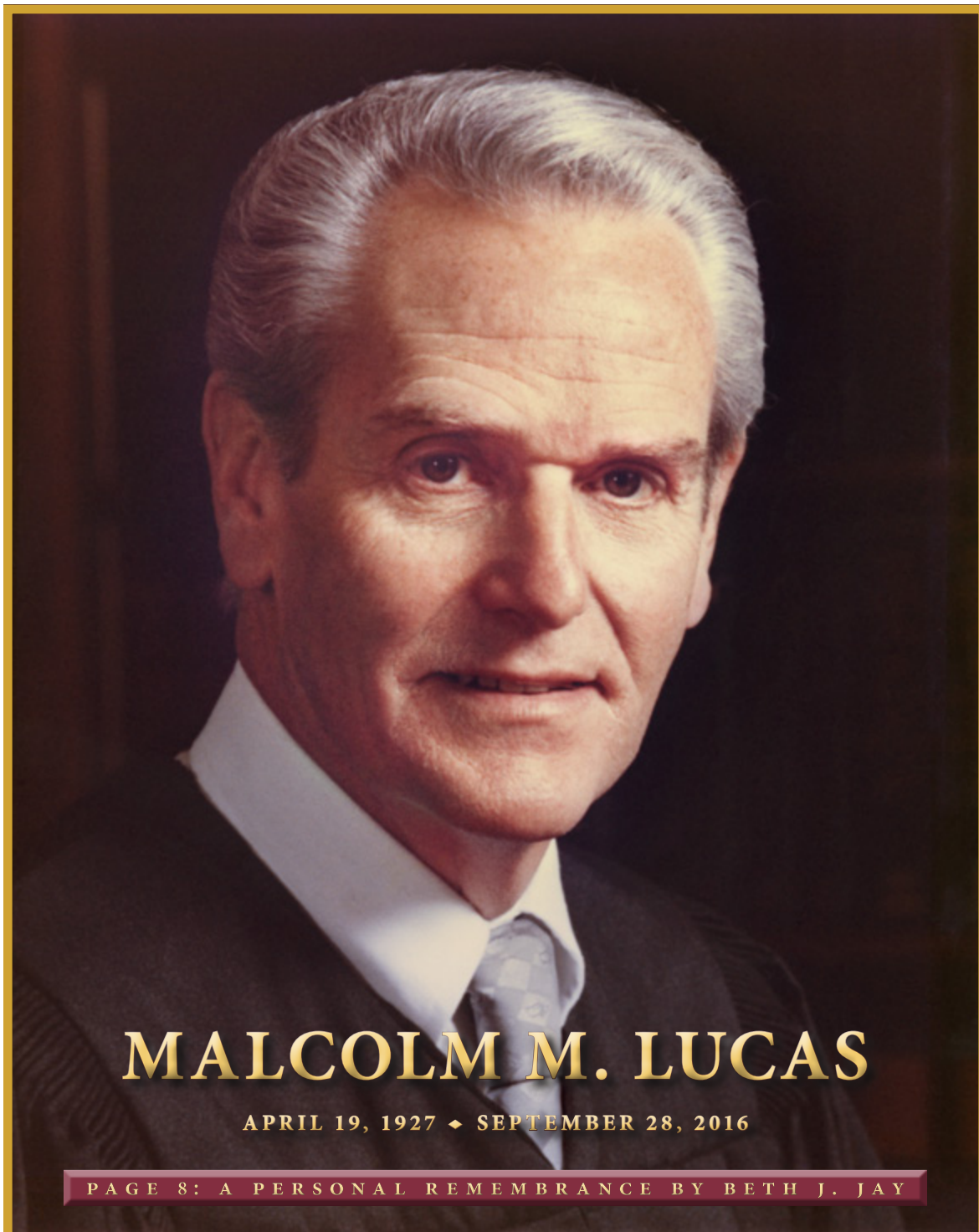




CALIFORNIA SUPREME COURT

Historical Society

NEWSLETTER • FALL/WINTER 2016



MALCOLM M. LUCAS

APRIL 19, 1927 ♦ SEPTEMBER 28, 2016

PAGE 8: A PERSONAL REMEMBRANCE BY BETH J. JAY

Our Common History Can Light Our Path Forward

BOTH THE PROFESSIONAL media and the social media of today tend to focus on what divides us as a people. Different political views, different judicial philosophies, different predictions of what our future will be. Speeches, articles, and posts frequently use strident language to espouse one view over all others, and leave little room for disagreement. Indeed, much of the discourse in today's world suggests that those who disagree with the author's point of view cannot add value to a debate on the issue. Rarely do we see a discussion of common ground that exists between two viewpoints.

But there is common ground. We all share the same history. We all share the discussions, debates, and struggles over prior disagreements, and the analyses that addressed them. To better understand the paths to which our current choices will lead us, we need to understand how our common past brought us to where we are today. The California Supreme Court Historical Society can play a critical role in helping us understand our common history, so we can avoid our prior mistakes and realize the benefits of compromise and consensus as we chart our future.

The Society seeks to recover, preserve, and promote the legal and judicial history of the State of California, with a particular focus on the California Supreme Court. We strive to achieve this goal, in part, through our publications and our programs. We recently celebrated the publication of an outstanding scholarly work, *Constitutional Governance and Judicial Power: The History of the California Supreme Court*, which is now available for purchase on our website. The book reflects the combined efforts of its editor, Prof. Harry Scheiber of UC Berkeley School of Law, one of six co-authors. The seven chapters explore not just the cases decided by the Court in different eras, and not just the personalities of the justices who decided them. Rather, the book illuminates the social, economic, and moral struggles of our society. By absorbing the viewpoints that guided historical debates, we can draw parallels to our current debates and gain a glimpse of how certain decisions may impact our future.

Our recent program to celebrate this publication, described in more detail elsewhere in this *Newsletter*, drove home these points to an audience of lawyers and non-lawyers alike. Current Chief Justice Tani



Cantil-Sakauye and former Chief Justice Ronald M. George engaged in a conversation with Society board members Molly Selvin and Dan Grunfeld about the book, the role of the Court as an influence on the country as a whole, and the importance of the general public's understanding of the judicial system. At one point, each of the Chief Justices reflected on a case from our past that might benefit from a "do over," making it clear that we can benefit from a review of past debates.

In another recent program, presented at the State Bar Annual Meeting — "Thirty Years After a Hundred Year Flood: Judicial Elections and the Administration of Justice" — board member David Ettinger led a panel discussion with former Associate Justices Joseph Grodin and Cruz Reynoso and UC Irvine School of Law Dean Erwin Chemerinsky about California's system for electing justices and judges and how those elections can influence the administration of justice. The panel, as further described in this *Newsletter*, explored not only the historical fact that voters decided not to retain three California Supreme Court justices in the 1986 election, but debated what we as a society have learned from that experience, how other states approach the issue, and how we might do things differently in the future.

Through publications and programs like these, the California Supreme Court Historical Society strives to define the common ground we all share, to provide a starting point for moving the debate forward. Although most of us feel that we live in a world of unprecedented polarization, we have experienced, and survived, troubled times before. Our history is filled with examples of vigorous, even strident, debate. There are decisions we may seek to emulate and decisions we may think about differently with the benefit of hindsight. But by studying our history, we can learn from the struggles of those who preceded us and strive to steer a better path.

We at the Society look forward to working with our membership and friends toward that goal.

With warm wishes for a Happy New Year,

GEORGE ABELE

George Abele is president of the California Supreme Court Historical Society and a partner at Paul Hastings in Los Angeles.



California Supreme Court Historical Society President George Abele opens the evening. Looking on (FROM LEFT): Bob Egelko, legal affairs reporter for the San Francisco Chronicle, Charles J. McClain, vice chair of the Jurisprudence and Social Policy Program at Berkeley Law, Harry N. Scheiber, Society board member and professor at Berkeley Law, former Chief Justice Ronald M. George, Chief Justice Tani Cantil-Sakauye, and Society board members Daniel Grunfeld and Molly Selvin.

Chief Justices Celebrate Publication of the History of the California Supreme Court

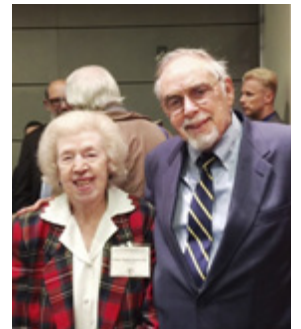
BY RICHARD H. RAHM*

CHIEF JUSTICE TANI CANTIL-SAKAUYE AND FORMER CHIEF JUSTICE RONALD M. GEORGE headlined the California Supreme Court Historical Society's landmark celebration, on November 15, 2016, of the publication of its book, *Constitutional Governance and Judicial Power: The History of the California Supreme Court*. The 669-page volume represents the culmination of a project the Historical Society began twenty years ago, and it fulfills two laudable goals of its editor, Harry N. Scheiber, Historical Society board member and professor of law at the University of California at Berkeley: to provide a serious, authoritative history of the California Supreme Court that is also accessible enough for lay readers. The San Francisco celebration, attended by almost 100 people, took the form of a program at the Milton Marks Auditorium in the Ronald M. George State Office Complex, during which the two Chief Justices answered questions posed by Daniel Grunfeld, a former president of the Historical Society and partner at Morgan Lewis in Los Angeles,

and by Molly Selvin, the Society's vice president and a legal historian who authored one of the book chapters.

Former Chief Justice Malcolm M. Lucas would have also been part of the program but for his passing on September 28. The late Chief Justice was instrumental in the founding of the Historical Society, and it was during his time as its first chairman that the book project was launched. The program was thus dedicated to the late Chief Justice, and Jennifer King, a Los Angeles appellate attorney and the Society's immediate past president, praised his achievements in forging majorities and restoring public confidence in the Court after voters defeated Chief Justice Rose Bird and Justices Cruz Reynoso and Joseph R. Grodin when they stood for re-election in 1986. After observing a moment of silence for the late Chief Justice, Chief Justice Cantil-Sakauye talked about her own admiration of him as someone who took on the task of healing the Court with great poise. Former Chief Justice George concurred with those observations but noted that he particularly appreciated Lucas' sense of humor and insightfulness. He mentioned *Spiritual Psychic Science Church v. City of Azusa*¹ as particularly exemplary in this regard. In that case, a fortune teller challenged a city law

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The evening featured a panel discussion in which former Chief Justice Ronald M. George and Chief Justice Tani Cantil-Sakauye answered questions from Daniel Grunfeld and Molly Selvin.

prohibiting commercial fortune telling. Then—Associate Justice Lucas suggested to the plaintiff’s attorney at oral argument that since his fortune-telling client must have already told him how the case would turn out, would he mind sharing that information with the Court? The attorney assured the Court his client was confident of winning. And, in fact, she won based on the statute being found unconstitutionally overbroad.

