Happy Trails, Justice Werdegar

Yesterday Justice Kathryn Mickle Werdegar announced her intent to retire from the California Supreme Court, effective August 31, 2017. We wish her a happy retirement.

Bob Egelko at the San Francisco Chronicle wrote a good overview of Justice Werdegar's major contributions to the law. So instead of focusing on her substantive legal work, we looked at the effect this retirement will have in the broader context of gubernatorial appointments.

Since 1934, the only way to become a SCOCA justice is to be appointed by a governor and confirmed by the Commission on Judicial Appointments; after appointment, justices stand for uncontested retention elections. Cal. Const. art. VI, § 16. Between 1910 and 1934, candidates for seats on the court ran in nonpartisan elections. Before 1910, candidates ran in partisan elections with the governor filling vacancies between elections by appointment. Thus, for about the past eighty-three years, California's governors have been the sole authority on who would gain a seat on the state's highest bench.

Eleven governors since 1934 have made SCOCA appointments: Frank Merriam, Culbert Olson, Earl Warren, Goodwin Knight, Pat Brown, Ronald Reagan, Jerry Brown (counting him only once), George Deukmejian, Pete Wilson, Gray Davis, and Arnold Schwarzenegger. In that period, other than the Brown family, only two governors made more than three appointments: Deukmejian appointed eight justices, and Olson appointed four.

But no other governor is even close to matching the number of appointments exercised by the governors Brown. Pat Brown was governor from 1959–1967. He made eight appointments, tied with Deukmejian.[1] Jerry Brown's first tour in the governor's office was 1976–1983, when he made seven appointments.[2] In his current second tour (2011–2019) Jerry Brown has made three appointments.[3] Combining both tours, and including his upcoming choice to replace Justice Werdegar, Jerry Brown holds the record for most SCOCA appointments ever at eleven. Collectively the Brown family will have nineteen appointments to California's

highest court. There have been forty-six total justices appointed to the court since 1934, and 119 justices total since 1849. The Brown family has appointed forty-one percent of all justices since 1934, and sixteen percent of all justices since California became a state.

We think there are two conclusions here.

The broader view is that SCOCA and the state have gradually shifted from solidly red conservative to solidly blue moderate since Pat Brown made his first appointment (Peters, 1959). Since Reagan was governor in the 1960s, California changed from being reliably Republican to staunchly Democratic in presidential races. With one exception (1964), California voted Republican in every presidential race from 1952 to 1988. But from 1992 to 2016, the Democrats won every presidential race in California. The presidential results are only one example of the state's policy trend. Consider how attitudes toward Hispanics (citizens or immigrants) have evolved since Wilson's term (1991–1999). Proposition 187 in 1994 barred illegal aliens from using state services, and Proposition 209 in 1996 abolished affirmative action. Yet today, California cities and counties are scrambling to declare themselves sanctuary zones to protect illegal immigrants from deportation by federal agents.

Justice Werdegar's positions and thinking as a jurist exemplify the recent trend—on the court and in the state—toward a moderately liberal view of society. Her appointment in 1994 by Republican Governor Wilson coincides with the state beginning to transition politically from conservative to liberal. Her opinions tracked that arc, and she was a strong leading voice among her peers. That is despite the fact that she is an outlier among the four Wilson appointments: Brown, Chin, and George are all more conservative than Werdegar's opinions have been. Of that group, Justice Werdegar best represented the path taken by the court and the state. Looking even farther back, we see a cyclical shift with sharply-defined periods: a distinctly liberal court in the Bird era, an equally identifiably conservative court in the Lucas era, followed by a moderating trend from the George court to the current court led by Chief Justice Tani Cantil-Sakauye.

The closer perspective is that the Brown family has done more than anyone else to

shape California's judicial branch. Most justices appointed. Greatest justices (possible exception for Traynor): Mosk and Tobriner. Most infamous justice: Bird (possible exception for David S. Terry). First woman: Bird again. And again, Bird: first female Chief Justice. First African-American: Manuel. First Hispanic: Reynoso.

Filling Justice Werdegar's seat will create a majority of four Brown appointees on the current court. And Jerry Brown has two more years in office; he may well have another appointment if Justice Chin retires, which would make five of the seven justices Brown appointments. If he keeps with past practice and appoints someone young to replace Werdegar (and possibly Chin), we could see a Brown majority on the court that lasts for 20 years. That is a legacy.

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[1] Governor Pat Brown appointed Justices Raymond L. Sullivan, Louis H. Burke, Stanley Mosk, Paul Peek, Mathew O. Tobriner, Maurice T. Dooling, Jr., Thomas P. White, and Raymond E. Peters.

[2] Governor Jerry Brown's first tour appointments were Justices Joseph R. Grodin, Cruz Reynoso, Allen E. Broussard, Otto M. Kaus, Frank C. Newman, Rose Elizabeth Bird, and Wiley William Manuel.

[3] Governor Jerry Brown's second tour appointments to date are Justices Leondra R. Kruger, Mariano-Florentino Cuéllar, and Goodwin H. Liu.