the judiciary article as a means of keeping the courts out of politics. Thomas B. McFarland of Sacramento thought that “the judiciary [was] by far the most important department to the people.” A Supreme Court justice’s salary must therefore be sufficient and the term long enough “that he may expect [to be judge] . . . the balance of his life.” Another delegate saw long terms as a barrier to political caprice. “The excellence of the judicial system . . . is predicated not on change, but on certainty, on permanence and precedent,” he offered. Further, judges were special breeds having “quite a different order of talent . . . to hand down the laws unimpaired, to adhere to precedent, and to refine without over refinement.” Long terms put some distance between judges and the political environment of frequent elections.

#### THE ELECTION OF A SUPREME COURT

In 1879 voters elected the California Supreme Court that sat in 1880. The Court was now seven in number, increased from five; the Workingmen’s Party of Denis Kearney nominated six of the seven. This first court under the new constitution was not unlike the Supreme Courts that would follow in the next 30 years. It was composed largely of attorneys schooled in the nineteenth-century manner of reading law. Twenty-six justices would serve in the period; yet only one, Charles Henry Garoutte, was a native son of California.

The 1879 election brought 23 candidates out for the seven seats on the California

Supreme Court. The top seven candidates would serve and they in turn would draw for terms. Robert Francis Morrison won election for chief justice on the Democratic and Workingmen’s Party tickets. Morrison brought three decades of practice and judicial experience to the position. Elisha Williams McKinstry, also a Democratic and Workingmen’s Party candidate, won the most votes at the election and was the only member of the old five-man court to win election. Admitted to practice in New York in 1847, McKinstry also brought three decades of practice, legislative, and judicial experience to the Court. Erskine Mayo Ross, a Democratic, Workingmen’s, and Prohibition Party candidate, was the only southern Californian elected to the Court. Ross was 35, a graduate of the Virginia Military Institute, a Confederate veteran of the Civil War, and a Los Angeles attorney with a decade of experience at the bar. Ross also raised oranges, lemons, and olives in Glendale. John Randolph Sharpstein, another Workingmen’s Party candidate, was admitted to practice in Michigan in 1846, entered practice in Wisconsin the next year, held legislative office in the Badger state, was U.S. Attorney in Wisconsin, and escaped Wisconsin winters in 1864 to settle in San Francisco. He too brought three decades of practice and public service experience to the Court. Samuel Bell McKee was born in Ireland, studied law in Alabama, practiced law in Oakland, and won election to the first of many judicial positions in 1856. He had decades of legal and



THE COURT’S HOME FROM 1890 TO 1896 WAS AT 305 LARKIN STREET IN SAN FRANCISCO.

judicial experience when he took his seat in 1880. The Democratic, Workingmen's, and Prohibition Parties all nominated James Dabney Thornton. He was admitted to the Alabama bar in 1849, arrived in San Francisco in 1854, and maintained his Democratic Party affiliation throughout the Civil War years. Thornton refused for two years to take the "ironclad oath" after the war, and he was appointed to the third judicial district bench in San Francisco in 1878. Milton Hills Myrick was the only Republican elected to the Court. Myrick was the son of a New York preacher and member of the New York Anti-Slavery Society. He was admitted to the Michigan bar in 1850, arriving in California in 1854. Myrick spent his early years in the West practicing the printers' trade before practicing law in Red Bluff. He presided over the San Francisco probate court from 1872 to 1880 and became widely known for his expertise in the law.

In sum, the justices of the Court were clearly experienced in the law, and they also were cognizant of the political issues of the day.

#### CALIFORNIA'S CHANGED ECONOMY

The first 30 years of the state's development under the new constitution was a time of dramatic social, economic and demographic change, as the economy grew explosively, due in considerable measure to transportation expansion. In the late 1870s the Southern Pacific Railroad extended its line into the agriculturally rich San Joaquin Valley and continued construction to New Orleans, finishing that branch in 1883. The Atchison, Topeka, and Santa Fe arrived in Los Angeles in the 1880s and by 1898 had extended its lines into the San Joaquin Valley. The Southern Pacific continued its northern expansion in the 1880s and 1890s into the Sacramento Valley. By 1910, California had four direct transcontinental railway links and a web of feeder lines into every corner of the state except the northwest. The expansion of the railway net opened new markets and with the advent of irrigation revolutionized California agriculture.

Irrigation started the shift from wheat culture to fruits, vegetables, and nuts on California's farms. Paul W. Rhode has termed this shift "one of the most rapid and complete transformations ever witnessed in American agricultural history." The refrigerator car enabled the shipment of an entire train carload of oranges to the east in 1886. In 1906 growers sent eastward nearly 82,000 carloads of fruits and nuts. A county named Orange won legal status in 1889.

Railroads also enabled the expansion of the lumber industry. Redwood became a familiar product in the East, and between 1899 and 1904 many eastern lumbermen moved their operations to the redwood forests and the pine forests of the Sierra. The port of San

Francisco shipped to the world, and railcars carried California lumber to the robust markets in the Midwest and the East. Meanwhile, San Francisco grew as a financial center for the West—but also thus became more susceptible to nationwide economic panic and depression, particularly in 1893 and 1907. Money at interests would push parties into court as well as into insolvency in times of economic distress.

California's population grew dramatically in this period and shifted away from San Francisco. In 1880, the state's population stood at 864,694. One decade later, the number had swelled to 1.2 million and by 1910 close to 2.4 million. The population increase after the turn of the century was not distributed evenly. Most of the new settlers came to Southern California or the Central Valley; and Los Angeles grew 212 percent to nearly 320,000 in 1910, while new settlements boomed in the hydraulic empire that had grown up in the San Fernando Valley. Newcomers to Sacramento and the San Joaquin Valley saw potential in the booming fruit and nut industries. With the surge of population, California revisited the problem of the homeless, the tramps, and the floating army of dispossessed workers. For the California Supreme Court, the expanding population and economy would bring a vast variety of important new questions to the appellate bench.

#### CONCLUSION

Despite the strident language of its critics, by 1910 the California Supreme Court had moved from the formalistic jurisprudence characteristic of its early years to a form of activism that would come to characterize the twentieth-century Court. The Court had affirmed a woman's right to access to employment, become more sensitive to the constitutional rights of minorities, and fearlessly interpreted law regardless of firestorms of public outrage. The Court was now a public institution at the center of efforts to reform government, regulate corporations, and preserve the rule of law. Moreover, the Court had created lasting precedent in numerous areas of law, resolved the most inflammatory water and land-use rights disputes of the day, and established new standards for inherently dangerous instrumentalities that would substantially influence tort law in the twentieth century. In so doing, the Court laid the foundations for California's transformation from frontier state to diverse and prosperous center of population and industry. Finally, the Court largely achieved the balance sought under the 1879 constitution, avoiding judicial despotism and adjudging disputes with fairness and integrity, and guiding with a modest hand California's development through the tempestuous politics of the late nineteenth century. ★

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# *The Age of Reform*

1910–1940

CHAPTER THREE | BY LUCY E. SALYER\*

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## INTRODUCTION

IN 1911, CALIFORNIA inaugurated its twenty-third governor, Hiram Johnson, and embarked upon a new political era, dominated by the so-called Progressive movement. Both contemporaries and later historians have been struck by 1911 as a vital watershed in California politics. Within 85 days of Johnson's election, the California legislature passed more than 800 bills and 23 constitutional amendments. "Astounding," "revolutionary," "sweeping," "novel"—these were the adjectives observers repeatedly used to convey the dramatic changes they saw engulfing the state. By 1913, California had adopted the initiative, referendum and recall; women's suffrage; a workers' compensation program; an expanded and reinvigorated public utilities regulatory scheme; an eight-hour workday and a minimum wage law for women; and a local-option law. California, concluded one commentator, was "the farthest outpost of advancing democracy."

Reform was to be a consistent theme in California in the period from 1910 to 1940, though not everyone would agree that reform was wise, necessary, or even progressive. In the early twentieth century, California grappled with the problems associated with becoming a modern, urban industrial state. Reformers sought to impose order and rationality on a diverse, unwieldy society and to temper the harsh effects of the new corporate, industrial economy. Although reformers' energies peaked during the Progressive Era, the 1920s and 1930s continued to witness significant change as the state dealt with rapid urban and economic growth, followed by the economic devastation of the Great Depression.

As the California legislature's record in 1911 demonstrates, law was both a tool and a target of progressive activists' reform agenda. In an address before the California State Bar Association in 1925, Professor Orrin K. McMurray of the University of California's then-School of Jurisprudence contrasted California jurisprudence in the last quarter of the nineteenth century, "a period of quiescence," with the early twentieth century when "the spirit of experiment in human affairs broke forth." By 1925, the legal system had been "radically changed . . .

profoundly affect[ing] lawyers and courts [as well as] the activities, ideals and habits of the mass of mankind." The reform legislation and constitutional amendments embodied new legal assumptions about the relationships between employers and employees, private property and public interest, and the prerogatives of the corporation. They also embraced a new form of governance: regulation through the administrative agency. Through such agencies, McMurray concluded, "Our life at every point is affected by regulation, from the registration of our birth to our burial permit."

Such sweeping changes in law and governance did not go unchallenged, and the California Supreme Court very soon had the opportunity to rule on several key aspects of the reform legislation. The Court proved less willing than reform politicians to modify late nineteenth-century concepts of property rights and negligence and more suspicious of new administrative power. Its reluctance to embrace the legislation likely came as no surprise to legislators who tended to identify the Court as the ally of the status quo. In fact, the California courts were a prime target of Progressives' reform agenda as they sought to make judges more politically accountable and limit judicial review of new administrative bodies. Legislators' suspicions of the Court were not groundless. In its evaluation of public utility regulation, water rights, and workers compensation, the Supreme Court often narrowed the reach of the new legislative and constitutional reforms. Yet by the 1920s and 1930s, the Court showed signs of accepting broader concepts of the police power and of endorsing governmental regulatory power over an ever-widening range of activities. What had seemed novel and shocking propositions in 1911 had become mainstream notions in the face of the unique challenges brought by the Great Depression and the multitude of problems California faced as it matured into a modern industrial state.