The remembrance of the late Chief Justice was followed by several questions to the Chief Justices eliciting their views on a range of topics from the history of the California Supreme Court to looming future challenges. Two themes emerged. One concerned the nature and protection of the California Supreme Court as an institution. In addressing the question of why the California Supreme Court is considered by many to be the second most influential court in the country, former Chief Justice George noted it is not just because it heads up a large state judicial system because, if that were true, states such as Illinois or New York would be as influential. While Chief Justice Cantil-Sakauye emphasized the diversity of California and the Court’s opportunity to be the first to address many ground-breaking

issues, former Chief Justice George emphasized aspects of the institution of the Court itself, such as the state constitutional requirement that every decision be published (not always required of other high courts), its cultivation of a strong central staff whose work product is exceptional, and that California justices may not run on a party-affiliated ticket. However, both Chief Justices worried about the continued independence of the California judicial system, which is often under attack, its ability to anticipate and respond to change, and the effect of long-running funding cuts in reducing access to justice.

Access to justice is also tied to the theme of eliminating discrimination in such a diverse state. Both Chief Justices singled out wrongly decided cases involving discrimination when asked which cases they wish they could remove from the case books. Chief Justice Cantil-Sakauye cited to the California Supreme Court’s decision in *Mackenzie v. Hare*,² which held that a native Californian woman surrendered her citizenship when she said “I do” in marrying a British subject. Former Chief Justice George pointed to *People v. Hall*³ as his candidate for removal; in that case the Court reversed the murder

FACING PAGE, TOP ROW:

(LEFT) *Immediate Past President Jennifer King reads a tribute to the late Chief Justice Malcom M. Lucas.*
 Looking on, (FROM LEFT): Bob Egelko, Charles J. McClain, Harry N. Scheiber, and former Chief Justice George.
 (RIGHT) *Barbara George talks with Daniel Grunfeld and Molly Selvin.*

FACING PAGE, SECOND ROW:

(LEFT) *Beth Jay, former principal attorney to the Chief Justice, talks with Chief Justice Cantil-Sakauye; Society Board Member Selma Moidel Smith greets former Chief Justice George; Jane L. Scheiber talks with Bob Egelko.*
 (RIGHT) *Guests and panel participants enjoy a reception following the panel.*

FACING PAGE, THIRD ROW:

(LEFT) *Society Vice President and book co-author Molly Selvin prepares for the panel discussion.*
 (CENTER) *Society Board Members Judge Barry Goode and Daniel M. Kolkey with former Chief Justice George.*
 (RIGHT) *Selma Moidel Smith and Prof. Harry N. Scheiber.* PHOTO COURTESY JANE SCHEIBER

FACING PAGE, BOTTOM:

The audience of approximately 100 guests listen to a panel discussion with Chief Justice Cantil-Sakauye and former Chief Justice George.

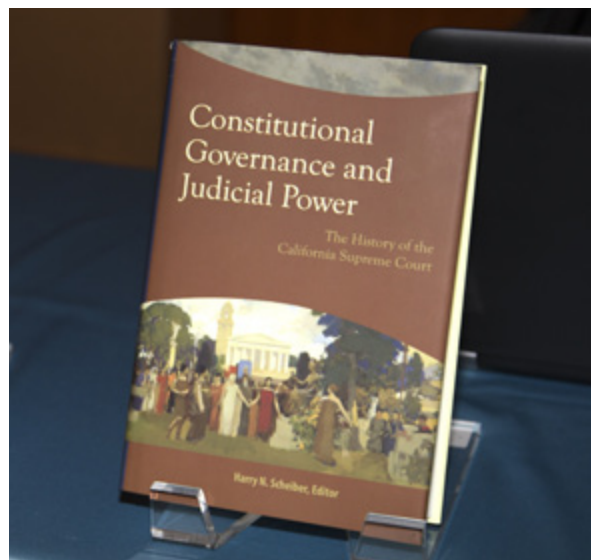
PHOTOS ON PAGES 3–6, EXCEPT AS NOTED: WILLIAM A. PORTER

conviction of a white defendant because it was based on the testimony of a Chinese witness. Conversely, former Chief Justice George praised the Court's 1948 trail-blazing decision in *Perez v. Sharp*.⁴ Nineteen years before the U.S. Supreme Court's decision in *Loving v. Virginia*,⁵ a plurality of the California high court signed onto Chief Justice Roger G. Traynor's decision invalidating the state's anti-miscegenation law. Contrary to the perceived shift of power from state to federal courts, former Chief Justice George continues to see California leading the way in civil rights because such rights in California are based on the state and not just the federal constitution.

Professor Scheiber concluded the program by highlighting the historical significance of the book itself and expressing the hope that the publication would contribute to a deeper understanding and appreciation of California's Constitution and its legal history among the general public as well as continued academic interest. Two of the other book authors on the stage, Charles J. McClain, vice chair of the Jurisprudence and Social Policy Program at Berkeley Law, and Bob Egelko, legal affairs reporter for the *San Francisco Chronicle*, concurred in that assessment. The event, which was underwritten by the Historical Society and several law firms, finished with hors d'oeuvres and wine in the foyer outside the auditorium. ★

ENDNOTES

1. *Spiritual Psychic Science Church v. City of Azusa*, 39 Cal. 3d 501 (1985).
2. *Mackenzie v. Hare*, 165 Cal. 1976 (1913).
3. *People v. Hall*, 4 Cal. 399 (1854).
4. *Perez v. Sharp*, 32 Cal. 2d 711 (1948).
5. *Loving v. Virginia*, 388 U.S. 1 (1967).



ORDER THE HISTORY AT
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California's Lost 'Arcadia'

Constitutional Governance and Judicial Power: *The History of the California Supreme Court*, the Society's newest publication and perhaps the most comprehensive account of the state high court, contains a 65-year old mystery. The mural that graced the Supreme Court's San Francisco courtroom from 1924 to 1950 and that now adorns the volume's cover, was removed during a renovation and has been lost ever since.

"The Commonwealth" was painted by Arthur Mathews, one of California's most famous artists. The enormous mural, fourteen feet high and thirty-four feet long, depicted California as "a prosperous, harmonious and cultivated Arcadian state," as Ray McDevitt noted in the *CSCHS Newsletter*, Spring/Summer 2011,¹ including symbols from Greek mythology, literature, justice, commerce and nature.

A sought-after painter whose work hung in the homes of San Francisco's elite as well as in the State Capitol rotunda, Mathews was chosen to paint a mural for the Supreme Court's courtroom in the new state office building, then under construction in San Francisco's Civic Center. His finished painting, for which the state apparently paid \$8,000,² was installed on the north wall of the new courtroom on April 10, 1924; it covered the entire wall above the justices' bench. The following morning, Mathews wrote that he experienced his first moments of "real 'comfort' after eighteen months of anxiety and hard labor."

In the early 1950s, however, the state spent \$80,000³ to expand and renovate the State Building. Naugahyde covered the architectural detail on the walls. The neo-classical dome and skylight were hidden by a dropped ceiling and fluorescent lighting. Mathews' mural, deemed out of place, was rolled up and stored away. According to the records of the California Department of Public Works, "the large painted canvas mural on the north wall of the Supreme Court Room (space 441) which is in sections will be carefully removed so that the canvas is not damaged in any way. The sections will be rolled, numbered and stored in the basement of the building until received by the State."⁴ The *Madera Tribune* noted that no one knew who ordered this work and "[s]ome amazement at the redecorating job was expressed."⁵ According to the report of the Director of Public Works, the contract for the renovations was awarded in September 1950 to Arthur W. Baum, a San Francisco general contractor.⁶



The lost mural, “The Commonwealth” by Arthur Mathews, as it appeared at the Supreme Court.

BLACK-AND-WHITE PHOTO OF COLOR MURAL, MOULIN STUDIOS

Following the 1989 Loma Prieta earthquake, the damaged, seven-story 1950s annex was demolished, and the 1920s State Building (renamed the Earl Warren Building) was seismically updated with its original architectural details restored. The justices’ bench was redesigned to resemble the original with space overhead to replace Mathews’ mural.

But no one could find it. An extensive search of storerooms, courthouses, historical societies, and art collections around California turned up nothing.

What remains is Mathews’ smaller study for the mural — now part of the Santa Barbara Museum of Art’s collection — which is the cover image on the State’s court history book.

A second image fortuitously surfaced in recent years: a photograph of the justices of the Court, most likely taken in the 1920s or 1930s, standing in the courtroom. Above them was a complete image of the lost Mathews mural. Friends of a former law clerk for one of the Court’s justices bought the print at a Santa Rosa secondhand store. Jake Dear, the Court’s chief supervising attorney, the unofficial Court historian, and associate editor of this *Newsletter*, was able to obtain a large print of the image, reproduced in part above (without the standing justices), which now hangs directly outside the entrance to the courtroom on the fourth floor of the Warren Building. ★

ENDNOTES

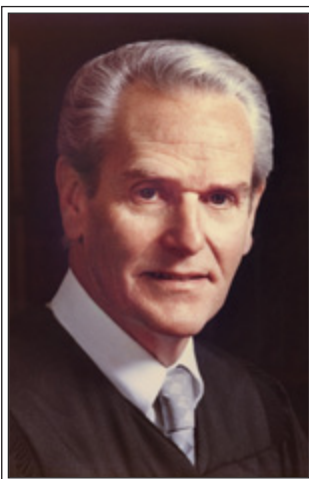
1. This article draws heavily on Ray McDevitt’s excellent account of the lost mural, “‘The Commonwealth’ — A Lost Art,” *CSCHS Newsletter*, Spring/Summer 2011, pp. 2–6, <http://www.cschs.org/wp-content/uploads/2014/08/2011-Newsletter-Spring-The-Commonwealth.pdf>. The Editor is also grateful to Sebastian Nelson, court records archivist, California State Archives, who provided additional background materials for this article.
2. California Department of Public Works, Division of Architecture, *Second Biennial Report to the Governor of California by the Director of Public Works* (California State Printing Office, 1924), p. 25. Retrieved on September 22, 2016 from <https://archive.org/stream/appendixtojourna1925cali#page/n1420/mode/1up>.
3. “Decoration Job Order Is Veiled,” *Madera Tribune*, Oct. 9, 1950, <http://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=MT19501009.2.7&srpos=6&dliv=none&e=-----195-en--20--1--txt-txIN-mural---1950---1>.
4. Work Order number 933, July 1950, Public Works Dept. Records, Division of Architecture, R386.155, California State Archives, Office of the Secretary of State, Sacramento.
5. *Ibid.*
6. *Director’s Reports*, September 1950, Public Works Dept. Records, Division of Architecture, R386.019, California State Archives, Office of the Secretary of State, Sacramento.

