

SPECIAL SECTION
HONORING
JOSEPH R. GRODIN

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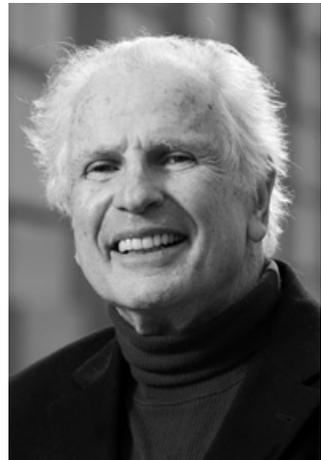
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HONORING JOSEPH R. GRODIN:

The Honoree Speaks

JOSEPH R. GRODIN*

It was the inimitable Selma Moidel Smith, longtime and amazing editor of this publication, who came up with the idea for this *festschrift*, and so when she suggested I should submit something of my own, perhaps by way of supplementing the oral history that was reproduced in these pages in 2008¹ (but based on interviews conducted for the Bancroft Library in 2004²) I could hardly refuse. Anyway, since when does a professor decline an opportunity to get something published?



* This article is one of a group published here on the occasion of the UC Hastings College of the Law Tribute Honoring Distinguished Emeritus Professor of Law and former California Supreme Court Associate Justice Joseph R. Grodin, November 12, 2015.

¹ 3 CALIFORNIA LEGAL HISTORY 1 (2008).

² Interviews were conducted by Leah McGarrigle, an oral historian and former student of mine, in five sessions conducted in the latter part of 2004. The edited transcript is available online or in hardbound manuscript at the Bancroft Public Library.

In the year following my oral history interviews, I retired from fulltime teaching, achieving thereby yet a new title, “Distinguished Emeritus Professor.” This has led to some modest expansion of time for recreational and family activity, though I am sure my wife Janet would say not enough. I continue to teach (though only part time), I continue to engage in (a minimal) amount of ADR work, and I spend, if anything, more time at the computer aggravating my back while writing a variety of things, which I will explain.

TEACHING

Teaching has been an important part of my life since I graduated from law school in 1954. While practicing in a labor law firm headed by Mat Tobriner, later a Court of Appeal and then a Supreme Court justice, I began teaching labor law at UC Hastings as an adjunct professor, and did so for several years. In 1972, after a year at University of Oregon Law School in Eugene, I became a member of the fulltime faculty at UC Hastings, and I have taught there ever since, with time off between 1979 and 1983 for the Court of Appeal and the Supreme Court. I love teaching. I love the interaction with students, and I love sharing with them my love for the law. (Too much love, my high school English teacher would say; I say, too bad!)

I have had the good fortune, over the years, to be able to select my own teaching subjects, reflecting my own interests and values. I began teaching labor law, which is what I knew best, including public sector labor law, which was then a rapidly developing field in which I had been conducting research and writing books (including casebooks) and articles. Some of what I had written seemed actually to have been read by, and had an impact upon, judges — a pleasing rarity for academics. I had always viewed labor unions as essential, not only for the wellbeing of workers, but for the effective functioning of democracy. Sadly, after I began teaching (though I trust not as a result), union organization and membership in the private sector declined precipitously. While unionization in the public sector continued to grow, that too has fallen upon bad times, as some politicians have found it convenient to blame labor for the economic woes of state and local governments. Still, it is an important subject, not only because of the continuing significance of unions and collective bargaining, but also because it lends itself to understanding of issues of federalism and the role

of administrative agencies. It grieves me that labor law is no longer taught in many law schools.

In addition to labor law, I developed and taught the first courses at Hastings in arbitration law, employment law, and employment discrimination law. A bit later I started to teach constitutional law, which had always been an interest of mine, and seminars in judicial process, law and literature, and an experimental seminar in state constitutional law, which as I recall attracted at the time all of four students. For a few years after my retirement I continued to teach constitutional and employment discrimination law, but I soon dropped those large lecture courses in favor of a seminar called, “Current Problems in Constitutional Law.”