## JUDICIAL REFORM: 1925–1934

One of the first major tasks the Court attended to was internal reform. By the late twenties, the California judicial system once again had become a target for reformers. The Progressive campaign of 1911, culminating in the passage of the judicial recall and the nonpartisan election of judges, sought to divorce judges from party politics, particularly by insulating the judiciary from the influence of the Southern Pacific political

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AFTER IT WAS DISPLACED BY THE 1906 EARTHQUAKE,  
THE SUPREME COURT MOVED TO THE WELLS FARGO BUILDING, 85 SECOND  
STREET, SAN FRANCISCO, WHERE IT REMAINED FROM 1907 TO 1923.

machine. The solution of the Progressives was to make judges more democratically accountable. Reformers in the late twenties shared the concern about the relationship between politics and the judiciary but identified a strikingly different range of problems and possible solutions. Attorney Hugh Brown pointed out that, unlike the movement leading to the judicial recall in 1911, the “ferment” in 1926 was less against the judges than it was “against delay, and against the vast mass of technicalities in the law of evidence and procedure, and against the dips, spurs and angles of appellate practice . . . and the unconscionably long life of the average litigation.”

The high turnover of judicial personnel, congestion, and delay plagued courts throughout the state. The dockets of the appellate courts were in serious arrears. “California Supreme Court is 20 Months Behind in Work” announced one *San Francisco Chronicle* headline in 1918. And this was an improvement, according to Chief Justice Angellotti, who reported that the Court had recently been as much as five years behind in its work. But “extensive litigation,” especially in Los Angeles, “made it difficult to keep pace with the docket.” Congestion had become so “critical” by 1926, according to Brown, that “it is tantamount to a breakdown in the appellate system of the state.” Some blamed the backlog on the “inefficiency and indolence” of attorneys who took frivolous appeals and did not prepare adequately. Others complained of “incompetent and lazy” judges.

But Brown found the fault to lie in an outdated legal system. “In a skyscraper age the Court business still lumbers up and down stairs,” he argued. The solution was “to release the court from its old traditions, its old straight-jacketed methods, and to speed its operations.”

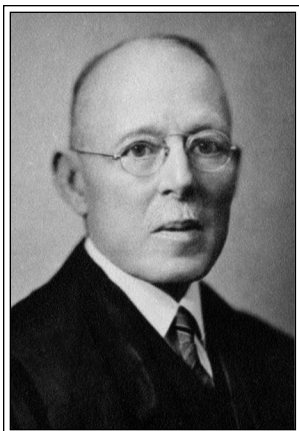
The judiciary and the bar associations took the lead in attacking the problem of congestion and the staffing of the courts; in doing so, they carved out a larger, more independent legal arena in which they would wield greater authority. Most legal reformers in the twenties shared Brown’s broad perspective that the judicial system needed to be revamped to meet the modern age. They further believed that lawyers and judges, as the legal experts, were situated ide-

ally to bring about this transformation. Drawing upon analogies to the business world, the reformers argued that congestion and delay could “be overcome only by coherent effective business administration, with a head vested with adequate powers.” If the best legal talent could be drawn to the bench and, once there, if judges had sufficient discretion to exercise their expertise, they soon would put the “judicial plant” in order. Between 1925 and 1934, legal reformers succeeded in instituting several changes, including, in order of their adoption: higher salaries for judges, the creation of a judicial council, the wearing of judicial robes, and the approval of the unopposed judicial retention election.

The push for higher salaries came as respected justices began to leave the Supreme Court for financial reasons. Modern justice, reformers argued, required judges of “greater mentality” to handle the complex, often technical issues of the day; yet such judges could not be attracted and kept on the bench at the salaries then current. In 1906, new provisions in the state constitution removed the power to set judicial salaries from the legislature and, instead, prescribed the pay of the justices at \$8,000 a year. Furthermore, the justices’ salaries could be delayed if the Court did not dispose of cases submitted for decision within 90 days. The resignations of Angellotti, Sloss, and Shaw for financial reasons provoked a move to change the “clearly inadequate” salary levels, to at least “relieve the judge and his family from

financial worry for the present and for the future.” Once again, the bar took the lead to improve judicial salaries. Initially distrusting the legislature with the power to adjust salaries, the California Bar Association first sponsored an initiative constitutional amendment in 1920 to increase the justices’ salaries to \$10,000, a measure that was “overwhelmingly defeated” by the voters. The bar then proposed to give the legislature the power to establish judicial salaries. Voters ratified that amendment in 1924 and a year later, the justices received a long-overdue raise.

Higher judicial salaries would help to keep the best jurists on the bench. But even the “best men” could not make a significant difference if they remained restrained, in Brown’s words, in “old straight-jacketed methods.” Reformers proposed a judicial council to help modernize the court system. Headed by “experts”—the chief justice of the Supreme Court and representatives from all of the state courts—the council’s mission was to study the administration of justice and suggest changes to expedite judicial business. California voters approved a constitutional amendment creating a judicial council in 1926, allowing for the assignment of judges to aid other courts in the hope that greater coordination of the state’s courts would allow “justice to speed up.”



CHIEF JUSTICE  
WILLIAM H. WASTE

One of its main proponents, Chief Justice Waste, trumpeted the “bold advance in the administration of judicial business” in California, but cautioned those who expected immediate results—and perhaps reassured those who worried about dramatic change—that his council was judicial in its method and orientation. Although council members were to be efficient administrators, they would conduct them-

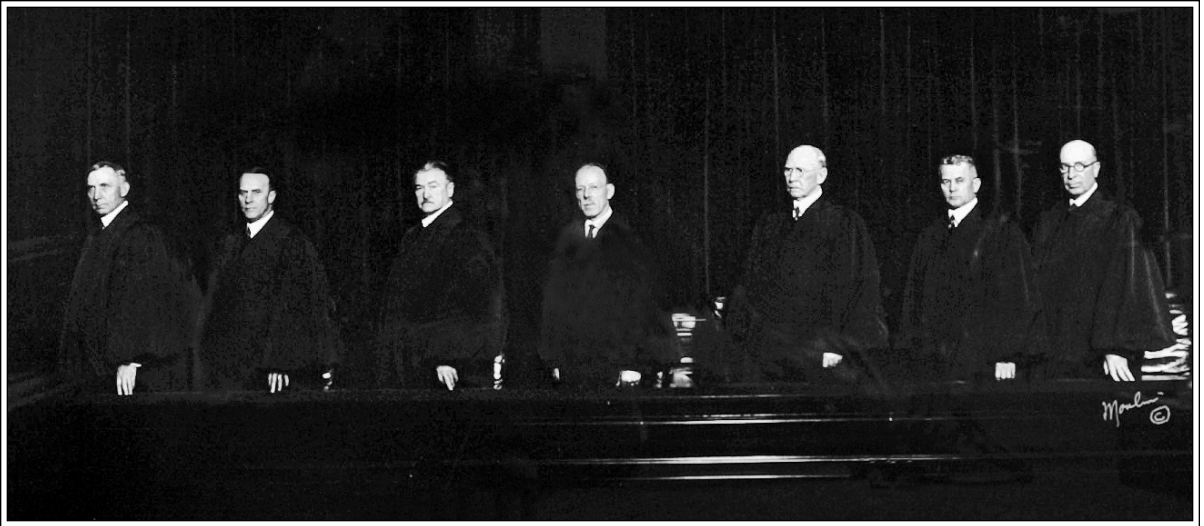
selves in a judicial manner, meaning “after due consideration of every matter presented, and in the exercise of sound judgment.”

As if to emphasize that judges would continue to be “judicial” even as they were being recast in progressive reform as efficient administrators, Waste instituted a third reform in 1928: the wearing of judicial robes. Although Governor Johnson had advised that the lawyers of the future would do better to pack away their wigs and legal traditions, Waste established the tradition of wearing robes to give the modern judge a patina of greater respectability. For the major chronicler of the

Supreme Court, the donning of judicial robes symbolized the end of the Court’s “pioneer age” and indicated that the state “had clearly come of age judicially.” The *San Francisco Chronicle* treated the topic humorously but readily acknowledged the symbolic effect of the robes: they served as “a reminder of the dignity of the law” and “will tend to make the court impressive to those who appear before it.” Perhaps wrapped in such robes, the Court would become clothed, literally, with greater authority and would be able to distance itself from recent political turmoil and from the tarnished reputations of certain justices.

The attempt to disassociate the judiciary from the political arena was more explicit in reform efforts concerning the selection of judges. In explaining the rapid turnover of Supreme Court justices, commentators blamed not only low salaries but the distasteful and costly nature of political campaigning. Supreme Court judges in California had been selected by popular election since 1849. The push for a different method of choosing judges gathered steam in the 1920s, as a response to the difficulty in getting qualified jurists to sit and remain on the bench. Though justices had always had to stand for election, the process had become worse since 1911, in the eyes of several critics. In 1911, the direct primary had been established, doing away with the political parties’ control over nominations. Lawyer Joe Sweet complained that while the direct primary had some laudable aims, it made the judicial candidate’s campaign more difficult; rather than relying upon the party organization to secure his election, the candidate had to “trumpet his own virtues, . . . solicit votes and . . . solicit funds” to pay for his campaign. These efforts not only took time away from judicial duties, but also attracted the “wrong sort” to the bench. The president of the California Bar Association agreed, arguing that the best jurists found campaigning “disagreeable” and “abhorrent” and antithetical to the judicial role, leaving the “incompetent and unfit to seek election.”