Malcolm M. Lucas

A PERSONAL REMEMBRANCE

BY BETH J. JAY*

WRITING ABOUT CHIEF JUSTICE LUCAS has proved surprisingly difficult. I spoke to him a few months before his death, and the sound of his still strong and deep voice was particularly moving at a time when our nation was subjected to an election campaign of unprecedented nastiness and vulgarity. Lucas's calm demeanor, rich baritone, elegance, and balance provided a very different atmosphere in which to argue, disagree and compromise. I was distressed at how much the competence and openness with which he led was so absent from the current chaotic ferocity.



Lucas became Chief Justice of California after the state had been through a divisive Court election that resulted in a vote against the retention of his predecessor Rose Bird and two associate justices. Justice Lucas had served as an associate justice for almost three years at the time he was elevated, and I worked with him from the beginning of his tenure through his retirement. Upon becoming Chief Justice, Lucas resolved to calm the waters and restore public respect for the courts. Internally, to consolidate and reassure the Court and its employees, he informed the staff members serving each of the justices who had not been retained that they could stay at the court and he would encourage the new justices to hire them for their staffs. Those who wanted to stay, found a place. He also was determined not to enter into comparisons with his predecessor, and from his first press conferences to the end of his time at the Court, he avoided requests to distinguish the newly constituted Court from its earlier iteration.

As Chief Justice between 1987 to 1996, Lucas faced a range of new responsibilities relating to the Court and to the Judicial Council and its staff arm, the Administrative Office of the Courts. He assigned supervisory duties over cases and internal policies to Graham Campbell and to me, although I gradually moved toward working predominantly on local

and statewide policy and administrative issues and serving as the Court's liaison in a number of arenas. For the Court, Lucas became the overseer of the weekly internal yellow, blue and salmon lists, each named for the color of the paper on which it was printed, containing updated information about case assignments, circulating memoranda and proposed opinions. He presided over the weekly conferences at which the Court decided whether to grant cases for review, and at the conferences after oral argument at which the justices would discuss the disposition of each case. And he handled and

oversaw the varied and numerous daily issues and questions and queries about everything from case protocols to contracts with the official publisher of the state's appellate opinions. Lucas also, like all modern Chiefs, shouldered a full one-seventh share of the Court's opinion caseload.

In a comprehensive new book on the history of the Supreme Court, *Constitutional Governance and Judicial Power*, edited by Harry N. Scheiber, the chapter on the Lucas years by long-time Court observer and journalist, Bob Egelko, provides an excellent review of the major cases during Lucas' tenure. The Court clearly took a more conservative turn in many areas, perhaps most strikingly in the greatly increased affirmance rate in death penalty cases. But its conservatism was not unlimited, and the Court on more than one occasion surprised confident prognosticators. Led by Lucas, the Court upheld the independent authority of the state Constitution in more than one instance — a viewpoint long championed by Justices Stanley Mosk and Joseph Grodin. Lucas was part of the Court's decision holding, contrary to the arguments of Gov. George Deukmejian and his proposed appointee, Rep. Dan Lungren, that approval of only one house of the Legislature was insufficient to confirm Lungren as state treasurer.¹ In another case, concerning the state Constitution's privacy clause, Lucas authored an opinion that allowed the National Collegiate Athletic Association to drug test participants in specific events, but also established that the California Constitution's privacy provision

* Beth Jay served as the principal attorney to Chief Justices Lucas, George and Cantil-Sakauye before retiring from the Supreme Court in 2012.



Chief Justice Malcolm Lucas is congratulated by Gov. George Deukmejian after being sworn in on February 6, 1987. His wife, Joan Lucas, looks on at the Senate Building in San Francisco.

PHOTO BY JIM GERBERICH, ASSOCIATED PRESS

applied both to government and private actors.² In these areas, as in many others, the Court's rulings were not always easy to predict in terms of details and impact. However, in the main, the Court's decisions traveled a more conservative path. Perhaps the best characterization is that the California Supreme Court under Lucas was a court of few extremes nor was it known for trendsetting, yet its opinions made it the most followed court in the country, as demonstrated in a 2007 study.³

Those cases foreshadowed issues that would arise during the tenures of Lucas' successors, Chief Justices Ronald M. George and Tani Cantil-Sakauye, as the Court was called upon to delineate the separation of powers among the branches of state government and the scope of privacy as new forms of communications emerged. These opinions, like many others, planted seeds in the law that grew with later decisions and applications nationwide, as well as in California.

In another area, with which I grew increasingly familiar as his tenure progressed, Lucas began the push that would culminate in major changes such as the move to state funding of all the state's courts, replacing a hybrid system of state and local funding that created inequities among courts located in different counties. He built on efforts that had preceded him, but was able to make concrete advancements that, under the direction of Chief Justice George, finally

blossomed into full application. Inequities persist to this day, but they have been greatly ameliorated by the actions of the courts and Judicial Council, while at the same time made much more difficult to correct by substantial budget cuts repeatedly imposed on the courts. Taking a broad look ahead, Lucas created the 2020 Commission, bringing together judges, lawyers, academics, politicians, social service providers, educators, and members of the public from a variety of backgrounds, to make proposals about how to act in order to ensure courts would be able to provide services for all Californians in the then distant, and now increasingly near, future. A remarkable number of recommendations from the Commission came to pass.⁴

Working with William Vickrey, then administrative director of the Court, Lucas convened meetings with Judicial Council members and other judicial branch leaders to discuss developing a new structure and procedures that would allow the Council to become an effective leader for the judicial branch. As a result of increased caseloads and expectations, the Council took an increasingly important role as the Trial Court Funding and Realignment Act began the push toward full state funding, and other actions building the statewide presence of the judicial branch were adopted. The newly structured Council relied on committees of judges, lawyers and other experts to formulate recommendations for changes in policy and practice.



Chief Justice Lucas and his staff, in his chambers, 1996.

STANDING, LEFT TO RIGHT: attorneys Beth Jay, Stacey Stokes, Larry Lee, Abbe McCall, Graham Campbell, judicial assistant Gale Tunnell, attorneys Mike Mintz, Alice Collins, and Jake Dear. SEATED: Malcolm M. Lucas.

PHOTO COURTESY JAKE DEAR COLLECTION

Chief Justice Lucas repeatedly urged the trial courts to “steer not row,” by taking charge of their courtrooms. It was a phrase that appeared in almost all his speeches for a long time. Instead of allowing litigants to set the pace, he stressed the practice of having judges lead, endorsing a pilot project adopted by the Legislature under the leadership of Speaker Willie Brown, requiring trial courts to set pretrial hearings and dispose of cases using a pre-determined calendar of events rather than relying on counsel to move a case forward. This approach proved so effective that it was extended statewide even before the pilot period expired. As a result, matters were settled earlier, dismissed sooner, and fewer matters approached the five-year deadline leading to automatic dismissal. Dockets were cleared and judges set cases set for trial on dates that were no longer simply aspirational but real. Courts made tremendous progress in handling cases in a timely fashion and reducing their large backloads until increasing budget cuts eroded that progress.

Lucas encouraged introspection and self-examination in the judicial branch, an effort that was not always first on the list for many judges. He gave life to a committee investigating gender bias in the courts created by his predecessor just before she left office. After comprehensive study, the group identified many areas in which gender bias abounded and a subsequent implementation committee recommended a range of remedies. Lucas led the Council in their adoption, again a move

not universally greeted with delight within the branch. Committees studying race and ethnic bias, disability issues, and discrimination on the basis of sexual orientation followed. The consolidated Judicial Council’s Fairness and Access Committee continues to monitor related issues and seek solutions when problems appear.

Early on, Lucas mentioned to me that even before he took the federal bench he had resigned from any club or organization to which he belonged that discriminated in membership. I was not surprised. Lucas was fair. He treated everyone with dignity and grace. For many years, at hearings of the Commission on Judicial Appointments, which reviewed gubernatorial nominations to an appellate court seat, a woman we dubbed the Rainbow Lady would appear. She dressed in layers of colorful, mismatched clothing, with a clashing hat, and I think I recall a cloth bag of many colors that contained the papers she brought with her. She would stand to address the Commission, chaired by the Chief, and launch into a narrative that had nothing to do with the nominee, and evolved from a grievance understood only by her. Lucas was always cordial and most importantly, skilled in limiting her to enough time so she felt heard while making sure the proceedings moved expeditiously. That exemplified his basic decency in treating individuals in very different situations. After all, he had allowed a somewhat better dressed, but often opinionated liberal female from the Bronx to work closely with

him on some very sensitive issues. For that, I am and always will be deeply grateful.

There are so many memories, personal and official. Lucas's dry, sometimes almost imperceptible, humor made working with him a pleasure. Before a press conference he held soon after becoming chief justice, I remember speaking with him and Lynn Holton, then the public information officer at the Administrative Office of the Courts. At one point, while discussing the arrangement of the room, the question of placing a table between the Chief and the press arose. After Lynn made some worried remarks about the unknown temper of the reporters, Lucas jokingly asked whether Lynn was concerned about the press coming over the table at him. It became a running punch line for him whenever he thought we were going a little too far in worrying about the potential for problems.

It sometimes took time for people to realize that this dignified, well-spoken gentleman had just launched a zinger. I recall a judges' night at a bar function, where, while seated in the back, I watched as a remark he made about golf clothes with a somewhat unexpected twist, sank in. After a moment of no reaction, heads snapped back in the audience and individuals turned to each other wide-eyed and apparently astonished. You had to listen carefully. Speaking of golf, after appearing at chambers dressed in bright green golf clothes from head to foot, Lucas later observed that many people, from clerks to justices, had suddenly found an urgent reason to see him in chambers — and he didn't plan to do that again. I must admit, after his usual impeccable suits, neckties (occasionally designed by Jerry Garcia, gifts from his son) and starched shirts, the vision of his six-foot, four or so frame in glowing green was not easy to forget.

