
*Justice Werdegar delivers the 2012 Jefferson Memorial Lecture, "The California Supreme Court and the Initiative Power — 100 Years of Accommodation," at UC Berkeley.*
PHOTO BY DICK CORTEN, UC BERKELEY

# *Justice Kathryn M. Werdegar Delivers the 2012 Jefferson Memorial Lecture*

Associate Justice Kathryn Mickle Werdegar delivered the Jefferson Memorial Lecture on March 20, 2012, at the International House Chevron Auditorium on the UC Berkeley campus. Her topic was "The California Supreme Court and the Initiative Power — 100 Years of Accommodation."

The Jefferson Memorial Lectures were established in 1944 through a bequest from Elizabeth Bonestell and her husband Cutler Bonestell. A prominent San Francisco couple, the Bonestells cared deeply for history and sought through the lectures to encourage students, faculty, visiting scholars, and others to explore the legacy of Thomas Jefferson and the values inherent in American democracy.

Since then, a number of distinguished scholars and public servants have delivered Jefferson Memorial Lectures at Berkeley, addressing a broad spectrum of topics, including the early years of the Republic, American politics, economics, law, government, education and religion, as well as Jefferson himself. Among the prominent figures in American intellectual life who have delivered lectures over several decades are:

- James Conant (President of Harvard University and U.S. Ambassador to Germany)
- Richard Hofstadter (historian and Pulitzer Prize-winning author)
- Archibald Cox (Harvard law professor, U.S. Solicitor General, and Watergate Special Prosecutor)
- Jeanne Kirkpatrick (Georgetown University professor and U.S. Ambassador to the United Nations)
- U.S. Senator Alan Simpson
- E. J. Dionne (*Washington Post* political columnist)
- David M. Kennedy (Stanford history professor and Pulitzer Prize-winning author)
- Linda Greenhouse (Pulitzer Prize-winning reporter covering the U.S. Supreme Court for the *New York Times*)
- A. Wallace Tashima (Judge, U.S. Court of Appeals for the Ninth Circuit)
- Elizabeth Warren (Harvard law professor and special assistant to President Obama)

LEFT TO RIGHT: *Professor Harry Scheiber, Chair of the Jefferson Memorial Lectures Committee; Andrew Szery, Dean of Graduate Studies; Goodwin Liu, Associate Justice of the California Supreme Court; Justice Werdegar; Robert Birgenau, UC Berkeley Chancellor.*
PHOTO BY DICK CORTEN, UC BERKELEY

The large and appreciative audience was welcomed by Harry Scheiber, Chair of the Jefferson Memorial Lectures Committee and Riesenfeld Professor of Law and History at UC Berkeley School of Law. Professor Scheiber characterized Justice Werdegar as "an eloquent and highly respected voice in the vital dialogue of recent years regarding constitutional principle and democratic governance. Her contributions both to scholarship and to the jurisprudence of California's high court are of enduring importance and her lecture will deal with an issue — the initiative power in relation to the judicial role — which has been a key feature of conflicts over modern-day legal process in our state."

Introducing Justice Werdegar, UC Berkeley Chancellor Robert Birgeneau noted both her having been the first woman to be elected Editor-in-Chief of the Boalt Hall Law Review and her service as a "central figure" on the California Supreme Court Historical Society board of directors.

Justice Werdegar opened her presentation by observing that her delivery of the lecture at the International House was an especially meaningful homecoming since she had lived at the "I-House" during her first year of law school at UC Berkeley. She also acknowledged the presence in the audience of two of her favorite teachers from Boalt — Professors Jesse Choper and Herma Hill Kay.

Justice Werdegar began by acknowledging that, although Thomas Jefferson believed that the people are the "sole and safe depository" of the wisdom necessary for governance, he was not a proponent of "direct democracy" as the term is now understood. Rather, he, like the other founders of the American Republic, was apprehensive about, in Madison's words, the "passions of the popular will." Hence, their preference for indirect democracy, effected through elected representatives. She traced the growing interest in direct democracy throughout the western and mid-western states in the late 19th century as a means to reduce corrupt influence on state legislatures and to encourage popular involvement in government. In California, the initiative, along with the related mechanisms of referendum and recall, were adopted in 1911 as Progressive Party reforms. She noted that not all Californians were enthusiastic, observing that the *Los Angeles Times* expressed fear that the "ignorance and caprice of the multitudes" would subject business interests, and property rights in general, to "constant turmoil."

Today, the initiative has been adopted in 24 states and the District of Columbia and is now an established part of the fabric of California government. The challenge for California courts has been to give effect to the wishes of the majority, as expressed through the initiative power, while holding true to the fundamental principles in the federal Constitution and in other provisions of the state Constitution. The balance of the lecture dealt with the efforts by the California Supreme Court to meet that challenge.

The principles evolved by the Court over the century that the initiative has been in effect imposed both procedural and substantive standards on initiative measures.

*Professor Herma Hill Kay, one of Justice Werdegar's favorite teachers at Boalt Hall, poses a question after the lecture.*
PHOTO BY DICK CORTEN, UC BERKELEY

Justice Werdegar described the procedural limits: (1) an initiative may amend, but not revise, the Constitution; and (2) an initiative measure may address only a single subject.

Justice Werdegar explained that the Court evaluates whether an initiative substantially alters basic government structure and framework. If it does, it constitutes a revision, which may be accomplished solely through a constitutional convention or legislative initiative. In only two cases has the Court held a voter initiative measure invalid as an attempted revision.

The "single subject" rule requires that all parts of an initiative measure be germane to a common subject and focused on achieving a common purpose. The rationale for the rule is, as Justice Werdegar explained, to prevent proponents of an issue from linking it up with other, politically-popular but unrelated, issues, thereby preventing an accurate expression of voter preferences. In only one instance has the Court invalidated an initiative measure on this ground.

The few occasions on which initiatives have been held invalid on procedural grounds illustrate the Court's restraint — itself a recognition that, were it to be more restrictive, it would invite charges of judges thwarting the will of the people.

By contrast, there is no difference between the Court's evaluation of the substantive legality of an initiative statute and that of a statute passed by the Legislature when challenged as violating a provision of the California or federal Constitution. Justice Werdegar provided two examples. Proposition 14 in 1964 authorized racial discrimination in housing. The California Supreme Court overturned it as a violation of the U.S. Constitution's Equal Protection guarantee. Similarly, Proposition 22, passed in 2000, was a statutory initiative prohibiting same-sex marriage. This was held invalid by the Court as violating the California Constitution's guarantee of equal protection. (The Court later upheld the constitutionality of the subsequently enacted Proposition 8, which amended the state Constitution to allow the prohibition.)

Justice Werdegar concluded her lecture with a summary of some of the contemporary issues that the initiative presents. First, it raises the question of the appropriate balance between the people and their Legislature. Second, it is a "winner takes all" process, with less accommodation to, or protections for, minority interests than legislation typically affords. Third, opponents of successful initiatives often challenge them in court, extending a struggle between polarized opponents: political parties; unions and employer groups; insurance companies and trial lawyers. Finally, the expense of gathering signatures and conducting statewide campaigns gives formidable advantages to well-funded interest groups. All these considerations, however, Justice Werdegar emphasized, are matters for the Legislature and the voters, not for the courts.

As Chancellor Birgeneau mentioned in his introduction, Justice Werdegar ranked first in her class in law school. One of her former teachers, Professor Herma Hill Kay, complimenting Justice Werdegar for a "clear and lucid presentation," confirmed that she remains at the top of the class. ✯