Recent contested judicial elections revealed the drain they took on the judges as well as their potentially damaging effect on the Court as a whole. Thomas Joseph Lennon, for example, campaigned vigorously against William H. Waste for the position of chief justice in 1926. Like Lennon, Waste had established a long judicial career before he came to the Supreme Court, but he had been appointed rather than elected to most of his judicial posts. When Angellotti resigned in 1923, Governor Stephens appointed Waste to the Supreme Court and, three years later, Governor Richardson, a friend as well as political colleague, elevated him to chief justice. A fervent proponent of the election of judges, Lennon cast both Waste and his judicial colleagues in an unfavorable political light. Lennon charged that the rapid turnover of justices after 1918 had allowed the governor



### THE WASTE COURT

CHIEF JUSTICE WILLIAM H. WASTE (CENTER) AND (LEFT TO RIGHT) ASSOCIATE JUSTICES JOHN W. PRESTON, JOHN W. SHENK, EMMET SEAWELL, JOHN E. RICHARDS, JESSE W. CURTIS, AND WILLIAM H. LANGDON

PHOTO: MOULIN STUDIOS

unprecedented opportunity to appoint justices to the bench, resulting in a judiciary chosen by “a coterie of high-powered corporation lawyers and ex- and incumbent judges.” “If I am elected at the hands of the people I will not be ‘The Governor’s Chief Justice,’ ” Lennon promised. “I shall be the people’s Chief Justice . . . and I can assure you that there will be no beaten path from my office to the private office of the Chief Executive of the State!” But fate denied Lennon his chance to become the people’s chief justice; before the election came to a close, he reportedly “died of exhaustion.” Now unopposed, Waste became chief justice and, partly in response to the contentious election battle with Lennon, became an advocate of an alternative to judicial elections. The elections clearly overtaxed the judges’ strength. They also turned judges into political candidates, tainting the image of a dignified, neutral judiciary and encouraging candidates to politicize the bench in unseemly ways.

Many in the bar agreed with California Bar Association President, Thomas Ridgeway, that “it would seem that some method ought to be devised that would remove our judiciary from politics and place it upon a higher plane where fitness and merit count.” From the late twenties into the early thirties, the bar sharply debated how judges should be selected. A move to appoint, rather than elect, state judges began as early as 1914 when the Commonwealth Club argued that the “average intelligent citizen” did not have the capacity to evaluate the qualifications of modern judges who needed to be of “greater mentality” as the growing “complexities of our life call for high technical ability in settling disputes.” Who did have the expertise to assess the qualifications of potential Supreme Court justices?

Not surprisingly, the bar answered “the bar.” As legal “experts,” lawyers sought to take the lead in judicial reform and secure a more professional judiciary, taking part in the national campaign of the American Bar Association to assert greater control over judicial selection and the legal profession as a whole. But proposals to appoint judges met persistent resistance from those such as attorney Saul Klein who believed “we . . . should maintain our democratic method of selection at all hazards.” He feared that appointment would return the state to the domination of the elite and concluded that “our task is to restore the judiciary to the people and not to make it easier to control them.”

The debate over judicial selection ended with a compromise: the constitutional amendment that was finally adopted in 1934 provided that candidates for the Supreme Court would run unopposed. Either the incumbent could declare his or her intention to stand for election, or, if the incumbent declined to declare such candidacy, the governor could nominate a candidate. The governor’s nomination first had to be approved by a “Commission on Judicial Appointments,” composed of the chief justice of the Supreme Court, a presiding judge of the district court of appeals, and the state attorney general. The electorate would then either vote “yes” or “no” on the single candidate.

By 1934, the legal reformers had achieved a significant degree of success in altering the image and operation of the California judiciary. The reforms adopted between 1925 and 1934 were an outgrowth of the earlier reforms of 1911. The Progressives’ critique of the judiciary in 1911 had raised questions about its relationship to politics and resolved the perceived conflict in favor

of greater democratic controls over the judiciary. By the 1920s, however, reformers from within the legal system addressed the same question by attempting to reconstitute the judiciary as a professional, neutral body of experts engaged in the administration of justice, rather than in substantive policymaking. Attorney Hugh Brown saw the difference in the 1911 recall and the later reform efforts when he argued that the first reflected dissatisfaction with judges and their decisions while the latter revealed an impatience with delay and technicalities. What he did not appreciate, perhaps, is how he and other legal reformers had helped to refocus the reform debate away from judges and their decisions in their framing of the problems and the solutions they advocated.

## CONCLUSION

By 1940, California law and legal institutions had changed significantly from when the Progressives first embarked upon their “search for order.” The reformers left their mark: the efforts to rationalize the economy had resulted in more active public management of natural resources and public utilities, the regulation of commercial markets, and the endorsement of organized labor under the “countervailing powers” theory. The boundaries of urban and rural communities were policed by novel zoning ordinances and discriminatory legislation such as the Alien Land Laws. The criminal justice system

had more tools at its disposal—probation, indeterminate sentencing, the juvenile court—and the discretion to use them in its effort to cope with modern crime. The California Supreme Court initially had resisted several of the changes such reforms brought, proving hesitant to sanction the substantial expansion of public power over private property that lay at the heart of much of the reform agenda. The Court eventually acquiesced to the new public order, sometimes enthusiastically, as in the Court’s path-breaking embrace of zoning, and at other times, such as in the conflict over riparian rights, reluctantly and only after the state passed constitutional amendments to overcome jurisprudential hurdles. The Court not only ended up endorsing much of the reform agenda, but also adopted some of the reformers’ rhetoric and techniques in putting its own house in order. With the creation of the Judicial Council and changes in judicial selection, the Waste Court appealed to the need for a more efficient, professional, and depoliticized judiciary and provided the foundation for ongoing Court reform. If the Court accepted the rise of the administrative state, with the concomitant need to redraw the boundaries of private rights, it had yet to consider in depth the consequences of expanded public power for civil liberties and civil rights. Before 1940, the Court proved hesitant to expand the protections of free speech and association or the rights of criminal defendants. Those issues would await the attention of the Gibson Court. ★



THE COURT MOVED TO ITS PRESENT LOCATION AT 350 McALLISTER STREET IN 1923.

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# *The Gibson Era*

1940–1964

CHAPTER FOUR | BY CHARLES J. McCLAIN\*

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## INTRODUCTION

ON JUNE 10, 1940, Associate Justice Phil S. Gibson succeeded William Waste as chief justice of California, elevated to the position by Democratic Governor Culbert L. Olson. He was the state's twenty-second chief justice and would preside over the California Supreme Court for almost a quarter century, longer than any chief justice save one in the Court's history. Gibson's tenure as chief justice coincided with a period of monumental social, economic, and demographic change in California. During these years the population grew from some seven to some eighteen million (its racial and ethnic composition changed as well), and by the time Gibson left the Court, in August 1964, California was the largest state in the union. The state's economy was also transformed during these years, and its wealth, both in aggregate and per capita terms, increased dramatically. Both of these developments—the growth in population and the economic expansion—were related in significant ways to the country's mobilization for the Pacific War and to federal defense spending during the Korean and Cold Wars.

The period would prove to be an extraordinarily eventful one for the California Supreme Court. While chief justice, Gibson oversaw and indeed was the driving force behind a major overhauling of the state's judicial machinery. More important, he and his colleagues on the bench in a series of decisions, some of which might be truly called pathbreaking, transformed major sectors of the state's public and private law. These decisions brought attention and increased prestige to the Court. In 1940, the California high court was seen as a solid if unspectacular tribunal, one that exerted considerable regional influence but that did not have much in the way of a national reputation. By the time Gibson retired it was perhaps the most highly regarded state appellate court in the nation.

## FIRST REFORMS IN JUDICIAL ADMINISTRATION

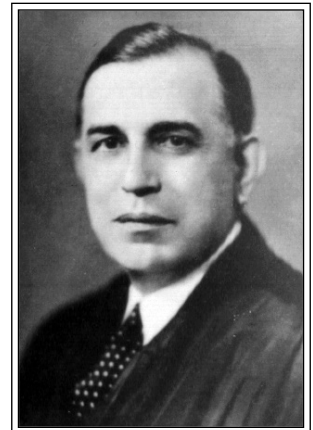
The chief justice of a state high court presides not only over the deliberations of his or her own tribunal, but is

also, by virtue of the post, chief executive of the state's entire judicial system, with ultimate responsibility for its smooth operation. Some find this responsibility bothersome and an unpleasant distraction from the more intellectually interesting job of addressing the important legal questions that come before appellate courts. Gibson was perfectly comfortable with his administrative duties and took them very seriously. Indeed a concern for improving the administration of the courts would be one of the defining features of his tenure as chief justice. It was evident from the very beginning of his administration.

Within months of taking office Gibson announced his strong support for a State Bar recommendation that the legislature confer the power to make rules of procedure on the Judicial Council, the constitutionally-created body of state court judges, chaired by the chief, that was responsible for monitoring and making recommendations for the improvement of judicial operations. Congress had given such power to the United States Supreme Court in 1934, and the legislatures of several states had given similar powers to their own high courts, but the California legislature still retained exclusive authority in this area.

The proposal made a great deal of sense, Gibson agreed, but that step would be meaningless, he cautioned, unless the legislature also provided the means for its effective exercise. The judges who constituted the Judicial Council were too busy with their ordinary judicial duties to do the extensive research that would be a necessary preliminary to the revision and drafting of rules of procedure. Money should be appropriated to empanel a body of experts—judges, legal academics, and lawyers—who could attend to this task under council supervision. And it should be assisted by a permanent professional support staff. (The council at the time had none.)