When the popular television program *L.A. Law* invited him to attend a party given in honor of its 100th episode, Lucas, of course declined, but his objection ostensibly was directed at something other than the clear ethical issue. Referring to an astonishingly misguided earlier episode misrepresenting a Supreme Court hearing on a death penalty appeal, he said he would decline because they had selected a shorter, somewhat heavier and definitely balding actor to play the Chief Justice. We too paused before laughing. It was a brilliant prank on us. Lucas rarely told jokes. His off-hand observations often unexpectedly hit the mark, and none of these few examples can really capture how astute and funny he was. Or what an extraordinarily keen observer he was. Lucas was a very private and reserved person who did not often let much of himself show in public settings. But if you had the privilege to work with him, you got to glimpse his quick wit and the openness and reserve with which he generally approached the world.

Lucas also was smart and thoughtful. A quick study, he was prepared to answer almost any question about

a case or a policy. And he was thorough. Once, when there had been a surfeit of colorful language in some opinions from other chambers, Graham, often a prankster, inserted an intentionally overwrought and over-written sentence in the final draft version of an opinion. Lucas returned the draft with the language circled and a note saying, "Nice try." Although at times I disagreed with his conclusions, I felt comfortable about his close attention and how he arrived at them.

I also learned a great deal from him about functioning under pressure. Early on, Lucas commented on an adverse press report that reflected a distorted understanding of the facts. He reminded me that it was always good to remember you could never win arguing with someone who bought ink by the barrel. Of course, this was in the days before the Internet when physical newspapers were more widely read, but I think the maxim still applies. On another occasion, after an internal disagreement among the Court of Appeal districts about a policy decision I had presented at Lucas' direction, one dissatisfied justice sent a letter to the justices on his court and copied all the Court of Appeal justices. It contained some less than complimentary comments about me and my ability, and I was all set to send a blistering reply. Instead, I listened to Lucas' wise counsel and let it be. The only mentions I heard thereafter about the adopted policy were complimentary. He taught me not to always rise to the bait, no matter how tempting. When I ignored his advice at times in later years, I often ended up encountering the hook.

I sought him out in Sacramento after an Assembly subcommittee had, in 1992, without notice voted to cut the Court's budget by 38 percent, mirroring the initiative-imposed term limits and budget reduction that the Court recently had approved for the legislative branch in an opinion Lucas authored.⁵ The Chief Justice calmly said we'd just have to wait and see. As I recall, there were no public protestations, but that reduction ultimately was not adopted during the state budget process with the governor's participation.

One unfortunate legacy of the court's decision upholding not only budget reductions but also term limits, was that the Legislature did not thereafter invite the Chief Justice to deliver an annual State of the Judiciary address to a joint meeting of their chambers until Chief Justice George was sworn in. I often worked with Lucas on speeches, and I remember being particularly proud of his delivery of one such address that included a thoughtful discussion of the effect of the growing crack epidemic not only on the courts, but on society — and on the need for the courts to be but one part of the overall necessary effort to diminish the terrible toll taken on individuals, families, and communities. It was a harbinger of specialty courts that were subsequently created to take on the challenges of addressing not just the results, but the causes

of drug use and domestic violence, and the intersection between mental health problems and criminal acts. Indeed, one can consider Lucas' tenure as the time when the first steps were taken toward greater engagement with the public that the courts serve. He continued to deliver annual addresses to the bar and the bench at their fall meetings, and he used those to outline policy objectives and changes in the operation of the courts.

I fear I have given an incomplete picture of the Malcolm M. Lucas I knew. There were many other facets to the man. He was proud of his children and told stories about his great white cat, Moby. His second wife, Fiorenza, brought much happiness into his life and energized him for more than 25 years on and off the Court. But what strikes me most, in a time of turmoil and divisiveness, was how smoothly my time with him went and how well the Court operated. He and I disagreed on many things — except, of course, for the fact that he always had the last word. And there was plenty of dissent and disagreement from legislators, judges, lawyers and others. But he listened and considered and even sometimes changed his mind. He was open to difference and how best to accommodate or reject it, but almost always ready to learn from it. He not only

looked like a chief justice from central casting, he honorably tried to comport himself as a chief justice who served the courts and the public and responded with civility and thoughtfulness to all comers. It was my great honor and pleasure to serve him. ★

ENDNOTES

1. *Lungren v. Deukmejian*, 45 Cal.3d 727 (1988).
2. *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1 (1994).
3. Jake Dear, my colleague on the staffs of Chief Justices Lucas, Ronald M. George, and Tani Cantil-Sakauye, coauthored an article studying the rates at which the decisions of the courts of all 50 states have been followed and relied upon by courts of other states over a 65-year period. California Supreme Court cases led by far; and within the California data, at the time of the study, the Lucas Court outperformed the eras of former Chief Justices Gibson, Traynor, Wright, and Bird. (Jake Dear and Edward W. Jessen, “Followed Rates’ and Leading State Cases 1940–2005,” 41 *UC Davis L. Rev.* 683 (2007).)
4. Commission on the Future of the Courts, *Justice in the Balance 2020: Report on the Commission on the Future of the California Courts* (1993), <http://www.courts.ca.gov/documents/2020.pdf>.
5. *Legislature v. Eu*, 54 Cal.3d 492 (1991).

Thirty Years After a Hundred-Year Flood:

CSCHS PRESENTS JUDICIAL ELECTIONS PROGRAM AT STATE BAR ANNUAL MEETING

BY DAVID S. ETTINGER*

THIRTY YEARS AGO, an election rocked California's Supreme Court. On November 4, 1986, the voters ousted three of the court's seven justices: Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso. The following year, Justice Malcolm Lucas — who was elevated to Chief Justice to fill the vacancy created by Bird's defeat — analogized the election to “a 100-year flood — a very unusual circumstance, which I do not anticipate happening again.”

To remember that historic event, and to examine judicial elections in general, the California Supreme Court Historical Society sponsored a program at the State Bar's annual meeting in October: “Thirty Years After a Hundred Year Flood: Judicial Elections and the Administration of Justice.” The event featured Dean Erwin Chemerinsky of the UC Irvine, School of Law, and former Justices Grodin and Reynoso, the two living members of

the trio who lost in 1986. (Chief Justice Bird died in 1999.) I moderated the program.

The panelists discussed the past and present of judicial elections, and also possible changes for the future, with a particular emphasis on California and 1986.

Although early American history saw a number of states giving their judges lifetime appointments, by the time California became a state in the middle of the 19th century, the trend was toward selecting judges in partisan elections. That was the old system in California, and it was not very unusual to have a sitting Supreme Court justice suffer an electoral defeat or even be denied his party's nomination. California's judicial elections evolved, moving to nonpartisan contests in 1911, and finally, in 1934, to the current retention process where Supreme Court and Court of Appeal justices do not face opponents and voters are asked simply to decide “yes” or “no” whether a justice should be elected or reelected. Superior Court judges are still subject to contested, but nonpartisan, elections.

Even with the elimination of partisan and contested elections, California appellate justices have had

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cause for concern when they face the voters. The year 1986 might have been the first time that any California justice lost a retention election, but there had been hints of trouble before that. For example, in 1966, the Supreme Court was strongly criticized for its 5–2 decision in *Mulkey v. Reitman*,¹ which struck down an initiative that permitted Californians to discriminate on any basis in the sale or rental of their property. Justice Grodin recounted at the program that “Supreme Court lore” was that Chief Justice Roger Traynor, who had concurred in the opinion, “had his bags packed” in anticipation of an adverse vote at his retention election six months after the unpopular decision. Traynor won, but his percentage of

“yes” votes was almost 25 points lower than when he had stood for reelection to a new term as associate justice four years earlier. He and two other members of the *Mulkey* majority, Justices Paul Peek (the opinion’s author) and Louis Burke, polled around 15 points behind the one dissenter who was on the ballot that year, Justice Marshall McComb.

Even though a California appellate justice hasn’t lost an election in the past 30 years doesn’t mean that judicial decisionmaking cannot be affected by electoral considerations. Former Justice Otto Kaus, who retired a year before the 1986 election, memorably said that deciding controversial cases while facing reelection was like finding a crocodile in your bathtub when you go in to shave in the morning — you try not to think about it, but it’s hard to think about much else while you’re shaving. After the 1986 election, Chief Justice Lucas disagreed. Altering the metaphor a bit, he claimed that “we’ve taken the alligator out of the bathtub and made alligator shoes out of it.”

More than one study supports the view that the crocodile remains in the bathtub. These studies conclude that, in criminal cases in general, and death penalty cases in particular, judges who are elected — either in contested elections or in yes–no retention elections — are more likely to issue pro-prosecution rulings than those who are appointed and don’t face the voters. And that impact is likely to increase because campaign spending on these races has grown dramatically since the turn of this new century. Of



Justices Cruz Reynoso (LEFT) and Joseph Grodin (CENTER) with Justice Allen Broussard (RIGHT), on Reynoso’s and Grodin’s last day in office after their electoral defeat two months earlier.

PHOTO COURTESY JAKE DEAR COLLECTION

course, some find that to be a positive effect. One death penalty advocate not long ago stated he preferred that California courts (with judges subject to electoral review) rather than federal courts (with lifetime judges) have the final word on criminal convictions, bluntly noting, “We can’t get rid of Reinhardt [liberal Ninth Circuit Judge Stephen Reinhardt]. We got rid of Rose Bird.”

There are alternatives. New York’s high court judges, for instance, are appointed by the governor from a list of candidates provided by a judicial nominating commission and are confirmed by the state senate, and they can be reappointed at the end of their 14-year terms.

The program at the State Bar meeting was largely a scholarly examination of judicial elections. After all, Justices Grodin and Reynoso were law professors both before and after their judicial service (and they continue in academia today), and Dean Chemerinsky has been a renowned teacher for years. However, the former justices are not mere dispassionate commentators, nor were they bystanders to history. They lived it. Their willingness during the program to include poignant personal memories of 1986, when they were forced to assume the unfamiliar roles of campaigning as statewide candidates, added to the historical record. ★

ENDNOTE

1. *Mulkey v. Reitman*, 64 Cal.2d 529 (1966), aff’d 387 U.S. 369 (1967).