Since I was a student in college I have been interested in questions concerning how we can debate questions of right and wrong, good and bad — the sorts of questions philosophers talk about under the heading of moral philosophy. Is there some objective anchor to such questions, or is it all a matter of subjective preferences, like those for flavors of ice cream? When I got to law school I came to see such questions through the perspective of the law. When appellate judges disagree, what is it they are disagreeing about? Is it the case, as (now Chief) Justice John Roberts famously insisted in his nomination hearing, that judges of a high court are simply referees calling balls and strikes? If not, is it appropriate to regard them as super legislators, using legal language to implement their own concepts of morality or public policy? And if neither of those metaphors is adequate to describe what it is that we expect judges to do, if the truth lies somewhere in between, then how should we talk about what they do?

The question is more than academic. The answer (if indeed we can find one) goes to the heart of how the public sees the judicial branch, and it determines (in part) how we ought to select judges, how we should evaluate their performances, and (at the state level) how we decide whether to retain them. It also has bearing upon whether we should treat judges the same as or different from legislators when it comes to campaign solicitations and contributions, attempts to influence their decisions, and limitations on unethical behavior.

Such questions became practically relevant for me when I became an appellate judge, but, like I suspect most judges, I found that the pressure of deciding particular cases left little time for introspection or philosophical

theorizing. It was not until I found myself (and two colleagues) in the midst of a retention election ostensibly aimed at the Court's decisions overturning death penalty judgments that I was forced to confront the tension between what our opponents viewed as unacceptable outcomes and what I saw as principled decision-making. During the campaign I tried to defend that distinction, but apparently without much success.

After the 1986 election I was off the Court and back in academia, with plenty of time for reflection. I began to read extensively about legal theory, to develop my own thinking through articles and a book called, "In Pursuit of Justice," and to stimulate thinking (mine and that of my students) through my teaching.

My current seminar, "Current Problems in Constitutional Law," in addition to considering current and emerging constitutional issues, addresses these sorts of problems. I co-teach the seminar with a sitting judge — for the first few years U.S. District Judge Thelton Henderson and more recently Ninth Circuit Judge Marsha Berzon. For each case we assign one of the students to read the briefs and prepare a "calendar memo" such as a real law clerk might prepare for a court in advance of oral argument. The other students are expected to reply briefly with their own thoughts. Then we discuss and "decide" the case, with the students acting as judges rather than as advocates, which is their typical law school role, and with my co-teacher and me providing questions and commentary. The class never fails to excite me, though I find that I still have more questions than answers.

OTHER ACTIVITIES: MEDIATING, LAWYERING, WRITING

For a while after I left the bench I did a good deal of arbitration and mediation, but that activity has slowed down. I still do a mediation now and then, which I enjoy. I also did some consulting on appellate briefs, but recently only for nonprofits, such as the Employment Law Center (SF Legal Aid Society) and ACLU. On occasion I have argued cases to the Supreme Court or the Court of Appeal, and authored *amicus curiae* briefs, such as in the same-sex marriage cases before the California Supreme Court.

I used to say, when asked to compare being an academic and being a judge, that there are two main differences. One is that as an academic you

get to write about anything that interests you, whereas as a judge you write mainly about the cases you have to decide. The other is that in the case of a judge's writing you can be pretty sure that someone reads it.

Despite uncertainty as to whether anyone is paying attention I have continued to write, for journals and for blogs, sometimes about legal issues that interest me (such as same-sex marriage), sometimes about the nature of judging, but mostly, in recent years, about the state constitution and its proper independent role in the consideration of constitutional claims. This journal has been kind enough to publish a number of my articles concerning the background and interpretation of provisions of the state constitution's Declaration of Rights, and just recently Oxford University Press published a second edition of a comprehensive book on the California Constitution co-authored by me and two colleagues, Professors Darien Shanske and Michael Salerno, with a Preface by Chief Justice Cantil-Sakauye. The first edition (with different co-authors) was published over twenty years ago, and since then numerous amendments and changing interpretations have rendered it virtually obsolete. And who wants to be obsolete?

THE FUTURE

“Those who have knowledge, don't predict. Those who predict, don't have knowledge.”

— Lao Tzu, 6th Century B.C. Chinese Poet

I am most grateful for what life has brought me so far, and I can't predict what it will bring in years to come, but I can say what I would like to have happen. I would like to continue teaching, so long as I am able and Hastings will let me; I would like to continue writing and to voice my opinions where I think they might have some effect; and I would like to remain close to my family and close to nature. Beyond that (oh, and age-appropriate health), I couldn't ask for anything more.