Gibson's plea bore fruit. In 1941, the legislature gave the Judicial Council authority to issue rules of appellate



CHIEF JUSTICE  
PHIL S. GIBSON

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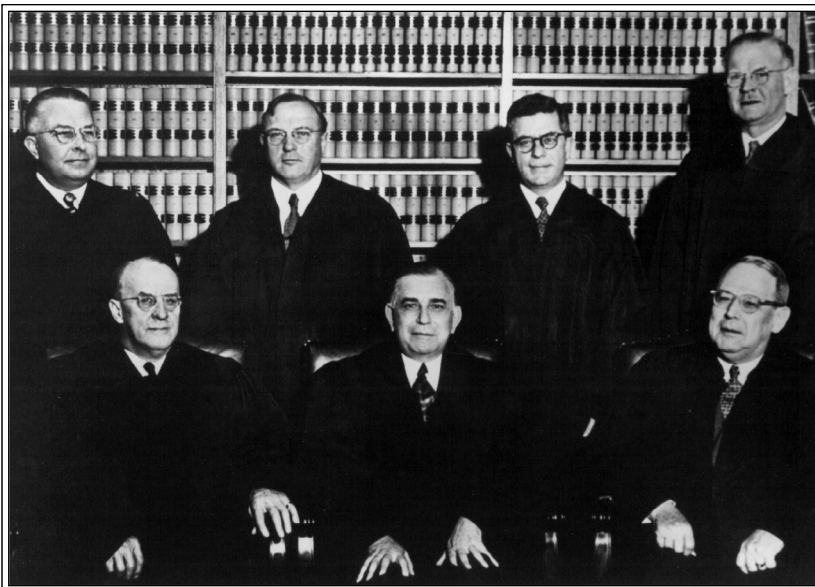
\* Lecturer in Law and Vice Chair, Jurisprudence & Social Policy Program, School of Law, UC Berkeley (retired). [Editor's Note: This article is excerpted, without endnotes, from the Society's forthcoming history of the California Supreme Court.]

procedure and practice and appropriated funds to hire a committee of experts and support staff to assist in the drafting effort. The committee worked under the supervision of Bernard E. Witkin, then on the Supreme Court staff, later the author of one of the most widely used treatises on California law. By early 1943, new Rules on Appeal were ready for legislative consideration and on July 1 of that year went into effect. As Gibson hoped, appropriations were made to retain on a permanent basis some of the research staff who had assisted in the enterprise. Thereafter the Judicial Council would have a permanent research staff at its disposal.

If a professional research staff was important for the proper functioning of an institution like the Judicial Council, it was even more important in Gibson's mind to the proper functioning of a state high court. Since the 1920s the California Supreme Court had employed law clerks to assist the justices in legal research and writing. (In this respect it was something of a pioneer among state appellate courts.) In 1940 each justice was assigned one such clerk. Some of these were what today would be called "annual clerks," recent law school graduates serving temporary stints on the Court before commencing careers in practice. Others were there on a more open-ended basis. Gibson moved early to expand the size of the research staff and to formalize the position of research attorney and to make it more attractive. To these posts he was able to recruit a highly talented corps of young lawyers, some of whom decided to make careers out of their jobs. As the years passed the research attorneys became increasingly integrated into the Court's decision making. All of the justices of the Gibson Court came to rely heavily on them for the drafting of their opinions as have almost all California Supreme Court justices ever since—a development that has not pleased all Court observers.

#### GETTING CONTROL OF THE DOCKET

The California Supreme Court in 1940 had an extensive jurisdiction. Litigants could appeal directly to it from the superior courts in equity cases, in cases involving title or possession of real property or challenges to the legality of taxes or fines, and in certain kinds of probate matters. The Court was obligated to hear appeals from the superior court "on questions of law alone" in criminal cases where judgment of death had been rendered.



#### THE GIBSON COURT

CHIEF JUSTICE PHIL S. GIBSON (CENTER) AND (LEFT TO RIGHT) ASSOCIATE JUSTICES B. REY SCHAUER, JOHN W. SHENK, JESSE W. CARTER, ROGER J. TRAYNOR, DOUGLAS L. EDMONDS, AND HOMER R. SPENCE

It had original (as well as appellate) jurisdiction to issue writs of mandamus, habeas corpus or prohibition. Finally it had discretion to review "matters pending" before the District Courts of Appeal, the intermediate appellate courts that had been established in 1904, which, in the words of the constitution, the Court could order "transferred to itself for hearing and decision."

By the time Gibson took office, thanks in part to the large jurisdiction described above, the Court's docket was bulging with a three-year backlog of pending but undecided cases. Invoking a provision of the constitution seldom before used that allowed the Supreme Court to send any matter pending before it to the district courts of appeal for decision, Gibson on April 23, 1942, ordered over 800 cases so transferred. To help the DCA deal with their now increased caseloads, the Supreme Court announced that they would be given additional pro tem justices (an additional division had already been added to the Los Angeles DCA). The Court simultaneously announced that its future policy would be to send all primary appeals to the DCA for initial consideration. Eventually this policy was extended to most petitions for writs. With these changes, the high Court's docket now consisted almost entirely of cases previously decided by the DCA that, in the exercise of its discretion, the high court decided it wanted to review. During Gibson's tenure about one in every four petitions for review was granted.

#### CONCLUSION

In his 1928 monograph, *The Paradoxes of Legal Science*, Justice Benjamin Cardozo describes the history

of legal development as the history of an eternal tug of war between conservation and change, rest and motion. The Gibson years were unquestionably years of motion in California. If one looked at the reforms in judicial administration alone the description would be apt. Gibson's reforms thoroughly transformed the structure and operations of the whole state court system, making it one of the most modern in the country and leaving it much better equipped than it had been before to meet the judicial needs of the vast and growing state. But this was a period of extraordinary change in substantive law as well. Indeed it is hard to think of a comparable period in the history of any state that has witnessed so much change in so many different areas of law. And the question arises, what factors account for the Gibson Court's extraordinary record of doctrinal innovation?

During the first 20 years of Gibson's tenure there was a solid core of justices—Traynor, Carter, and Gibson himself—who were to one degree or another activist by temperament. They had confidence in the law's ability to shape the social landscape, to act as a catalyst for social change. Justices Schauer and Edmonds could be persuaded to join this group from time to time, and a majority could thus be fashioned for one of the Court's bolder moves—*Perez v. Sharp*, for example, or *People v. Cahan*. (By the last years of Gibson's chief justiceship there was a solid majority of activist judges on the tribunal.) Moving beyond the core and the occasional swing justices there was a surprisingly broad consensus on the Court in favor of some change. Almost all of the justices seem to have been receptive to the view that the Court had an obligation to keep the law abreast of modern social needs and that the law of California was lagging behind these needs—at least in some areas. This was particularly noticeable in fields like torts where changes were brought about in almost every instance by unanimous or near unanimous votes. The same can even be said of some of the civil rights cases.

It is doubtful, though, whether all of this would have happened without the leadership of the chief justice. Gibson was a soft-spoken person of great personal warmth, but no one who ever dealt with him had any doubts about the forcefulness and determination that lay beneath the surface. He radiated, as his friend Governor Brown observed, the habit of command. The qualities of forcefulness and determination were coupled with a well-developed political sense, one that his stint as director of finance in the Olson administration, a post requiring great political savvy, could not help but have honed. Gibson knew how to deal with people to get results. These skills, as we have pointed out, were much in evidence in his implementation of administrative reforms. They must also have stood him in good stead in building consensus for changes in the substantive law.

Roger Traynor's presence on the Court was obviously, too, an extremely important element in the mix. He provided leadership as well, of an intellectual variety. He funneled into the Court's deliberations his own ideas and the best ideas, as he saw them, of the legal academy, lifting discussion, one imagines, to a new level of seriousness. He could also articulate the rationale for legal change better than any of his fellow justices. At the same time, he does not seem to have been overbearing or in any way condescending in advancing his views. One cannot document specific instances in which he influenced his fellow justices, but it would be surprising if the weight of his intellectual presence did not tell from time to time in decision making.

There is finally a negative factor that needs to be considered. No countervailing forces arose during the Gibson years to stop the Court in what it was doing or suggest that it should slow down. No serious attempts were made during Gibson's tenure to upset either by legislation or voter initiative any of his court's decisions. (Initiatives designed to overturn California Supreme Court decisions have occurred with some regularity in the recent past.) This was probably because the Court in general was moving in phase with public opinion or at least was not too far ahead of it. Some evidence of this is the relative dearth of news media commentary critical of the Court. Another, possibly, is the vote in judicial retention elections. These elections give voters a chance to express their disapproval for the direction in which a tribunal is going by voting justices of whom they disapprove out of office. During Gibson's tenure the vote was always lopsidedly in favor of retention. Gibson, Traynor, and Carter, the three most activist members of the Court, won the last retention elections in which they stood—elections held in the years 1958 and 1962—by margins of seven, nine, and ten to one. It is true that no sitting justice had been unseated since the system went into effect in 1934. Still, the size of the margins seems significant.

Why might the several audiences to which the Court spoke—press, legislature, general public—have watched acquiescently while the Court remade so much California law? The two decades following World War II were, as the historian James Patterson has observed, years of “grand expectations” in America. Vibrant economic growth gave Americans a new sense of optimism. It led them to believe that by their purposive actions they could solve whatever problems confronted them, whether domestic or foreign. Nowhere was growth more vibrant than in the state of California. Nowhere was there more of a sense of dynamism in the air. It is perhaps not surprising that in a period of expansive feelings generally, many members of the public, like so many justices of the Gibson Court, would take an expansive view of the law's possibilities.



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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

IN 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



CHIEF JUSTICE  
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.