Justice Mariano-Florentino Cuéllar and Wisconsin attorney Jessica Mederson at Comic Con, July 2016, San Diego.

PHOTO: JACK YANG

The Supreme Court Justice Who Went to Comic Con

BY JOSHUA GILLILAND*

HOW DID A California Supreme Court justice, a former federal judge, and five attorneys find themselves on a Comic Con panel discussing *Star Trek* in front of hundreds of devotees? The voyage began when I asked then-U.S. Magistrate Judge Paul Grewal if he would like to speak on *Star Trek* at San Diego Comic Con in July.

Judge Grewal agreed and asked what I thought of inviting California Supreme Court Justice Mariano-Florentino Cuéllar, a huge *Star Trek* fan, to join us.

My exact reply was, “That would be pretty awesome, Your Honor.”

San Diego Comic Con (SDCC) started in 1970 and has grown to one of the largest celebrations of pop culture. For fans of science fiction, comic books, TV, or movies, this convention is the show of the year.

At last year’s Comic Con, Paul Grewal, Jessica Mederson, and I presented on the legal issues in *Star Wars*; we wanted to appear again to honor the 50th anniversary of *Star Trek*.

Justice Cuéllar is a long-time “Trekkie”; he grew up watching *Star Trek* on his grandmother’s black-and-white TV set in Mexico and remains a huge science fiction devotee. Among his favorites are the *Star Wars* movies, *Dune*, the novel by Frank Herbert, the *Foundation* series by Isaac Asimov — and of course, the *Star Trek* franchise.

For Cuéllar, science fiction is “more about the present than about the future or the past.” It’s about “the anxieties and concerns and possibilities people see in a given moment in history.”

Our panel was entitled, “*Star Trek*: Where Lawyers Boldly Go.” In addition to Justice Cuéllar and myself, the panelists included Neel Chatterjee from Orrick (lead trial counsel for Facebook in the lawsuit depicted in the film *The Social Network*), Jessica Mederson from Hansen Reynolds Dickinson Crueger LLC in Madison, Wisconsin, Christine Peek, from McManis Faulkner, and Megan Hitchcock, from Schaffer, Lax, McNaughton & Chen.

We focused on *Star Trek* episodes with trials from the five live-action television series. Our panelists prepared material on diversity in the practice of law, civil rights, trial advocacy, and due process.

Attorneys made up about a third of the 400 people who attended the MCLE-eligible panel (almost the crew size of the original USS Enterprise NCC-1701).

The show has long been a natural draw for lawyers because “it’s a lot about legal values,” Cuéllar said. “Some of the hardest questions in law are about how to live up to commitments that are not always spelled out in great detail, for example, constitutional provisions that seem vague and open-ended. There’s certainly some of that in science fiction and in *Star Trek*.” Moreover, he observed, many of *Star Trek*’s “iconic” courtroom episodes center on characters that have a “love-hate relationship” with rules.

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Summers v. Tice ♦ 33 CAL.2D 80 (1948)

BY KYLE GRAHAM*

EDITOR'S NOTE: "A Second Look" is a series of articles that will provide new perspectives on noteworthy decisions by the California Supreme Court.

THE CALIFORNIA SUPREME COURT'S decision in *Summers v. Tice* represents a staple of the first-year law-school curriculum. *Summers*, which many of you may remember as "that who-done-it tort case with the three hunters," makes excellent classroom fodder because the facts are so simple, the dilemma they create so readily grasped, and the Court's solution so elegant. But as in so many cases, the facts in *Summers* were hotly disputed. This article takes a second look at *Summers*, and considers how the case might have turned out differently.

The *Summers* Court recited the material facts in one paragraph, as follows:

Plaintiff's action was against both defendants for an injury to his right eye and face as the result of being struck by bird shot discharged from a shotgun. The case was tried by the court without a jury and the court found that on November 20, 1945, plaintiff and the two defendants were hunting quail on the open range. Each of the defendants was armed with a 12 gauge shotgun loaded with shells containing 7½ size shot. Prior to going hunting, plaintiff discussed the hunting procedure with defendants, indicating that they were to exercise care when shooting and to "keep in line." In the course of hunting plaintiff proceeded up a hill, thus placing the hunters at the points of a triangle. The view of defendants with reference to plaintiff was unobstructed and they knew his location. Defendant Tice flushed a quail which rose in flight to a ten foot elevation and flew between plaintiff and defendants. Both defendants shot at the quail, shooting in plaintiff's direction. At that time defendants were 75 yards from plaintiff. One shot struck plaintiff in his eye and another in his upper lip. Finally it was found by the court that as the direct result of the shooting by defendants the shots struck plaintiff as above mentioned and that defendants were negligent in so shooting and plaintiff was not contributorily negligent.¹

These facts reveal the plaintiff's problem: Summers did not know who, as between his two companions (Simonson

and Tice), had fired the blast that deposited shot in his eye and lip. Assuming Summers had to prove every element of his case by a preponderance of the evidence, how could he show which of the defendants caused his injury, if the proof was in complete equipoise as to the two of them?

This was not a problem that the plaintiff in *Summers* anticipated. His complaint envisioned that the court would identify either Tice or Simonson as the culpable party, and enter judgment against one of them. It alleged "[t]hat plaintiff is in doubt as to the person from whom he is entitled to redress and therefore has joined both defendants in this action with the intent that the question as to which of the defendants is liable, and to what extent, may be determined by this Court."²

But instead of pinning responsibility on Tice or Simonson, the trial judge found them both jointly liable. Two weeks after a two-day bench trial in October 1946, the judge pro tempore who presided over the case ordered "that the plaintiff have judgment against the defendants, and each of them, in the sum of Ten Thousand (\$10,000) Dollars."³ This order did not include a factual or legal basis for the decision. Instead, it directed Summers' counsel to prepare findings of fact and conclusions of law. As drafted by this attorney and later signed by the judge, these findings included the somewhat coy determination that "as a direct and proximate result of the shots fired by defendants, and each of them, a birdshot pellet was caused to and did lodge in plaintiff's right eye and that another birdshot pellet was caused to and did lodge in plaintiff's upper lip."⁴

Tice and Simonson both appealed the judgment, arguing (as put in Tice's opening brief before the Court of Appeal) that "the judgment must be reversed because of the failure of the court to make a specific finding . . . as to which of the defendants is liable in this action, in that the evidence conclusively shows that plaintiff's eye was not destroyed by shots from each of the guns of the defendants, but only by one shot which could have been fired only by one of the defendants."⁵

The defendants managed to secure a reversal from the Court of Appeal, but Summers petitioned for review and fared better before the California Supreme Court. In unanimously affirming the judgment entered by the trial court, *Summers* advanced a resonant policy rationale for holding both defendants liable for their negligence:

When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants

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only, a requirement that the burden of the proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers — both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. . . . Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. . . . [I]n the instant case plaintiff is not able to establish which of defendants caused his injury.⁶

Torts professors love *Summers* because it engages students of all inclinations. More cautious pupils can draw a narrow rule from the decision, learning that circumstances analogous to those involved in *Summers* (i.e., negligent defendants with better access to proof, a blameless plaintiff unable to establish causation on his or her own, all potentially culpable defendants before the court) may allow for a shift in the burden of proof on causation in a negligence case. More adventurous students, meanwhile, can glean from the case the broader, if more qualified, principle that doctrine should serve to promote justice, not stand in its way, and to the extent that the law does not fulfill this purpose, it should be reformed.

In addition to these takeaways, *Summers* offers a subtler lesson regarding the contingencies that lurk behind any appellate holding. The three hunters all recounted the events of November 20, 1945 differently in their trial testimony. Some of these differences were crucial. Among them, the three actors disagreed about the timing of the relevant shots. Tice testified that he fired his gun just once, three to five minutes before Simonson fired the first of his two shots. Tice added that it was only after Simonson's second shot that Summers yelled out that he had been shot. Simonson confirmed that he fired twice to Tice's once, testifying that Tice's shot and his first shot came in fairly close sequence, with his second shot being somewhat delayed. Summers, however, testified that his companions fired two shots "almost together, simultaneously." Simultaneous firing, of course, made it more likely that either Simonson or Tice could have fired the shot that put out Summers' eye.

Another important point of disagreement involved the type of shot Simonson and Tice used. The *Summers* decision repeats the trial court's finding that both defendants used size 7½ shot, and provides no indication that the size of the shot was disputed. It was. Tice testified at trial that he loaded his gun with size 6 shot, which is of detectibly different size from the size 7½ shot Simonson used. Summers' trial testimony imbued this discrepancy with added significance. Summers testified that although he had been given the shot removed from his eye, he had since lost it. If Tice testified truthfully about the sizes of the shot that he and Simonson used, then Summers,

and not the defendants, had access to the best evidence regarding the identity of his shooter, in the form of the shot he had since misplaced — a fact that would undercut a key pillar of the Supreme Court's decision.

All in all, the parties' testimony, along with the other evidence adduced at trial, could have supported a judgment against Simonson only. It is unclear why the trial judge, without explanation in his order, found both defendants liable. Perhaps he believed that Tice lacked credibility as a witness. Perhaps he believed that Tice's blast was a cause of Summers' harm even if it hit nothing, as it may have emboldened Simonson to fire — a theory later posited by the Supreme Court in its decision. Perhaps other considerations, such as the defendants' ability to pay damages, factored into the equation.

In any event, the findings of fact that Summers' attorney extrapolated from the judge's terse order made certain to resolve every material factual dispute in his client's favor. These findings flatly rejected Tice's testimony regarding the type of shot he used, determining instead that both defendants were using size 7½ shot at the time of the accident. Given this finding, Summers' loss of the shot became immaterial. The findings also rejected Tice's testimony that he last fired his gun three to five minutes before Simonson first fired his. Instead, both defendants were found to have shot in Summers' direction, and "within a very short space of time after said shooting" Summers called out that he had been shot.⁷ After the road bump in the Court of Appeal, these findings paved the way for the Supreme Court's innovative twist on conventional causation principles.