★ ★ ★

HONORING JOSEPH R. GRODIN:

A Tribute to Justice Joe Grodin

KATHRYN M. WERDEGAR*

“What makes great courts is great judges.”

(The Nation, February 19, 1973, p. 237)

The author of this perceptive observation was Joseph R. Grodin, Professor of Law at Hastings College of the Law, University of California, writing more than forty years ago. It was six years before the author himself was to be appointed to the First District Court of Appeal (1979) and, three years later (1982), to the California Supreme Court. Professor Grodin could not then have known that one day he would be among the pantheon of great judges who have made the California Supreme Court a great court.

Labor lawyer, appellate justice, supreme court justice, mentor, scholar, professor, outdoorsman, husband, father, friend — these are the roles that define Joe Grodin, and it has been my privilege to know him in a great many of them. When I was invited to write about Justice Grodin, what first came to my mind were images — visual and mental pictures of experiences

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* Associate Justice, California Supreme Court.

we have shared that reflect some of his many roles and his personal and intellectual qualities.

Monterey (Monterey County, California), and the State Constitution — Passionate about the California Constitution and with a deep knowledge and love of its origins and history, Justice Joe Grodin swept my husband David and me away from proceedings at the State Bar Convention in Monterey and escorted us to Colton Hall, the site of the first California Constitutional Convention. There we were treated to his scholarly and engaging exposition of the circumstances surrounding the 1849 signing of our first state constitution and vignettes about its original signators, Californios and Anglos both. Concerned that it not be overlooked, before our departure Justice Grodin guided us to the glass case that holds the original Spanish language copy of our first Constitution.

Bolinas (Marin County, California), and the Declaration of Independence — On July 4th of any given year, family and friends of Joe and Janet Grodin join them in Bolinas to enjoy the unconventional and colorful Bolinas 4th of July Parade, and then gather at their weekend retreat to discuss matters frivolous and profound, but most of all to recognize the document whose creation the day celebrates. “When in the course of human events,” Justice Grodin begins, and then engages each guest in turn to read a segment of our founding document. Lively discussion of the meaning of its various declarations ensues, as phrases are examined and debated. In case food for thought is insufficient nourishment, an old-fashioned July 4th barbeque and refreshing beverages are offered as well.

Silver Lake (Amador County, California), and A Hikers Guide — On vacation in Amador County near Carson Pass, staying at Kit Carson Lodge, David and I venture forth to explore the beautiful Silver Lake and its environs. In our day-packs, as essential to a successful outing as our water supply and hiking poles, we put the area’s only authoritative trail guide. This invaluable guide, my husband’s favorite birthday present that year, was written by a frequent Silver Lake visitor and accomplished hiker. Who was the author? Joe Grodin, in his persona of outdoorsman and inveterate hiker of the Sierras. Justice Grodin, with his daughter, researched the trails over many seasons and wrote a little gem of a guidebook simply for the pleasure of others who might seek the beauty and solitude of that special area of California’s high Sierras.

Justice Joe Grodin's Jurisprudence — As a member of the California Supreme Court for the past twenty-one years, I have had many occasions to research and rely on Justice Grodin's scholarship and jurisprudence. A renowned labor lawyer when he was appointed to the Court of Appeal, he authored the landmark *Pugh v. Sees Candy* case (1981) 116 Cal.App.3d 311, which established that a contract of employment, depending on the facts shown, may contain an implied-in-fact promise that the employee would be terminated only for good cause.

On the California Supreme Court his influential decisions touched on varied, often sensitive subjects, such as a therapist's duty to warn a potential victim and her young child of a patient's threat of harm (*Hedlund v. Superior Court* (1983) 34 Cal.3d 695); the conditions under which a guardian or conservator of a developmentally disabled woman can consent on her behalf to surgical sterilization (*Conservatorship of Valerie N.* (1985) 40 Cal.3d 143); the remedy for an agricultural employer's unfair labor practice of firing resident union-affiliated employees and evicting them from their labor camp housing (*Rivcom Corp. v. Agricultural Labor Relations Board* (1983) 34 Cal.3d 743); and the free speech rights of an environmental group advocating a boycott of advertisers in a newspaper whose editorial policies it criticized (*Environmental Planning & Information Council v. Superior Court* (1984) 36 Cal.3d 188).