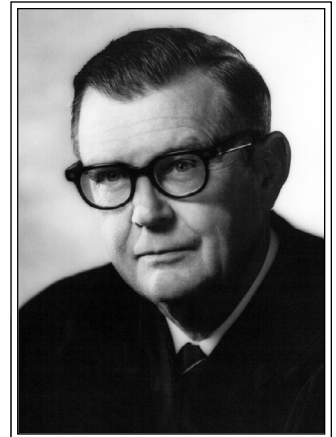
Various proposals were floated, most notably in a proposal by the State Bar in 1992 calling for creation of a new “Court of Review” that would share workload with the Supreme Court, divided by the degree of the social or political importance of issues involved; and some leading figures in the California 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



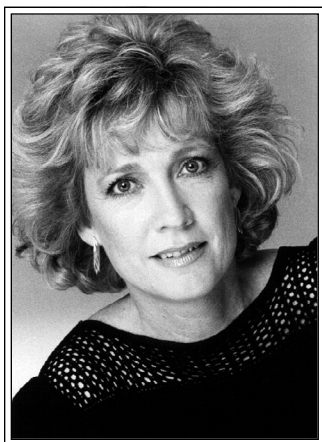
CHIEF JUSTICE  
DONALD R. WRIGHT

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



CHIEF JUSTICE  
ROSE ELIZABETH BIRD

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 unrelenting. 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. ★

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# The Lucas Years

1987–1996

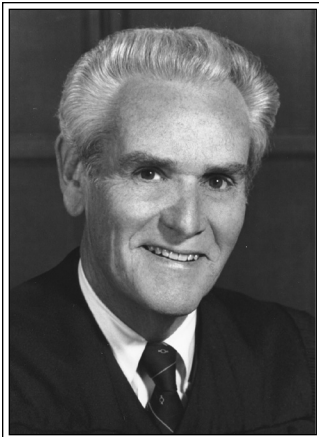
CHAPTER SIX | BY BOB EGELKO\*

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THE MORNING AFTER the November 1986 election, “it was as if a scythe had cut through the Court,” recalled Peter Belton, Justice Stanley Mosk’s longtime head of chambers and staff attorney. “People were walking around looking like they’d been hit by a ton of bricks.” Three months later, the shell-shocked Court gained a new leader when Malcolm M. Lucas became California’s 26th chief justice, and the first in modern times to have been put in office by the people.

The 59-year-old former federal judge had been nominated as chief justice in January by Governor George Deukmejian, his former law partner, who had first appointed him to the Court in 1984. But Lucas owed his elevation to the voters, who had denied new terms in November

to Chief Justice Rose Bird and Justices Cruz Reynoso and Joseph Grodin. It was the first time since California switched from contested elections to yes-or-no retention votes for its highest courts in 1934 that any justice had been unseated. When Deukmejian’s three Supreme Court nominees, appellate Justices John Arguelles, David Eagleson, and Marcus Kaufman, were sworn into office on March 18,



CHIEF JUSTICE  
MALCOLM M. LUCAS

in 1987, a court with a liberal majority for most of the previous four decades was suddenly controlled by conservatives.

Few court-watchers expected Lucas to lead the rightward shift. In three years on the Court, Lucas had not written any particularly significant majority opinions, and few of his numerous dissents had attracted much attention. Nor was he considered charismatic by those who followed the Court. But this proved to be the Lucas Court, in fact as well as in name. To a degree unmatched by any latter-day California chief justice except Roger Traynor, Lucas wrote most of the Court’s important rulings. His opinions narrowed tort liability for insurers and

employers, set new standards for Californians’ privacy rights and for discrimination suits by business customers, placed new limits on local taxing authority under Proposition 13, preserved state judges’ power to interpret criminal defendants’ constitutional rights, shielded private arbitrators from judicial review, and upheld a legislative term-limits initiative. He charted a new course for the Court on the death penalty, leaving the existing case law mostly intact but regularly upholding death sentences with a broad application of the doctrine of “harmless error,” all the while struggling to reduce the Court’s mounting backlog of capital appeals.

In all, Lucas wrote 152 majority opinions as chief justice, more than anyone else on the Court during the same period, and dissented in less than five percent of the cases, the lowest rate on the Court. His dissent rate reflects to some degree the narrow range of views among the majority justices and Lucas’s conservatism; it also suggests his ability to forge and maintain a majority in cases that divided the justices.

## THREE NEW JUSTICES

Of the three newly appointed justices, Kaufman was probably the most publicly visible, bringing a reputation as an intellectual conservative in his return to the Court. He had worked there as an annual law clerk for Justice Traynor, his ideological opposite, in 1956–1957, after graduating at the top of his USC Law School class. He practiced real estate and business law in San Bernardino until 1970, when Governor Ronald Reagan named him to the Fourth District Court of Appeal.

Justice Eagleson, on the other hand, came to the Court with more renown as an administrator than as a judicial theorist, yet became the Court’s most prolific writer of majority opinions during his tenure. He had previously spent twenty years practicing civil law before Governor Reagan appointed him to the Los Angeles Superior Court in 1970. In 1984 Governor Deukmejian elevated Eagleson to the state’s Second District Court of Appeal. Eagleson once described himself as a “bread and butter” judicial pragmatist who preferred workable solutions to elegant concepts. His most lasting impact on the Court may have been administrative, as the chief craftsman of procedures that enabled the justices, beginning in 1989, to issue their rulings within ninety days of oral argument.

The third member of the newly appointed Deukmejian trio, Arguelles, was the second Hispanic (follow-

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\* Legal Affairs Reporter, *San Francisco Chronicle*. [Editor’s Note: This article is excerpted, without endnotes, from the Society’s forthcoming history of the California Supreme Court.]

ing Reynoso) ever appointed to the Court, and arrived with a reputation as being somewhat more moderate than the other newcomers. He spent eight years in private practice, while also working as a legislative lobbyist and a Montebello city councilman, before Governor Pat Brown, a fellow Democrat, appointed him to the Los Angeles Municipal Court in 1963. He was elevated to the superior court by Reagan in 1969, and to the Second District Court of Appeal by Deukmejian in 1984.

#### THE OTHER THREE EXISTING JUSTICES

The fifth Deukmejian appointee, Justice Edward Panelli, was regarded as only moderately conservative, based partly on his record in 13 months on the Bird Court, and partly on his role in a battle over judicial appointments. After 10 years on the Santa Clara County bench, Panelli had been nominated first by lame-duck Governor Jerry Brown in December 1982 for one of three positions on the new Sixth District Court of Appeal in San Jose. Then-Attorney General Deukmejian, the governor-elect, blocked all three confirmations as a member of the Commission on Judicial Appointments, but named Panelli to the same court in August 1983. Panelli became presiding justice of that appellate court a year later, and was appointed by Deukmejian to succeed retiring Supreme Court Justice Otto Kaus in November 1985. He easily won retention for a new term a year later.

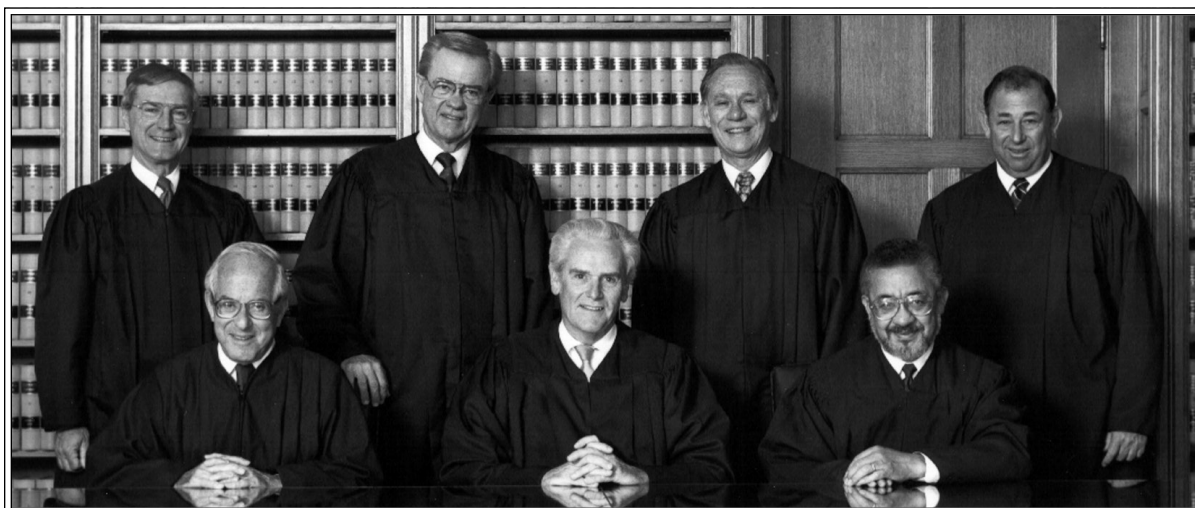
Mosk, then in the twenty-third year of what was to be a record 37-year tenure on the Court, and Allen Broussard, the only remaining Jerry Brown appointee, suddenly found themselves as the only two liberals on the Court. Mosk's reputation as one of the nation's foremost state jurists, his political sure-footedness, and perhaps his sudden proliferation of votes to uphold death sentences, had enabled him to survive the 1986 election; Broussard,

the mainstay of the Bird Court, had avoided its electoral purge because of the timing of his 1981 appointment, which allowed him to seek and win a new 12-year term in 1982. Ideologically in the minority for the first time in their judicial careers, the two liberal justices had to choose their roles in the new court: as insiders, joining the majority when they could, and working to maximize their influence and negotiate compromises whenever possible, or as outsiders, hoping to sway the public and future courts with the persuasiveness of their dissents. Statistically, their records did not differ greatly, but when they diverged, it was Mosk who joined the majority.

#### RETIREMENTS AND REPLACEMENTS

By 1991, all three of Deukmejian's new appointees would retire (along with Broussard), ushering in an infusion of new judicial blood. Arguelles's replacement was Joyce Kennard, a little-known Los Angeles jurist with a sparse resume: two years on the trial bench and one on the appellate court, all through Deukmejian appointments, preceded by seven years as a court of appeal staff attorney and four years as a deputy attorney general. Kennard became the second woman ever named to the Court and the first justice of Asian heritage, and would soon assume a unique role on the Court as an independent and unpredictable centrist.