For all of its prominence in casebooks, in practice *Summers* now serves more as an archetype than a touchstone. Few cases involve the seemingly perfect balance of proof that makes *Summers* so memorable. A Westlaw search performed in connection with this article yielded twice as many citations to *Summers* in secondary sources as have appeared in judicial opinions. But even though *Summers* dictates the outcome in relatively few cases, the logic behind its holding is today well accepted; *Summers* now represents a base camp on the way to more challenging and remote destinations in the law. ★

ENDNOTES

1. *Summers v. Tice*, 33 Cal.2d 80, 82-83 (1948).
2. Complaint for Damages and Personal Injuries, *Summers v. Tice*, Los Angeles Superior Court No. 509835 (Jan. 25, 1946), at p. 2.
3. Order, *Summers v. Tice*, Los Angeles Superior Court No. 509835 (Oct. 24, 1946), at p. 1.
4. Findings of Fact and Conclusions of Law, *Summers v. Tice*, Los Angeles Superior Court No. 509835 (Nov. 27, 1946), at p. 4.
5. Appellant Harold W. Tice's Opening Brief on Appeal, *Summers v. Tice*, Court of Appeal Case No. 16002 (July 18, 1947), at p. 4.
6. *Summers v. Tice*, *supra*, 33 Cal.2d at p. 86.
7. Findings of Fact and Conclusions of Law, *supra*, at p. 3.



*Drought refugee family from McAlester, Oklahoma that arrived in California, October 1936
to join the cotton harvest, near Tulare, California.*

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Vagrants, Migrants and California's "Bum Blockade"

BY JUDGE BARRY GOODE*

HISTORY IS BEST told looking backward and applied forward, as CSCHS board member John Caragozian demonstrated in a presentation to the California Judges Association on March 13, 2016.

He focused attention on a case heard in the United States Supreme Court in 1940 (and re-argued in 1941), in which counsel first argued,

[I]mmigration... has developed... [to] a problem staggering in its proportions... Their presence here upon public relief, with their habitual unbalanced diet... means a constant threat of epidemics. Venereal diseases... are common with them... The increase of rape... are readily traceable to... these people.... Petty crime among them has featured the criminal calendars of every community into which they have moved.... [T]hey are readily led into riots by agitators.... Their coming here has alarmingly increased our taxes and the cost of welfare outlays... and the

care of the criminal, the indigent sick, the blind and the insane...

The case of *Edwards v. California*¹ illustrates just how hot a topic *domestic* migration was during the Depression, much as *international* immigration is today. And Caragozian told well the story of how the Court handled the domestic issue.

Fred Edwards was living in Marysville when his sister gave birth in the latter part of 1939. The father of the child, Frank Duncan, was working in Texas for the federal Works Progress Administration. He earned only about \$40 a month, but he was lucky to have a job because unemployment still dominated American society.

Edwards drove to Texas to fetch his brother-in-law so the family could be re-united. In Spur, Texas, Duncan got in the car with only \$20 in his pocket, all of which was spent by the time the two men returned to California.

Duncan could not find work in Yuba County and within a couple of weeks began receiving "financial assistance" from the federal Farm Security Administration. As a result, Edwards was charged with a violation of California Welfare and Institutions Code § 2615:

* Judge Barry Goode hears complex civil cases in the Contra Costa County Superior Court. He is also a member of the board of directors of the California Supreme Court Historical Society.

Every person . . . that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be . . . Indigent . . . is guilty of a misdemeanor.

That was only one of California's measures to keep poor immigrants from crossing its borders. As Caragozian observed, the state's motives were not hard to fathom. The populace was suffering from the Great Depression, and nowhere more than in rural counties like Yuba. Crop and cattle prices were hard hit, financial credit was difficult to obtain, mechanization had begun to reduce the need for farm labor, and federal policy required farmers to fallow their land. Simultaneously, two "great migrations" were occurring in the United States: the Great Migration from the Deep South (chronicled in *The Warmth of Other Suns*²) which brought more than 1.6 million people, largely African Americans, out of the South; and the Dust Bowl Migration which drove more than 2.5 million people from the Southwest. Of course, Route 66 — which ended at the Santa Monica Pier — was a major artery for many of these migrants.

At times more than one in five Californians depended on public relief. But as the economy worsened and incomes dropped, so too did tax revenues. California was concerned about an influx of needy who would seek public assistance and add nothing to the tax base.



(LEFT) Sign at entrance to the Yuba City FSA (Farm Security Administration) farm workers' camp. Yuba City, California.

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So California sought to stem the migration. In 1936 the Los Angeles Police Department sent 125 officers to the Arizona border, forming the so-called "bum blockade." They had orders to turn back those who appeared to be poor.

District attorneys began to enforce Section 2615. Edwards was convicted in the Marysville Justice Court for having knowingly brought his indigent brother-in-law into California. His conviction was affirmed by the Yuba Superior Court. Under then-existing California procedure, he had no further appeal — save to the United States Supreme Court, which took the case in order to consider the constitutionality of Section 2615.

In defense of the statute, Yuba's counsel cited the *Japanese Immigrant Case*,³ decided by the Supreme Court in 1903. He reasoned that if the federal government could exclude a penurious Japanese immigrant who was likely to become a public charge, then so too could California exclude Mr. Duncan. Counsel also made the argument quoted above.

The United States Supreme Court unanimously declared the statute unconstitutional. The principal opinion garnered only five votes; one concurrence represented the views of three other justices, and Justice Jackson's concurrence was joined by no other.

The majority grounded its decision on the Commerce Clause. Justice Byrnes wrote,

The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true . . .

But, in the words of Mr. Justice Cardozo: "The Constitution was framed . . . upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."



Squatter camp on county road near Calipatria. Forty families from the dust bowl camped here for months on the edge of the pea fields. There was no work because the crop was frozen.

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It is difficult to conceive of a statute more squarely in conflict with this theory than the Section challenged here. Its express purpose and inevitable effect is to prohibit the transportation of indigent persons across the California border. The burden upon interstate commerce is intended and immediate; it is the plain and sole function of the statute We think this statute must fail under any known test of the validity of State interference with interstate commerce.

Justices Douglas, Black and Murphy did not accept the Commerce Clause rationale. (“[T]he right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.”) Instead, they grounded their decision on the Privileges and Immunities Clause, holding the right to move from state to state a right of national citizenship.

Justice Jackson also turned to the Privileges and Immunities Clause. But he deepened Justice Douglas’ analysis, writing,

It is here that we meet the real crux of this case. Does “indigence” as defined by the application of the California statute constitute a basis for restricting the freedom of a citizen, as crime or contagion warrants its restriction? We should say now, and in no uncertain terms, that a man’s mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. “Indigence” in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact — constitutionally an irrelevance, like race, creed, or color

Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a short-sighted blow at the security of property itself.

Edwards’ conviction was reversed. But the views of the four “privileges and immunities” justices lived on.

Their analysis was revived in the mid-1960s when some of the great civil rights cases came before the Court. *Edwards* was cited to sustain a federal conviction for interfering with a right to interstate travel (*United States v. Guest*⁴). Justice Jackson’s ringing endorsement of the irrelevance of poverty was used to strike down Virginia’s poll tax in *Harper v. Virginia Board of Elections*.⁵ *Edwards* underlies the decisions that struck down a state’s one-year residency require-



Dust bowl refugees camp along the highway near Bakersfield, California.

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ment for welfare eligibility (*Shapiro v. Thompson*⁶) and state and local anti-vagrancy laws (*Papachristu v. City of Jacksonville*⁷).

Space precludes describing many of the other lessons and ironies which Mr. Caragozian presented to the members of the California Judges Association who attended. But those who heard the presentation were reminded that history surely is the third dimension of our profession and merits our attention. ★

ENDNOTES

1. *Edwards v. California*, 314 U.S. 160 (1941).
2. Isabel Wilkerson, *The Warmth of Other Suns* (Vintage Books, 2011).
3. *Japanese Immigrant Case [Yamataya v. Fisher]*, 189 U.S. 86 (1903).
4. *United States v. Guest*, 383 U.S. 745 (1966).
5. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).
6. *Shapiro v. Thompson*, 394 U.S. 618 (1969).
7. *Papachristu v. City of Jacksonville*, 405 U.S. 156 (1972).

EDITOR’S NOTE: *The photographs on pages 17, 18 (lower) and 19 were taken in the 1930s by photographer Dorothea Lange, working for the U.S. Government. The Farm Security Administration – Office of War Information Photograph Collection forms an extensive pictorial record of American life between 1935 and 1944. Photo captions are modified from those on the FSA website. For more information visit <http://www.loc.gov/pictures/collection/fsa/>.*

Shirley M. Hufstedler: The Long Reach of a Legal Life

BY KATHLEEN TUTTLE*

EDITOR'S NOTE: "Appreciations" is an occasional column noting the passing of California jurists and attorneys who made particularly significant contributions to the state's law and legal community.

A GREAT DEAL HAS been and will be said of the Hon. Shirley M. Hufstedler, the path-breaking former judge of the Ninth Circuit Court of Appeals, later the nation's first cabinet-level secretary of education, who died at the age of 90 on March 30, 2016. Tribute is paid here to a singular quality of hers voiced by so many upon her passing: her lifelong commitment to mentoring, teaching, and befriending generations of young California lawyers. That commitment and her accomplishments were celebrated on May 7 at Caltech's Athenaeum, where many Los Angeles legal luminaries gathered in her honor.

Second District Appellate Justice Dennis M. Perluss was among the several who spoke. His memories of Shirley Hufstedler date to the fall of 1971 when he began his second year at Harvard Law School. Hufstedler, relatively new to the Ninth Circuit (she was appointed in late 1968), had been invited to judge the Ames Moot Court Competition along with U.S. Supreme Court Justice Harry Blackmun and Second Circuit Judge James Oakes. "There was a buzz afterward about how extraordinary she was," Perluss recalled, noting how different the times were: just 10 percent of Harvard Law students then were women and the faculty was all male. Judge Hufstedler was then the only woman on the federal appellate bench anywhere in the country.

Upon graduation in 1973, Perluss began a clerkship with Hufstedler. "I was able to spend a year working at her elbow." Her hallmark traits included, the importance of thorough preparation, the underappreciated art of listening and, most significantly, the belief that while judges apply neutral principles to arrive at a result, they can and should be aware of, or at least mindful of, the impact their ruling may have. "They needn't be completely bereft of human compassion," Perluss noted.



That was a departure from legal convention.

Perluss still remembers a case that prompted a particularly lengthy and compelling dissent from Hufstedler. It involved the government's warrantless interception and recordation of a private telephone conversation, raising the question of whether the Fourth and Fourteenth Amendments had been abridged. Hufstedler's dissent enunciated the primacy she placed (except in

unusual circumstances) on confidential communication and privacy in a free and open society. She concluded that the electronic surveillance violated petitioner's justifiable expectations of privacy, and cautioned that, "The fate of any one man enmeshed in the criminal process is never inconsequential."