In *Isbister v. Boys' Club of Santa Cruz* (1985) 40 Cal.3d 72, involving the then controversial question of whether a private nonprofit boys club could exclude girls, Justice Grodin, writing for the majority over three separate dissents — one claiming the decision would “strain our social fabric and send shock waves through the realm of children's organizations” (*id.* at p. 93) — concluded that the club could not. Reasoning that the club qualified as a business establishment subject to the nondiscrimination provisions of the Unruh Civil Rights Act, the majority held that the club's male-only membership policy “is an arbitrary form of discrimination prohibited by that statute.” (*Id.* at p. 91.)

In a different vein, dealing not with individual rights but procedure — and critical to orderly judicial review — Justice Grodin, expressing the view of a unanimous Court, wrote the landmark opinion of *Palma v. U. S. Industrial Fasteners* (1984) 36 Cal.3d 171. There the Court set forth rules bringing order and restraint to the previously abused practice of granting peremptory writs of mandate in the “first instance,” that is, without prior

issuance of an alternative writ giving the adverse party the opportunity to oppose. Considering the particular document at issue in the case, the opinion observes that it was neither writ nor order, but “a hybrid, unknown to jurisprudential taxonomy.” (*Id.* at p. 182.)

In the early days of rent control, when communities were experimenting with its parameters, Justice Grodin authored two significant opinions, both upholding the constitutionality of the law in question, *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, involving the requirement of a pre-demolition permit before a landlord may level rental units, and *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, concerning an ordinance that required consideration of tenant financial hardship in determining the validity of a rent increase.

Included in his legacy are numerous significant criminal cases, as well. One with far-reaching implications is *In re Lance W.* (1985) 37 Cal.3d 873, concerning whether the electorate could amend the California Constitution by enactment of Proposition 8, the initiative measure known as “Truth in Evidence.” Proposition 8 mandated that no unlawfully seized evidence could be excluded in a California criminal prosecution that would not be excluded under federal law, thus abrogating the broader vicarious exclusionary rule the California Supreme Court had adopted under the California Constitution. Rejecting the argument that Proposition 8 was an impermissible revision of our state constitution, Justice Grodin concluded the electorate had the authority — and the intent — to change the law so that courts could exclude evidence unlawfully seized under either the California or the United States Constitution only if exclusion is compelled under the federal constitution.

In *People v. Cook* (1985) 41 Cal.3d 373, the Court was presented with a case of first impression involving a police helicopter flying over defendant’s property looking for evidence of marijuana cultivation in his enclosed back yard. Writing for the majority, Justice Grodin rejected “the Orwellian notion that precious liberties derived from the framers simply shrink as the government acquires new means of infringing upon them” (*id.* at p. 382), and concluded that “an individual has a reasonable expectation of privacy from purposeful police surveillance of his back yard from the air” (*id.* at p. 382), and in the absence of a warrant, the search was illegal. In words that resonate today — twenty-five years later — Justice Grodin observed

that the case required the Court “to examine the contours of California citizens’ entitlement to be free from the intrusive gaze of the state, in an era when the instruments of surveillance at the disposal of the police are far more sophisticated than our nation’s founders would have dared contemplate.” (*Id.* at p. 375.)

Beyond his jurisprudence, Justice Grodin has thought deeply about the role of judges in our society. His reflections and philosophy on the subject are valuable contributions to that perennial enquiry. His book *“In Pursuit of Justice: Reflections of a Supreme Court Justice* (U.C. Press, 1989) is a trove of wisdom that I have often consulted. In the conclusion, he states he has “attempted to convey understanding of the sort of principled creativity that . . . is the essence of the judicial function — the exercise of judgment in a disciplined way within a framework of democratic procedures and values.” (p. 188) His own jurisprudence demonstrates that as a member of the California Supreme Court, Justice Grodin exercised his judgment in a creative but disciplined and principled way, leaving a rich legacy of significant decisions that touch the lives of every Californian and continue to guide courts as they confront the issues of the day.

Justice Grodin’s time on the California Supreme Court was cut short by the retention election of 1986, when the electorate failed to retain three of the four members of the Court who were on the ballot. Legal scholars, other judges, court personnel, and knowledgeable observers of the court — attorneys and lay persons alike — all deeply felt the loss. Nevertheless, in his all-too-brief four years on the California Supreme Court, Justice Joseph Grodin distinguished himself as one of the great judges that make a great court.