Kaufman's successor was Armand Arabian, a longtime Los Angeles judge and friend of the governor who made him the first Armenian-American ever appointed to the Court. A trial judge for 11 years and a Deukmejian-appointed appellate justice for seven, Arabian had gained prominence as an antirape crusader whose act of judicial civil disobedience led to the demise of an antiquated instruction telling jurors to view a woman's allegation of rape with suspicion. Deukmejian's final



#### THE LUCAS COURT

CHIEF JUSTICE MALCOLM M. LUCAS (CENTER) AND (LEFT TO RIGHT) ASSOCIATE JUSTICES EDWARD PANELLI, STANLEY MOSK, DAVID N. EAGLESON, JOHN A. ARGUELLES, ALLEN BROUSSARD, AND MARCUS M. KAUFMAN

appointee, Marvin Baxter, was more informal and outgoing than Eagleson, the justice he replaced, but every bit as conservative. After 15 years as a lawyer in Fresno, Baxter had served as Deukmejian's appointments secretary for the governor's first six years in office and helped him choose more than 600 judges, including most of Baxter's future Supreme Court colleagues. In 1988, Deukmejian named him to the Fifth District Court of Appeal in Fresno in what was widely, and accurately, viewed as a prelude to a Supreme Court appointment.

The retirements of Broussard in 1991 and Panelli in 1994 allowed Governor Wilson to appoint the last two members of the Lucas Court, Ronald George and Kathryn Mickle Werdegarr. Both appeared to be cautious, safe selections. George had defended California's death penalty law before the U.S. Supreme Court, had won his judicial spurs by refusing a district attorney's request to dismiss murder charges against a serial killer known as the Hillside Strangler, and had been promoted by every governor since Ronald Reagan named him to the Los Angeles Municipal Court in 1972. Werdegarr had been a friend of Wilson's since law school. When she finished first in her class at Boalt Hall in 1961, Werdegarr, like future U.S. Supreme Court Justice Sandra Day O'Connor a decade earlier, couldn't find a law firm that would hire a woman. She eventually spent a year in the Justice Department's Civil Rights Division in Washington, held jobs as a legal researcher, consultant and educator, then worked as a staff attorney for the First District Court of Appeal in San Francisco and for Panelli on the Supreme Court before Wilson named her to the appellate bench in 1991.

## CONCLUSIONS

In nine years, the Lucas Court espoused the most consistently conservative view of the law that California had seen in a half century. But it was a court of retrenchment, not revolution.

Despite the Court's narrowing of tort liability, employees could still sue when they were fired illegally or recruited under false pretenses. Unwitting subjects of genetic research and neighbors of toxic dumps were allowed to seek recompense. The right of privacy established by California voters in 1972 was extended to encounters with the private sector. Criminal defendants' independent rights under the state constitution, though weakened, survived a ballot measure intended to demolish them. Even the Bird Court's death penalty precedents remained in place, with a few notable exceptions.

These, however, were modest counterweights to the Court's prevailing direction. Institutional litigants—prosecutors, employers, insurers, shopping mall owners—made up important ground they had lost in the previous decade. The Court deferred to one city's decision to protect its property from homeless campers, but not to another city's choice to protect overcharged tenants by imposing

triple damages on their landlords. Criminal juries' death verdicts were sustained despite judicial errors while civil jurors' power to award damages against businesses was scaled back. The Court upheld the voters' authority to put new limits on local tax revenue, on legislators' terms and budgets, and on criminal defendants' procedural rights, but thwarted their efforts to limit political contributions. Court majorities paid tribute to the values of marriage and parental authority in subjects as diverse as emotional-distress lawsuits, surrogate motherhood, and minors' abortions. A court that in earlier years had viewed U.S. Supreme Court rulings in criminal cases as an invitation to explore the California Constitution for new rights was now much more likely to follow Washington's lead.

The Court's defenders saw most of these developments as correctives for a period in which the scales of justice had tipped to one side. The Lucas Court's decisions "have brought a needed balance to California law after almost fifty years of liberal hegemony," Stephen Barnett, a University of California, Berkeley law professor, said in a 1992 essay. Professor J. Clark Kelso of McGeorge School of Law concluded in 1996 that "except for the death penalty, this court has been very much a mainstream court."

Such observations were subject to debate, yet they also raised intriguing questions about the Court's role and how it should be assessed. The much-admired Gibson Court, for example, would never have been labeled "mainstream," but it was widely regarded as an innovator whose work redefined the judicial mainstream. It was that leadership mantle that, in the view of the Lucas Court's detractors, had been sacrificed on the altar of public acceptance.

Whether the Lucas Court was a leader or a follower is an oversimplified question that probably can't be answered meaningfully, let alone conclusively. But a 2007 study found no sign that the California Supreme Court's considerable influence with its sister state courts had declined during the Lucas years; in fact, measured by the number of out-of-state citations that followed its rulings, the Lucas Court scored higher than any prior era of the California Supreme Court or of the nation between 1940 and 2005. And the study's lead author, in a follow-up survey, found that Lucas himself surpassed the liberal legends Traynor, Mosk, and Tobriner in one statistical measurement of influence: the number of majority opinions per year that were followed at least three times by non-California courts. This may not prove that Lucas and his Court were trailblazers, but it would appear to establish them as exemplars.

One virtually universal assessment of the Court was that Lucas had succeeded in his goal of calming the waters. The mostly supportive Barnett praised the chief justice for "pulling the Court out of politics," while the generally critical Gerald Uelmen said Lucas's greatest legacy was "the giant strides he achieved to restore public confidence in the legal system at a time of historic peril."

But an equally important question, with a less clear answer, is how the Court balanced the tasks of responding to the public's legitimate interests while maintaining its independence. The question is recurrent in a state that subjects its appellate justices to retention elections but at the same time expects them to rise above politics.

Lucas and his colleagues won their greatest public support for their record of affirming death sentences, but some of those cases were also among their least credible—the juror who lied about her knowledge of the defendant's record, the lawyer who denigrated his client and barely represented him, the trial judge who seemingly confused the defendant with someone else, all swept under the blanket of harmless error. Yet the Court also showed it could follow its view of the law contrary to powerful interests and public opinion, as when it rejected the governor's nominee for state treasurer and invalidated part of a prosecution-sponsored crime initiative. Insurance companies, some of which had helped to fund the campaign against the Bird Court, won new protections from liability under Lucas, but the Court later upheld voter-approved regulation of insurance rates. *People v. Freeman*, upholding the free-speech rights of pornographers, ran counter to prosecution practice in the state's most populous county, and probably to public opinion as well.

One area in which the Court willingly yielded California's leadership role was in the development of state constitutional rights, particularly in criminal cases. On questions of admissibility of evidence and standards of review, the Lucas Court regularly followed its national counterpart, even beyond the mandates of Propositions 8 in 1982 and 115 in 1990. The Court balked only when the voters sought to prohibit judges from interpreting the California Constitution independently in criminal cases; the ruling defined new limits on initiatives for the first time since 1948, but most likely owed as much to the justices' unwillingness to limit their own authority as it did to their concern for defendants' rights. The Court was equally resistant to what it saw as encroachment on judicial powers by agencies administering local rent control and statewide discrimination laws, and to the elimination of judges' sentencing discretion in three-strikes cases.

It was also a court that was largely reactive rather than proactive. Some of the most important civil law rulings—*Harris* on business discrimination, *Foley* on wrongful firings, *Thing v. La Chusa* on negligent infliction of emotional distress, *Ann M.* on premises liability, *Brown v. Superior Court* on enterprise liability—rolled back expansive concepts of liability that had been developed by the Bird Court or by lower courts under its purview. But the rulings added little that was new to the law, and instead redefined older doctrines, like bad-faith firings in violation of public policy and a bystander's right to sue for emotional distress. Much the same could be said of the *Rider* case, which had momentous consequences for local

governments and taxpayers but was legally significant only as a repudiation of the previous Court's constraints on Proposition 13. Some cases ventured into new territory, such as the duties of genetic researchers, the right to child custody in surrogate parenting, and individuals' privacy rights against businesses and other private entities, but these were relatively uncommon.

When a court owes its existence to a voter backlash, it should not be surprising if its early years are devoted to reining in what it considers the excesses of the recent past. But the Lucas Court suffered from encumbrances that limited its impact on the law. Foremost was the stream of judicial retirements, which reduced the Court's productivity and hindered its continuity. Whether the repeated departures and arrivals interfered with the development of coherent case law is subject to debate. But it was at least symbolic that what might have been the Court's most important ruling on a social issue, affirming the parental consent law for minors' abortions, became a casualty of the last two retirements, those of Arabian and Lucas. In addition, the relentless volume of death penalty cases diverted the justices' time and attention from matters of greater statewide importance, despite such reforms as the creation of a central staff to review and prepare internal memoranda on civil petitions for review and the virtual elimination of State Bar cases from the docket; comments by several justices suggested that the death cases also lowered court morale.

In the end, this was a transitional court. The dramatic change in the state's judicial leadership in 1987 did not, as it turned out, lead to a wholesale transformation of California legal doctrines from liberal to conservative, or of its justices from assertive architects of the law to restrained interpreters of others' policy decisions. The Lucas Court proved to be a bridge between the liberal-dominated tribunals of previous decades and the more moderate court that was to follow. The justices who were forming a new and more lasting majority by the mid-1990s were not necessarily more capable or qualified than their immediate predecessors. But they were more diverse and more committed to staying at their jobs, and most of them had many more years to serve before qualifying for maximum pensions—and then staying well beyond that. They were also probably closer to mainstream Californians' views than the majorities on the two courts that preceded them. The outgoing court's modest legal footprint may have represented a lost opportunity for the chief justice and the governor who appointed him, or may have simply reflected the justices' view of the Court's proper role. Regardless, it was part of the legacy that Lucas left for his successor on May 1, 1996. The new Court began in calmer and more orderly circumstances than those that had existed nine years earlier, but—for very different reasons—it was presented with much the same opportunity to move the law in another direction. ★

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# Defining a Branch, Finding the Center: The George Court

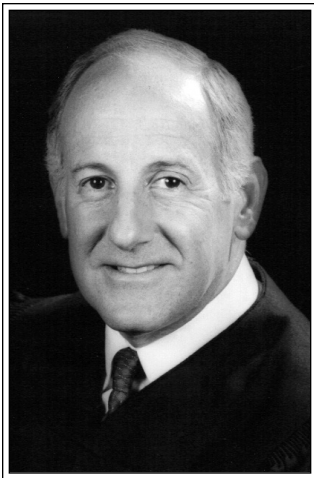
1996–2010

CHAPTER SEVEN | BY MOLLY SELVIN\*

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## INTRODUCTION: THE ANXIOUS GOLDEN STATE

**R**ONALD M. GEORGE took the helm of California's sprawling court system on May 1, 1996, as the state was edging out of another boom-bust cycle. Yet Californians were still profoundly nervous about the economy. The recession that began in 1990 was deeper than any time since the 1930s, and it would hold the record as the most severe downturn in the state until the Great Recession that began in 2007–08.