After a second clerkship (with U.S. Supreme Court Justice Potter Stewart), Perluss joined the Los Angeles firm of Beardsley, Hufstedler & Kemble, founded by Shirley's husband (and partner in most everything), Seth Hufstedler. Shirley also joined the firm when her term as secretary of education ended following President Jimmy Carter's reelection defeat in 1980. As law partners, she and Perluss handled a number of cases together. Other than the year he clerked at the U.S. Supreme Court, Perluss remained in what might be termed the "Hufstedler orbit" from 1973 until he was appointed to the bench in 1999.

What explains this long association that began at a law school competition so long ago? For Perluss, there was richness in knowing the Hufstedlers. Not only were they gifted lawyers; they were naturally curious people who loved to learn and grow. They had an "extraordinary willingness to share life experiences, whether it was a good book, a hike, or an intriguing symposium." Moreover, their dedication to service — to the legal profession, the community and the nation — was contagious.

Los Angeles Superior Court Judge Helen I. Bendix, who clerked for Hufstedler in 1976-77, also attended the May 7 celebration and later shared her memories of the judge. Bendix's clerkship origins were unorthodox. By the start of her third year at Yale Law School, she had become friends with Pierce O'Donnell, an LLM student who had, in the two preceding years, clerked for Judge

* Kathleen Tuttle, deputy-in-charge, Antitrust Section, Los Angeles District Attorney's Office, and author of the upcoming book, *Lawyers of Los Angeles*.

Hufstedler and then for U.S. Supreme Court Justice Byron White. “Pierce asked me if I wanted to meet Shirley Hufstedler” who happened to be at Yale on business. They met in the law faculty lounge after hours. Bendix recalls that she brought brownies she had baked and was dressed like a student. O’Donnell made introductions, then left Bendix and Hufstedler; the two talked informally for about an hour. Shortly thereafter, Judge Hufstedler phoned Bendix to offer her a clerkship. “Only then,” Bendix said, “did it occur to me that that casual conversation constituted my clerkship interview.”

“She took such a strong interest in the development of me as a lawyer and a whole person...that was startling to me,” Bendix reflected. Whether cases heard that year concerned water law, civil rights class actions, antitrust conspiracies, corporate securities fraud, or criminal procedure, Hufstedler’s probity and innate sense of fairness were always evident. One case involved the denial of disability benefits to a lone person without status or clout. Hufstedler asked Bendix to draft a dissent. It became the majority opinion, holding that the appellant *was* eligible for disability benefits, and reversing and remanding the judgment.

Bendix’s husband, John Kronstadt (now a federal District Court judge in Los Angeles), was clerking the same year for Judge William P. Gray of the Central

District, a good friend of the Hufstedlers. They all became social friends. Dinners at the Hufstedlers were hands-on affairs. Shirley cooked numerous courses, made elaborate table centerpieces with flowers from their garden, and entertained afterward by playing the piano. The two women remained close in the decades that followed, attending many family celebrations, including Bendix’s swearing in as a judge in 1997.

Both former law clerks still marvel at Hufstedler’s breadth of interests. She was a Caltech trustee for nearly four decades, champion of Jet Propulsion Lab’s scientific endeavors, member of the Harvard Board of Overseers, veteran trekker in the Himalayas, enthusiastic gardener, board member of the Carnegie Endowment for International Peace, accomplished pianist, and voracious reader. “Yet,” Bendix noted, “she was not a dilettante, she didn’t just collect titles. She was actively involved and contributed.”

These are but two examples of the impact Judge Hufstedler had on lawyers who followed in her footsteps. Last May, however, the sizable Athenaeum courtyard was filled with middle-aged lawyers reminiscing about how, in their youth, Shirley Hufstedler had helped them to become better at the law, better at life, and closer to making a positive impact in the world. ★



Official photo of the Ninth Circuit (with signatures) for the year 1973–74, during the clerkship of Justice Dennis M. Perluss. TOP ROW, L TO R: J. Clifford Wallace, Herbert Y. Choy, Eugene A. Wright, Walter Ely, Shirley M. Hufstedler, Ozell M. Trask, Alfred T. Goodwin, and Joseph T. Sneed. BOTTOM ROW, L TO R: James R. Browning, Charles M. Merrill, Richard H. Chambers (chief judge in 1973 when this photograph was taken), M. Oliver Koelsch, and Ben C. Duniway.

PHOTO COURTESY DENNIS M. PERLUSS

RESTORED PORTRAIT OF FIRST NORTHERN DISTRICT COURT JUDGE CELEBRATED WITH SKIT ABOUT HIS RIVAL

BY RICHARD H. RAHM*

JUDGE OGDEN HOFFMAN was the first Northern District of California judge, serving from 1851-1891. Judge Hoffman hated his rival and fellow New Yorker, Stephen Field, who served on the California Supreme Court from 1857-1863 (the last four of those years as Chief Justice) and as Associate Justice of the U.S. Supreme Court from 1863-1897. The hatred between the two was mutual, with Justice Field removing Judge Hoffman's own clerk and forcing him to use a clerk allied with Justice Field, instigating legislation to eliminate Judge Hoffman's jurisdiction over certain cases, and attempting to abolish the Northern District of California altogether. Yet when Judge Hoffman died in 1891, Justice Field insisted on being a pallbearer at his funeral, after which he went to Judge Hoffman's house (the Pacific Union Club), threw a party honoring himself and chose the person to replace Judge Hoffman as district judge. And this was before Judge Hoffman was actually buried.



Judge Ogden Hoffman

COURTESY U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA

* Richard H. Rahm practices employment law with Littler Mendelson in San Francisco.

How appropriate then that the restoration of Judge Hoffman's portrait in the Ceremonial Courtroom of the District Court (in the Phillip Burton Federal Building in San Francisco) should be celebrated on November 14, 2016 with Judge Hoffman (played by Ret. U.S. District Judge Marilyn Hall Patel) being confronted by his nemesis Justice Field (played by a balding and bearded, masked U.S. District Judge William H. Alsup) in a short skit scripted by Christine Van Aken and Richard H. Rahm, members of the board of directors of the Northern District of California Historical Society. U.S. District Judge Charles R. Breyer served as master of ceremonies (and referee) for the program, which included the two arch ene-

mies making their entrances from the nether world through a cloud of smoke in the Ceremonial Courtroom. After the (mostly bloodless) verbal sparring ended, Judge Breyer introduced Anne Rosenthal, the artist who restored the portrait. The program concluded with Rosenthal unveiling the portrait to the applause of all attending, who were then feted with wine and cheese by the Northern District Historical Society. Rumors of a rematch could not be verified. ★

The Judge Who Went to Comic Con

continued from page 14

Cuellar's comments focused on the implication of the Prime Directive, which explored the implementation of complex laws by organizations rather than courts. Cuellar and Grewal also debated a legal issue that arose in "Measure of a Man," an episode from *The Next Generation* series: should artificial intelligence, in this case Lt. Commander Data, an android, have fundamental rights? "It's a bold and consequential thing to treat a piece of technology as having agency," Cuellar noted.

Justice Cuellar contrasted the *Next Generation* episode to the original *Star Trek* episode "Court Martial," where the key evidence against Captain Kirk was a computer record. Samuel T. Cogley, Kirk's lawyer, insisted that the computer should not be treated as a human. "It's intriguing to see both of these episodes together," Cuellar noted.

Wisconsin attorney Jessica Mederson, from *The Legal Geeks* blog, and Justice Cuellar analyzed legal issues that arose in the *Deep Space Nine* episode, "Hard Time." For instance, would it be constitutional to implant false

memories of having served a 20-year prison sentence in an individual instead of an actual prison term?

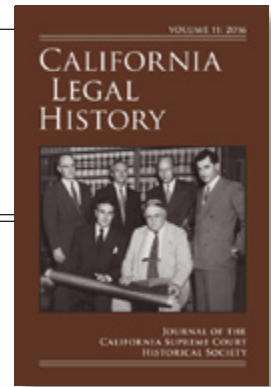
The panelists set their phasers to stun. Christine Peek analyzed the trial advocacy, evidence, and ethical issues from the *Enterprise* episode "Judgment." Ms. Peek explained how she would have cross-examined one of the Klingon Empire's witnesses, how the prosecutor violated his ethical duties by knowingly having a witness lie on the stand, and that the Klingon system did not allow for the right against self-incrimination. Megan Hitchcock compared the number of women lawyers in *Star Trek* episodes to the number of women actually practicing law between 1967 and 1996, concluding that *Star Trek* was far more progressive than the profession. In the episode "Court Martial," for example, a woman attorney prosecuted a court martial at a time when only 3 percent of U.S. attorneys were women.

It was a privilege to moderate our *Star Trek* Comic Con panel. Justice Cuellar, Paul, Neel, Christine, Jessica, and Megan all have a deep respect for *Star Trek* and the law. Their analysis of the many legal issues was inspiring. And as Spock would say, "there are always possibilities" that we will return to San Diego Comic Con. ★

CALIFORNIA LEGAL HISTORY

VOLUME 11, 2016

JOURNAL OF THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY



THE EVENTFUL EARLY HISTORY OF THE UCLA SCHOOL OF LAW is the principal theme of this volume of *California Legal History*. The school's first years are of unusual historical interest — and, by reason of the available source materials, are uniquely suited to historical inquiry.

SECTION 1: UCLA LAW HISTORICAL DOCUMENTS

THIS SECTION PRESENTS PREVIOUSLY UNPUBLISHED DOCUMENTS related to the opening of the law school in 1949 and the story of its early development. The principal figures are, on the one hand, the founding dean of the law school and, on the other, the faculty members he recruited. Two documents are presented:

- ♦ The manifesto of the dissident faculty members, presented to the UCLA chancellor in September 1955.
- ♦ The report of the investigative committee appointed by the UCLA chancellor that led to the replacement of the dean.

SECTION 2: UCLA LAW ORAL HISTORIES

UCLA IS THE ONLY LEADING LAW SCHOOL IN CALIFORNIA OR THE NATION old enough to be the subject of historical inquiry well past the lifetimes of its founders — and also young enough to have captured the thoughts of its founders through the medium of oral history. Selections from seven oral histories are presented:

- ♦ The author of the bill in the California Legislature to create the UCLA School of Law.
- ♦ The professor who chaired the committee to select the first dean.
- ♦ One of the two professors who were supporters of the dean.
- ♦ One of the eight dissident professors.
- ♦ The first dean himself.
- ♦ The long-serving first member of the law school staff who observed the events.
- ♦ The second dean, who is credited with bringing the law school to national prominence.