★ ★ ★

HONORING JOSEPH R. GRODIN:

A “Founding Father” of the Doctrine of Independent State Constitutional Grounds

RONALD M. GEORGE*

When invited to contribute an article to this issue honoring Joseph R. Grodin, my first reaction was to wonder where one would begin in embarking upon this task. With apologies to Elizabeth Barrett Browning, “Let me count the ways. . . .” After all, Joe Grodin has distinguished himself in numerous ways during his long and prolific career: as a lawyer specializing in labor and employment law; as an academic teaching students at the University of California’s Hastings College of the Law and publishing scholarly articles on a broad range of constitutional and other issues related to the administration of justice; as a jurist whose written opinions both as a justice of the California Supreme Court and of the California Court of Appeal have made lasting contributions to the jurisprudence of our state and our nation; as a highly regarded arbitrator and mediator; and as a steadfast advocate for expanding access to justice.

Faced with this daunting range of subject matter, I have chosen to contribute a few pages highlighting Joe’s contributions to an area that, if

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* Former Chief Justice of California.

not overlooked, has not received the attention it deserves — his groundbreaking efforts in the matter of state constitutions and their corollary, the doctrine of independent state constitutional grounds. At first blush this may appear to be a dry, theoretical subject perhaps worthy of academic debate but not imbued with great practical significance. But how wrong it would be to take such a cramped view of this vital and vibrant doctrine that plays such a critical role in protecting the civil rights and liberties of the residents of California and other states where it is robustly applied by the courts.

Joe Grodin has expressed his views at great length regarding the significance of the doctrine, and my review of portions of an interview he gave as part of his oral history,¹ as well as some of his writings on this subject,² has been of great assistance in preparing this article. Joe credits United States Supreme Court Justice William J. Brennan, Jr. (who served previously as a justice of the New Jersey Supreme Court), Oregon Supreme Court Justice Hans A. Linde, and California Supreme Court Justice Stanley Mosk for being instrumental in developing the doctrinal foundation for this area of constitutional law. I would add Joe's name as the fourth in this pantheon of Founding Fathers.

Joe Grodin's thesis, that state constitutions occupy — and should occupy — a crucial role in our nation's jurisprudence, is premised initially on historical chronology. Each of the original thirteen states adopted a state constitution before the Constitution of the United States and its Bill of Rights were ratified. The first Constitution of California was adopted subsequent to the federal Bill of Rights as the result of our state's 1849 Constitutional Convention, and the second (and current) constitution was adopted following our 1878–1879 Constitutional Convention. Nonetheless, as Joe Grodin has observed, “At that time, the provisions of the

¹ *Oral History: Joseph R. Grodin, Professor of Law and Supreme Court Justice*, conducted by Leah McGarrigle, Regional Oral History Office, The Bancroft Library, University of California, Berkeley (2008) 3 California Legal History 1; specifically, Interview No. 4 (November 23, 2004), pages 97–123.

² Joseph R. Grodin, *The California State Constitution and Its Independent Declaration of Rights* (Fall/Winter 2014) California Supreme Court Historical Society Newsletter, pages 13–14, available at <http://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-CA-State-Constitution.pdf>; Joseph R. Grodin, In Pursuit of Justice: Reflections of a State Supreme Court Justice (1989) pages 123–130.

federal Bill of Rights did not apply to the states, so . . . the California Constitution was the primary, if not the only, protection California[ns] would have against abuse of power by the state and local governments.”³ A 1974 amendment to the California Constitution significantly reinforced the independent nature of the state charter by providing, “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” (art. I, sec. 24.) But both prior to and subsequent to the adoption of this constitutional amendment, the California courts had begun to follow an independent approach in viewing the federal constitution as establishing a floor (or minimum level) of protection of constitutional rights for Californians, while interpreting companion provisions of the state constitution as constituting a ceiling of additional constitutional protection.