CHIEF JUSTICE  
RONALD M. GEORGE

Moreover, in part because of the collapse of the aerospace industry, long a mainstay of the Southern California economy, the 1990 recession hit the state harder than the rest of the nation, a double jolt to longtime residents convinced that California's diverse and vibrant economy immunized it from the boom-bust cycle that, for example, plagued the Rustbelt states. Because the recession forced a steep drop in California hous-

ing prices and personal income along with a rise in unemployment and poverty indicators, this time the economic doldrums took longer to shake in the Golden State than in the rest of the nation.

As often happens, economic fears took political form, centering on crime and immigration. Crime rates rose through the early 1990s but began to level off through the later part of the decade. At the same time, immigration continued to change the face of California. Whites, who comprised 68.9 percent of the

state's population in 1990, dropped to 57.6 percent in 2010, while the Hispanic and Asian population grew dramatically during that time.

Notwithstanding a plateau in the crime rate, fearful state voters passed a number of ballot measures, challenges to which landed on the new Court's docket. Through these initiatives and constitutional amendments, voters defined new felonies and significantly stiffened the penalties for existing crimes. Fears about immigration also led voters to back measures barring undocumented immigrants from a variety of public services, requiring public officials to report suspected aliens, and eliminating bilingual education instruction as well as affirmative action programs in university admissions and public sector hiring. Frustration with what some perceived as "shakedown" lawsuits prompted passage of Proposition 64 (2004), which limited private lawsuits against businesses, requiring the plaintiff to have been injured and suffer a loss due to an unfair, unlawful, or fraudulent business practice. Challenges to some of these measures had made their way to the high court's docket during Malcolm Lucas's tenure but others faced their first constitutional test with the George Court.

It should be noted that these and other measures fundamentally altering the rights of all Californians were passed by a steadily diminishing share of eligible voters. In 1996, when George became chief justice, 52.56 percent of eligible voters cast ballots in the November general election but only 43.74 percent went to the polls in 2010 with turnout dipping as low as 20.80 percent in 2009. The chronically dismal turnout gave rise to unease among lawmakers and others concerned about the scope and often extreme nature of these measures. For instance, voter angst and antipathy also found voice in two same-sex marriage measures that, to a considerable extent, came to define the George Court's legacy. Passed after nasty and expensive campaigns, Propositions 22 (2000) and Proposition 8 (2008) contained identical language, limiting marriage to one man and one woman. Voters first enacted that limitation by amending California's Family Code; then, when the George Court struck it down as unconstitutional, voters amended the state constitution. These propositions, part of a wave of same-sex marriage bans that voters in more than 30 states passed

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during the mid-1990s and early 2000s, gave rise to the California Supreme Court's trio of marriage decisions which, in turn, drew national attention—and lent considerable momentum—to the cause of marriage equality nationally.

The Court's caseload aside, the chief justice oversees the nation's largest court system. In 1996, however, California's courts were less a cohesive whole than they were some 220 often-querulous local court fiefdoms. Knitting judges from Siskiyou to San Diego into a unified and forceful judicial branch—a goal that Chief Justice George shared with several of his predecessors—would prove no less difficult than parsing voters' intentions on a variety of contentious ballot issues, most prominently the volatile same-sex marriage question.

This chapter, then, is a story in two parts. The California Supreme Court between 1996 and 2010 weighed in on some of the major legal and political issues of the day, and its decisions burnished the Court's reputation for the quality of its jurisprudence. If the George

Court seldom reached out to create new rights, as the Court had done during the 1960s and 1970s, it did take bold steps on social issues, including same-sex marriage and abortion, and in other areas of the law, and it compiled a solid record as a moderate to liberal body. That this Court, a majority of whose members were appointed by Republican governors, was not reliably pro-business and pro-prosecution is largely indicative of how the newly constituted Court had parted ways with both the Lucas majority and with Republican elected officials who had dragged their party sharply rightward. The George Court's jurisprudence has evoked comparisons between Ronald George and Chief Justices Roger Traynor and Phil Gibson, and it re-established the California Supreme Court's reputation and prominence after the steep dive and discord of the late 1970s and early 1980s.

The story of the California Supreme Court between 1996 and 2010 is also one of Chief Justice George's considerable managerial accomplishments. By centralizing administrative control and funding for California's



#### THE GEORGE COURT

CHIEF JUSTICE RONALD M. GEORGE (CENTER) AND (LEFT TO RIGHT) ASSOCIATE JUSTICES JANICE R. BROWN, JOYCE L. KENNARD, KATHRYN M. WERDEGAR, MING W. CHIN, MARVIN R. BAXTER, AND CARLOS R. MORENO

220 courts, he did what others had tried and failed to do; in essence, he helped to create a coherent judicial branch in place of a collection of courts that historically had been unable to effectively lobby for the funding needed to run efficiently. Through persistence and force of personality, he succeeded by forging alliances with feuding legislators to secure operating funds, by courting judicial colleagues around the state and the bar, and when needed, by winning voter support. Many of George's colleagues on the Court held him in exceptional respect—several of them used the word “beloved”—and he had an easy working relationship with the three governors with whom he served. Yet a number of judges, particularly on the larger superior courts, and most notably judges on the gargantuan Los Angeles bench, bitterly resented losing the considerable autonomy they had long exercised with county officials to the state's judicial administrators. Many of them held strong views of the man they derided as “King George” and their resentment surfaced as rebellion during the last years of George's tenure.

#### THE NEW CHIEF, COLLEAGUES AND CONSENSUS

Ronald George was Gov. Pete Wilson's first and only choice to succeed Lucas as California's 27th chief justice. Few questioned his qualifications or readiness for the post; and indeed, his elevation appears to have been a foregone conclusion. George had long been viewed as a star who had distinguished himself in nearly two decades on the Los Angeles Municipal and Superior Courts. As noted in Chapter 6, above, George's seemingly boundless appetite for judicial administration and attendant politics was well known. During the two-year Hillside Strangler trial (1981–83)—the longest criminal trial in U.S. history—he took on an unusually crushing set of extracurricular assignments, serving both as president of the California Judges Association and supervising judge of the Los Angeles criminal courts, as well as sitting on numerous panels and commissions.

Polished, yet with a terrier's persistence, George had a reputation as a skilled politician, administrator, and marketer by the time he assumed the Court's top post. Disciplined and a hard worker, colleagues recall him in a constant blur of meetings and activities, always with pen and yellow pad—even in the barber's chair. The administrative reforms he pushed as chief and earlier won him national recognition and shelves of awards. Apart from his experience and relative youth—he was 56 when he took the helm of the high court—George was well-liked by many of his judicial colleagues, politicians, and the state's bar. After joining the Supreme Court in 1991, George had earned a reputation as a capable if not brilliant judicial thinker,

and his enthusiasm for the challenge of managing the state's gargantuan court system and its often fractious judges was obvious.

The Court experienced little turnover during these years. Gov. Gray Davis tapped Carlos Moreno to replace Stanley Mosk who died in June 2001. Mosk served 37 years on the high court, longer than any other justice, and authored almost 1,700 opinions with landmark rulings in nearly every area of the law. Moreno, a Los Angeles native and the son of a Mexican immigrant, had served as Deputy Los Angeles City Attorney and practiced commercial litigation before becoming a federal trial judge. In 2005, Gov. Arnold Schwarzenegger added Carol Corrigan, a former prosecutor and Alameda County Superior Court judge, to replace Justice Janice Brown when President George W. Bush appointed her to the U.S. Court of Appeals. (Wilson tapped Brown when he elevated George, in 1996; she had been the governor's legal secretary and had served briefly on the Sacramento appellate court.)

#### JURISPRUDENCE

These appointees joined with holdovers from the Lucas Court, including Justices Joyce Kennard, Kathryn Werdegar, Marvin Baxter and Ming Chin, to produce a Court more centrist—and often liberal—than in past years, and one that more generally spoke with unanimity or at least consensus. The chief himself moderated some of more conservative positions he had taken as an associate justice and the Court's dissent rate fell significantly from the Lucas years, partly as a result of the chief's push for collegiality, with an unprecedented number of unanimous decisions.

Substantively, the Court under George's leadership was generally friendly toward prosecutors; it affirmed nearly every death sentence and largely upheld the “three-strikes” law while blunting some of its harshest elements. Employers were pleased by decisions bolstering California's at-will employment law and capping punitive awards and consumer litigation. At the same time, many credit, or blame, the Court's wage-and-hours rulings with triggering a wave of employee class actions in this area. The George Court favored strong constitutional protection for speech and press, and for transparency, notably articulating expansive public and media access rights to court proceedings and legal documents. Women and minorities gained stronger protection from discrimination, and the Court threw out a law requiring minors to receive parental permission before having an abortion. With notable exceptions, the Court largely deferred to voters and the legislature, the problematics of which were vividly exemplified by its handling of the “three-strikes” and gay-marriage cases. And if its decisions “rarely soared,” the California Supreme Court during this period maintained its 65-year status



SPECIAL SESSION COMMEMORATING THE COURT'S SESQUICENTENNIAL FEBRUARY 8, 2000,  
B.F. HASTINGS BUILDING, OLD SACRAMENTO: (LEFT TO RIGHT) JUSTICES MING W. CHIN,  
MARVIN R. BAXTER, STANLEY MOSK, CHIEF JUSTICE RONALD M. GEORGE, JUSTICES JOYCE L. KENNARD,  
KATHRYN M. WERDEGAR, AND JANICE R. BROWN

as the nation's most influential state court, at least by the measure of citations in other jurisdictions: A study tracking the citation patterns of state supreme courts from 1940 to 2005 found that California Supreme Court decisions were followed more often than those from any other state.