SECTION 3: UCLA LAW PERSONAL REMINISCENCES

TO COMPLEMENT THE EARLIER HISTORICAL MATERIALS, this section provides newly-written reminiscences of all periods of the school's history, contributed by more than a dozen distinguished emeritus faculty and alumni. Included are judges of the U.S. Court of Appeals for the Ninth Circuit and the California Court of Appeal, and current and former law school deans and professors.

SPECIAL SECTION

THE FIRST-PLACE WINNING ENTRY in the California Supreme Court Historical Society's 2016 Selma Moidel Smith Law Student Writing Competition in California Legal History:

- ♦ A Model for Juvenile Parole Reform: California's Youth Offender Parole Hearings Challenge the Modern Parole System and Apply the Fundamental Principles in *Graham* and *Miller* to the Release Decision-Making Process
Courtney B. LaHaie



2016 STUDENT WRITING COMPETITION WINNERS ANNOUNCED

First place winner Courtney B. LaHaie (CENTER LEFT) is congratulated by Chief Justice Tani Cantil-Sakauye (LEFT), Associate Justice Kathryn Mickle Werdegar (CENTER RIGHT), Society President George Abele (RIGHT), and board member Selma Moidel Smith (CENTER), who initiated and conducted the competition — in the Chief Justice's chambers at the California Supreme Court, November 15, 2016.

PHOTO: WILLIAM A. PORTER

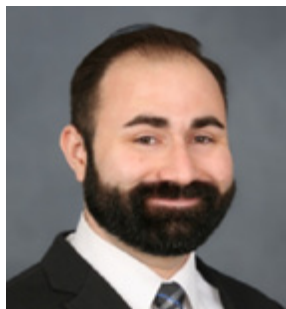
(PUBLISHED IN THE SAN FRANCISCO AND LOS ANGELES EDITIONS OF THE DAILY JOURNAL ON NOVEMBER 25, 2016)

THE CALIFORNIA SUPREME COURT HISTORICAL SOCIETY is pleased to announce the winners of its 2016 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.

First place was won by Courtney B. LaHaie of Washington University in St. Louis School of Law for “A Model for Juvenile Parole Reform: California’s Youth Offender Parole Hearings Challenge the Modern Parole System and Apply the Fundamental Principles in *Graham* and *Miller* to the Release Decision-Making Process.” She receives a prize of \$2,500 and publication in the 2016 volume of *California Legal History*, the Society’s annual scholarly journal.

Second place was awarded to John James Daller of UC Davis School of Law for “Equal Protection and California Public School Finance.” He receives a prize of \$500.

The third place winner is Cory Baker of Pepperdine University School of Law for “Hinkley Groundwater Contamination — How Pacific Gas & Electric Avoided



*Second-place winner
John James Daller*



*Third-place winner
Cory Baker*

Negotiation: A Reassessment of the Changing Scope of Historical Mass Tort Cases.” He receives a prize of \$250.

The three distinguished judges, all of whom are professors and legal historians, were Laura Kalman, UC Santa Barbara, Department of History; Charles J. McClain, UC Berkeley School of Law; and Peter L. Reich, Whittier Law School. ★

New CSCHS Board Members

KATHARINE J. GALSTON



NEW BOARD MEMBER Kate Galston has a weakness for historic courthouses. “Sometimes I get distracted in oral arguments wondering, is that an original light fixture? Or that’s a fabulous stained glass window.”

Her interest in history and old buildings led her to accept President George Abele’s invitation to join the California Supreme Court Historical Society. They had worked together on an ABA group focused on improving bench–bar relations and the practice of law, subjects of deep interest for Galston.

A double major in classics and government at Dartmouth, Galston thought she was headed for an academic career after college but ultimately opted for New York University School of Law instead. Following law school, she clerked for the Honorable Reena Raggi of the U.S. Court of Appeals for the Second Circuit. She practiced litigation and appellate litigation at Irell & Manella LLP and then at Akin Gump Strauss Hauer & Feld LLP where she focused on labor and employment law.

Two years ago, she and Orly Degani opened their own appellate firm, Degani & Galston in West Los Angeles. “I saw opportunities to broaden my career,” Galston said of the move. The 40-year-old now describes herself as an “appellate generalist” with a caseload that includes wage and hour class actions, arbitration disputes, intellectual property, entertainment, employment discrimination, family law, trusts and estates, real estate, contract interpretation, bankruptcy, constitutional law, criminal law, and complex business disputes.

She “loves” the research and writing required of appellate law practice and the ability to “go in depth on an issue” and understand the legislative history of a statute. “You don’t have time for that in trial practice,” she said.

Her skill and focus has led Galston to be named to *Los Angeles* magazine’s list of Southern California “Rising Stars” in appellate law multiple times in recent years, most recently in 2015. She was also included in

the 2016 edition of *The Best Lawyers In America* in the area of appellate practice.

In her off hours, Galston, the mother of two school-age sons, serves on the board of directors of the Harriett Buhai Center for Family Law where she does outreach and helps with fundraising. The Los Angeles legal services organization protects victims of domestic violence and works to improve the wellbeing of children living in poverty.

She recently became chair of the American Bar Association’s Council of Appellate Lawyers and serves on its executive board. She has worked with the education committee of the Appellate Judges Education Institute, a non-profit that educates state and federal appellate judges nationwide, and is also an active member of the Appellate Courts Section of the Los Angeles County Bar Association. ★

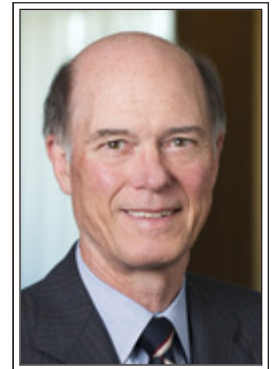
GEORGE S. HOWARD

GEORGE HOWARD first became interested in the history of the California Supreme Court while a law student at the University of Virginia during the 1970s. “I read several of [Chief Justice] Roger Traynor’s opinions,” he recalled, and “watched the court evolve.”

Howard, who joined the California Supreme Court Historical Society board of directors in June, moved to California shortly after graduation, arriving just a month after Chief Justice Rose Bird was sworn in. He’s never left.

Howard is a partner at Jones Day in San Diego where he’s practiced labor and employment law on the management side since 2007.

A Philadelphia native, Howard’s father was an executive with Westinghouse during a period when the company experienced a number of strikes. Philadelphia was a strong union town in the 1960s when Howard grew up, so when working summers as a newspaper reporter, he covered labor issues. Howard’s interest in the field was cemented in law school by influential labor law professor Frank McCulloch,



continued on page 26

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who had chaired the National Labor Relations Board under President John F. Kennedy.

The practice has “been my bread and butter,” Howard noted, and undergone dramatic change in recent decades. “Employment law was initially just Title 7.” Employees could not yet bring claims for sexual harassment or discrimination, there was no family leave law, and wage and hour cases were individual claims. “All that has developed since.”

“I honestly don’t know how small companies keep up,” he said, noting that much of his job involves educating clients about changes in the law and their responsibilities as employers.

Howard, now 64, has been included in every edition of *The Best Lawyers in America* since 1993, and since 2005 has been listed annually in *Chambers USA Guide* as one of the leading labor and employment lawyers in California. He is a founding editor of *The Rutter Group’s California Practice Guide — Employment Litigation* and continues to serve as a contributing editor of that treatise.

The La Jolla resident is also amicus coordinator and past chair of the Employers Group Legal Committee, a collection of 20 California employment lawyers who represent the interests of employers, as amicus curiae, in appeals of important employment and labor cases in state and federal courts.

Prior to joining Jones Day, Howard practiced with Pillsbury Winthrop Shaw Pittman and earlier, with Luce, Forward, Hamilton & Scripps LLP.

Howard’s interest in the development of California law and its courts is part of a larger passion for history. Among his recent reads are Lawrence Wright’s *The Looming Tower: Al-Qaeda and the Road to 9/11* and *Hartford in World War I*, authored by a friend. The father of two adult children, Howard does much of his reading in his Montana vacation home.

President George Abele persuaded Howard, a longtime friend, to channel some of his interest in history toward the California Supreme Court Historical Society. Howard’s reaction: “This is something I haven’t done. It should be kind of fun.” ★

EDITOR’S NOTE

WELCOME TO THE California Supreme Court Historical Society’s bi-annual *Newsletter*. If you’ve reached this page, I trust you’ve found an article, hopefully several, that interested you.

I became editor this past summer but have been a member of the Society’s board for several years. I am a legal historian by training and wrote my dissertation on the development of the public trust doctrine in state courts during the 19th and early 20th centuries. California law, for example, decrees that the state holds certain natural resources, like the coastline, in trust for public use. Far from arcane law, the doctrine has been at the forefront of recent heated battles over beach access and use up and down the state. That circularity — how the past pulls on the present — has continued to fascinate me.

I’m excited to head up the *Newsletter*. But it truly takes a village to produce this publication and we have a crack set of villagers here at the Society. Jake Dear, who heads the Chief Justice’s legal staff and is the Supreme Court’s chief supervising attorney, has graciously agreed to continue serving as associate editor; designer Em Holland produces the first-class layout that you see on these pages; and Publications Chair Selma Moidel Smith, who is editor-in-chief of *California Legal History*, CSCHS’s academic journal, and is a former editor of this *Newsletter*, provides essential all-around advice and help.

We enthusiastically welcome your contributions to this publication. Our *Newsletter* typically includes a mix of serious if short historical articles along with news of the Society. Our range is California law and courts, broadly drawn — not just the Supreme Court. We welcome contributions from lawyers, jurists, and lay and professional historians, and we’re a great outlet for something too small for a full-on academic article but interesting, even quirky.

Also, let me know if you’ve discovered a recent book on California legal history or courts that you’d like to review. And please tell us about your news. Have you changed firms? Made partner? Been elevated? Retired? Become involved in some new extra-curricular activity?

I look forward to hearing from you. Write me at molly.selvin@gmail.com. And thank you for reading.

— MOLLY SELVIN*

* Molly Selvin is a legal historian, former newspaper journalist, CSCHS board member and incurable enthusiast.

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