In *People v. Cahan* (1955) 44 Cal.2d 434, California’s high court, six years before the nation’s high court came to a similar conclusion based on the federal constitution, held that the state constitutional prohibition against unreasonable searches and seizures barred the admission of improperly obtained evidence in a criminal proceeding. Despite federal constitutional law to the contrary, the California Supreme Court held that the state constitution’s ban on double jeopardy did not permit a defendant in a criminal case to be retried after a mistrial granted on the trial court’s own motion (*Cardenas v. Superior Court* (1961) 56 Cal.2d 273). In a decision later overturned by voter Initiative, the state’s high court invalidated the death penalty as violative of the state charter’s ban on “cruel or unusual punishment.” (*People v. Anderson* (1972) 6 Cal.3d 628.) That Court also took a broader view of a criminal defendant’s “Miranda rights” under the California Constitution than that accorded by the United States Supreme Court under the federal constitution (*People v. Disbrow* (1976) 16 Cal.3d 101). And the Court has interpreted the state’s constitutional protection of free expression as providing a broader level of protection than that accorded by the First Amendment. (See, for example, *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899.) The California electorate’s 1972 addition of a specifically worded constitutional right of “privacy” (art. I, sec. 1), which does not appear in the federal constitution and only has been

³ “The California State Constitution,” *id.* at 13.

held by the courts to be implied in that document, has given rise to a variety of constitutional protections recognized by the courts of this state.

As California Chief Justice Tani Cantil-Sakauye has noted, notwithstanding the Supremacy Clause of the United States Constitution, California courts consider themselves charged with interpreting state constitutional provisions in a manner independent of the interpretation given to comparable provisions of the federal document, even when the state and federal charters are identically or similarly worded. In doing so, our courts give respectful consideration to the rulings of the federal high court, the lower federal courts, and the courts of other states, but are not bound by them.⁴ Lest the decision of a state court not to follow the lead of the federal high court on a given issue be considered a negative manifestation of “judicial activism,” Justice Grodin points out that Chief Justice William Rehnquist’s opinion for the Court in the *Pruneyard* case, “holding that a shopping center is not subject to the First Amendment[,] in no way deprived California of the right to adopt in its own constitution ‘individual liberties more expansive than those conferred by the Federal Constitution.’”⁵

Joe Grodin credits Hans Linde with developing an analytical approach to constitutional interpretation that applies the concept of judicial restraint to the resolution of constitutional issues, and Justice Stanley Mosk for being a leading advocate on the California Supreme Court for that approach. Judicial restraint, of course, traditionally requires courts to resolve issues on statutory or other non-constitutional grounds, if possible, without reaching the constitutional issue. Similarly under Linde’s approach, judicial restraint requires that if the constitutional issue must be reached, courts ordinarily should attempt to resolve it on state constitutional grounds before, if necessary, reaching the federal constitutional issue. Although Grodin confesses to being initially “resistant” to Linde’s approach, he became a self-described “convert” as he observed the ebb and flow in the rulings of the United States Supreme Court over the years and realized the importance of not tethering the decision-making of state high

⁴ Chief Justice Tani Cantil-Sakauye, *The Truly Independent Nature of the California Constitution* (Fall/Winter 2014) California Supreme Court Historical Society Newsletter, pages 15 and 26, available at <http://www.cschs.org/wp-content/uploads/2014/05/2014-Newsletter-Fall-Truly-Independent-Constitution.pdf>.

⁵ *In Pursuit of Justice*, *supra* note 2, at 125.

courts on vital issues of constitutional rights and liberties to every shift in course instituted by a changing composition of the nation's high court.⁶ [6]

Having authored opinions for the California Supreme Court that relied upon independent state constitutional grounds, for example decisions involving the right of reproductive choice and marriage equality for same-sex couples,⁷ I consider myself and my judicial colleagues to be greatly indebted to Justice Grodin, whose writings have afforded recognition to the importance of independent state constitutional grounds as a legitimate basis for judicial decision-making.

Justice Grodin observes that the “reliance of state courts on independent state constitutional grounds as a basis for decision has had a checkered history;” and that “[f]ew courts are consistent in the manner in which they invoke that doctrine, and this inconsistency tends to detract from the doctrine’s integrity.” With his customary modesty, he poses the possibility that he may not have been “blameless” in this regard.⁸ Unfortunately, I must join him in my own *mea culpa*.

But, as noted by Justice Brennan in his Forward to one of Justice Grodin’s books,⁹ given the crucial role played by state courts in resolving the vast majority of the cases filed each year in the United States, as compared to the relatively small number decided in federal courts, it is essential that appropriate attention be given to the vital role of state courts in shaping constitutional and other law. Joe Grodin’s persuasive exhortation to judges and lawyers that they accord consistent and due recognition to independent state constitutional grounds in the development of the law continues to serve as one of his most significant contributions to the American system of justice.