#### TOWARD A UNIFIED STATE JUDICIARY

George's signature administrative accomplishments include trial court unification, centralized court funding, and a menu of initiatives designed to improve civics education, increase access for unrepresented litigants, improve jury service, and raise the profile of the state court system. Each of these ideas has a long history of study and support in California and nationally. In 1906, Roscoe Pound, Harvard Law School's dean, famously criticized the multiplicity of courts and concurrent jurisdictions as archaic and wasteful. His calls were echoed by Chief Justices Phil Gibson, Rose Bird, and Malcolm Lucas, other prominent California jurists, the State Bar, and numerous panels and commissions. Meanwhile, several other states had adopted various forms of consolidation. George's packaging of these proposals as a reform that would create a true "judicial branch" in place of a fragmented system of superior, municipal, and justice courts, as well as his considerable political skill, helped push them to fruition.

So did California's precarious finances in the wake of the 1990 recession.

To be treated like a branch co-equal to the legislature and governor, George believed, the judiciary needed to "act like one." He largely succeeded in this regard—at least for a time. When George retired in 2010, funding for court operations was substantially greater than before he became chief; disparities between counties had narrowed; court rules had become more unified across the state; and a number of programs and services helped litigants of modest means, including self-help centers and expanded interpreter services.

William Vickrey, who led the Administrative Office of the Courts (AOC) until 2011, wielded the laboring oar on much of this effort. Vickrey had arrived in California in 1992 from Utah to work with Chief Justice Lucas; he took charge of a relatively low-profile agency with some 261 professional positions and a modest portfolio, namely, to oversee administration of the Supreme Court and the Courts of Appeal. By the time Vickrey resigned, in 2011, AOC staff numbered 1,100, as large as the Administrative Office of the United States Courts, which serves far fewer judicial officers, and its supervisory reach extended to most every aspect of California's trial and appellate courts.

Shortly before George's confirmation, he and Vickrey decided to visit courthouses in each of the



THE SUPREME COURT VISITS THE FIFTH APPELLATE DISTRICT'S NEW GEORGE M. BROWN COURTROOM — CHIEF JUSTICE RONALD M. GEORGE (CENTER) WITH ASSOCIATE JUSTICES JOYCE L. KENNARD (LEFT), MARVIN R. BAXTER (RIGHT), AND (STANDING, LEFT TO RIGHT) CARLOS R. MORENO, KATHRYN MICKLE WERDEGAR, MING W. CHIN, AND CAROL A. CORRIGAN.



THE NEW COURTHOUSE OF THE CALIFORNIA COURT OF APPEAL, FIFTH APPELLATE DISTRICT

PHOTOS THIS PAGE BY HOWARD K. WATKINS

state's 58 counties. George was already keenly aware of the courts' longstanding needs and the inequities in funding and facilities between counties. But the tour, which attracted newspaper reporters in virtually every county the two men visited, drew public attention to the deplorable physical condition of many county courthouses and generated momentum for reform. George later said that his support for trial court unification, state funding, and jury reforms "jelled" after he

saw the "abysmal conditions" in many county courthouses. For instance, the Paso Robles courthouse that the chief visited had been the scene of an attempted hostage taking some years before but still had no money for security. One judge there had piled tall stacks of law books around his bench as an improvised bulletproof shield. One northern county had no jury assembly room, and on the day George and Vickrey visited, jurors there huddled on the sidewalk holding umbrellas in the rain as they waited to be called to a courtroom. In another county, jurors sat all day on the concrete steps of the courthouse stairwell and had to scoot to the side when sheriffs led defendants past them in chains to and from a courtroom.

The courthouse tour, which continued over 18 months and covered an estimated 13,000 miles, also won him allies among the judiciary. "I don't think we've ever had a chief justice come here," said a Sierra County judge visited by George in late 1997. "He seems to be a decent guy who's interested in finding out what our problems are." George often met as well with local political leaders, consciously using these visits to talk about the importance of an independent judiciary and to build support for the administrative and budgetary changes he sought.

The tour was just one aspect of George's effort to raise the judiciary's visibility and build consensus for change. He was a familiar sight in Sacramento, lobbying legislators and regularly briefing successive governors on court issues. To some extent, the Court still suffered from the fallout from Lucas's caustic language in *Legislature v. Eu*, upholding California's term limits measure. Meanwhile, those term limits, which state voters imposed in 1990, had begun to hollow out the capitol's core of legislative expertise. As a result, George later recalled, some lawmakers lacked even basic civics knowledge, seemingly unaware that the judiciary is an independent, co-equal branch of California government. Not infrequently, a lawmaker would ask George or Vickrey which agency judges work for, audaciously grill the chief about a matter pending before the Supreme Court, harangue him about a decision already rendered, or block funding for some aspect of judiciary's operations out of personal pique. George was incredulous and dismayed.

By late 1997, George's personal diplomacy began to bear fruit as the legislature passed a first package of administrative reforms—transitioning trial courts from county to state funding—and appropriated additional money for badly needed new judgeships. The following year, California voters passed a constitutional amendment authorizing the superior and municipal courts in each county to voluntarily “unify” as a single, county-wide trial court. By January 2001, all 58 California counties had voted to unify their trial court operations, and municipal and justice courts ceased to exist as separate entities. The additional judgeships some counties obtained during these years, and the sizeable judicial pay raises received helped win support for unification and other major reforms.

To trial court judges used to considerable autonomy over these matters, this centralization was a naked power grab. Nowhere was this loss of power felt more keenly than in Los Angeles, which as the state's—and the nation's—largest trial court, was long used to managing its own operations and striking its own lucrative deals with the county and state lawmakers. Moreover, some Los Angeles judges genuinely feared that a unified superior court in their county, with its 400-plus judges and enormous geographic span, would simply be unmanageable. These same worries would surface as the state's trial courts moved to one-day or one-trial jury service beginning in 1999.

In both instances, the Los Angeles court has adapted but the transition gave rise to formation of a rump group, the Alliance of California Judges, committed to “accountable local management of the California courts.” Initially led by judges from Los Angeles, Sacramento, and Kern counties, the Alliance proved a potent political adversary for George and his successor, Chief

Justice Tani Cantil-Sakauye, undermining unity within the judicial branch and forcing some ugly showdowns, for example, over legislation to erode state funding.

## CONCLUSION

George's signal achievement, forging splintered local courts into a judicial branch, is of enormous significance and unlikely to be undone. The accomplishment ranks him as among California's most effective chiefs. Court unification, the first step, set much else in motion including state funding for local trial courts, the massive courthouse title transfer and revamped jury duty to a more citizen-friendly model. Paternity for these accomplishments is, of course, shared with many over decades; what George brought were the exceptional leadership and political skills to finally drive these ideas to fruition by forging alliances with legislators, governors, the bar, and his judicial colleagues. He repaired the judiciary's relationship with the legislature after the frostiness of the Lucas years; as a result, he won significant funding increases for the state judiciary in boom times and, once the recession hit, was able to hold the line for a period of time. But the chief did not get everything he wanted—no one does—and notwithstanding the demise of a long-planned computer system, the California courts still badly needed a 21st century caseload management system.

The George Court's jurisprudence has often been described as a reflection of the chief's own views—pragmatic, moderate and “steadfastly” centrist. Those views, in turn, reflected the thinking of many if not most Californians, who considered themselves (as evidenced in initiative voting and opinion polling) as being tough on crime; progressive on most social issues; holding a strong sense of individual autonomy and privacy; and seeking a positive business environment with strong consumer protections. By the time George retired, the justices seemed to have found themselves most comfortable in that space somewhere between the conservative Lucas Court of the late 1980s and 1990s and the liberal Rose Bird Court of the late 1970s and early 1980s—not always ideologically consistent but nuanced and flexible.

Perhaps most significant for the Court and the chief himself was the trio of gay marriage decisions, particularly *In re Marriage Cases*, in which the Court invalidated the 2000 voter-approved ban on gay marriage as a violation of state constitutional principles. Momentous at the time, the Court's reasoning has since been echoed in same-sex marriage cases by dozens of federal and state court rulings. That opinion, like most others during his tenure, was largely the work of Chief Justice Ronald George. With that opinion, along with creation of an independent, viable third branch of California government, he left an enduring mark on the law and California history. ★

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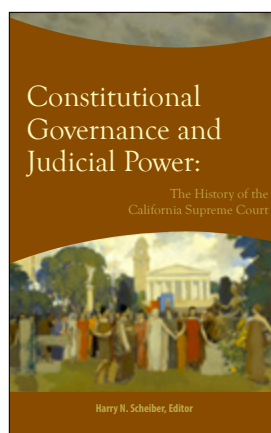
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PREVIEW

TABLE OF CONTENTS

CONSTITUTIONAL GOVERNANCE  
AND JUDICIAL POWER:  
THE HISTORY OF THE  
CALIFORNIA SUPREME COURT

CHAPTER ONE:

*Pioneers on the Bench* 1849–1879  
CHARLES J. MCCLAIN . . . . . 2

CHAPTER TWO:

*Creating a Court System* 1880–1910  
GORDON MORRIS BAKKEN . . . . . 5

CHAPTER THREE:

*The Age of Reform* 1910–1940  
LUCY E. SALYER . . . . . 8

CHAPTER FOUR:

*The Gibson Era* 1940–1964  
CHARLES J. MCCLAIN . . . . . 13

CHAPTER FIVE:

*The Liberal Court: Ascendancy and  
Crisis* 1964–1987  
HARRY N. SCHEIBER . . . . . 16

CHAPTER SIX:

*The Lucas Years* 1987–1996  
BOB EGELKO . . . . . 22

CHAPTER SEVEN:

*Defining a Branch, Finding the Center:  
The George Court* 1996–2010  
MOLLY SELVIN . . . . . 26