
The Lucas Years

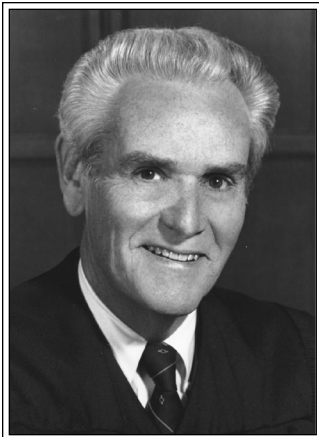
1987–1996

CHAPTER SIX | BY BOB EGELKO*

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

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-

* 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.

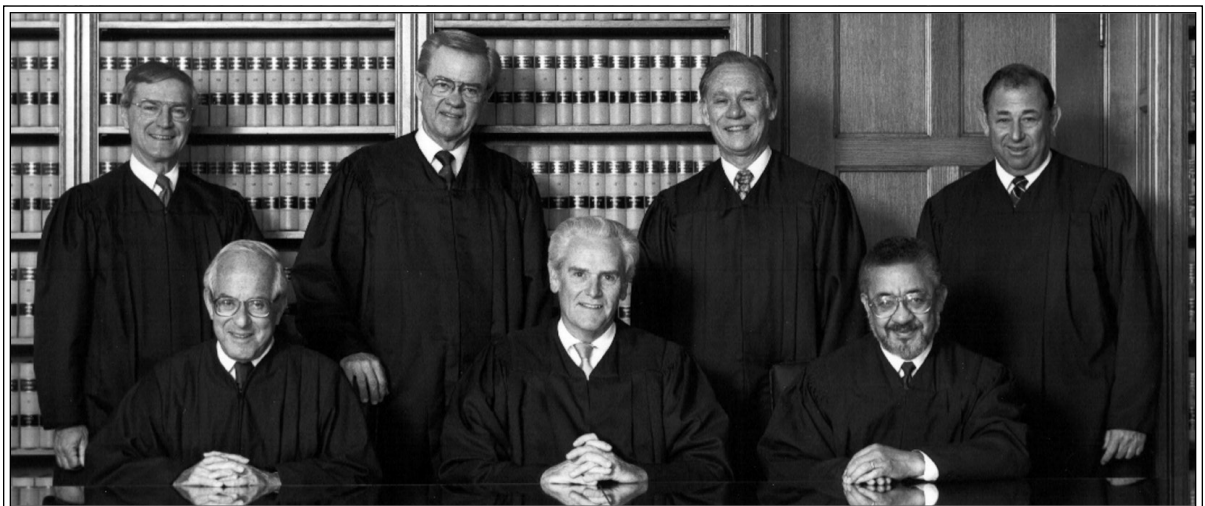
Mosk, then in the twenty-third year of what was to be a record 37-year tenure on the Court, and Allen Broussard, the only remaining Jerry Brown appointee, suddenly found themselves as the only two liberals on the Court. Mosk's reputation as one of the nation's foremost state jurists, his political sure-footedness, 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 Werdegar. 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. Werdegar had been a friend of Wilson's since law school. When she finished first in her class at Boalt Hall in 1961, Werdegar, 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. ★