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⁶ *In Pursuit of Justice*, *supra* note 2 at 123.

⁷ *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307; *In re Marriage Cases* (2008) 43 Cal.4th 757.

⁸ *In Pursuit of Justice*, *supra* note 2 at 129, 130.

⁹ *In Pursuit of Justice*, *supra* note 2.

HONORING JOSEPH R. GRODIN:

Tribute to a Colleague

CRUZ REYNOSO*

Justice and Professor Joseph R. Grodin and I share family backgrounds. He's one year older than I am. Both of us had parents who immigrated to the United States, his father from Lithuania and my parents from Mexico. And we both considered Justice Mathew Tobriner a model. I had the privilege of replacing Justice Tobriner on the California Supreme Court.

Our lives diverged. Justice Grodin continued his education. I took two years to serve as a Counter Intelligence Corps agent with the U.S. Army. He graduated from law school in 1954 and I in 1958. After law school, he joined Attorney Tobriner's law firm and I accepted a position in Imperial County in the small law firm of State Senator J. William Beard, as his part-time assistant and part-time associate in the law firm.

It was not until Justice Grodin's appointment to the Agricultural Labor Relations Board that I became acquainted with his work. When the ALRB was formed I was a law professor at the University of New Mexico, in

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* Former Associate Justice, California Supreme Court, and Professor of Law, UC Davis School of Law.

Albuquerque, and I returned to California in 1976 to assume a position as associate justice on the Third District Court of Appeal. In 1976, he was appointed an associate justice by the same governor, Jerry Brown, to the First District Court of Appeal. In 1979, it was in our capacity as justices of the Courts of Appeal that I got to know Justice Grodin well. We had occasion to sit with the California Supreme Court with Chief Justice Rose Bird on several occasions, and once or twice on the same case.

Governor Brown elevated me to the California Supreme Court in March of 1982 and elevated Justice Grodin at the same time to presiding justice of Division Two of the First District. Later in 1982, Governor Jerry Brown elevated Justice Grodin to the California Supreme Court. Governor Jerry Brown had an extraordinary opportunity to have appointed six of the seven justices of the Supreme Court when he left office.

I appreciated Justice Grodin's role as a fellow justice on the Supreme Court. He and I were generally in the majority in the cases we heard. However, in one case, I was a lone dissenter. I believed that, since the issue was equitable, we had a duty to decide the case. All other justices felt the decision should be left to the Legislature. Justice Grodin wrote a concurring opinion agreeing with the issue I had raised in my dissent, but nonetheless agreeing with the majority that the Legislature should act. I appreciated his gesture which made it appear that it was a five-to-two decision rather than a six-to-one. It made me look better.

★ ★ ★

HONORING JOSEPH R. GRODIN:

*Hercules in a Populist Age*¹

HANS A. LINDE²

A preoccupation with judges and judging has marked American views of law at least since Justice Oliver Wendell Holmes of Massachusetts made the prediction of a judicial decision the definition of law itself.³ Unhelpful as Justice Holmes' definition is to appellate judges, the choices in decisions and in styles of explanation that our system leaves open to courts justify this otherwise rather improbable interest in judges.

Prior to their appointments to the Supreme Court, however, both Justices Holmes and Benjamin Cardozo focused American jurisprudence on the judicial function in common law appeals in state courts. They wrote at a time when explicit, contentious, and frequently amended legislation

¹ This article is one of a group published here on the occasion of the UC Hastings College of the Law Tribute Honoring Distinguished Emeritus Professor of Law and former California Supreme Court Associate Justice Joseph R. Grodin, November 12, 2015.

Editor's Note: In response to the invitation to contribute to this special section, Justice Linde offered the following review of Joseph R. Grodin's book, *In Pursuit of Justice: Reflections of a State Supreme Court Justice* (Berkeley: University of California Press, 1989), first published at 103 HARV. L. REV. 2067 (1990) and reprinted here by kind permission of Justice Linde. — Selma Moidel Smith.

² Senior Justice, Oregon Supreme Court (retired).

³ See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

for civil and criminal liability was exceptional and constitutional law was marginal to legal theories. More recently the focus both on judicial action and on personal reflection has shifted to the federal bench and its public law agenda. In the states, too, most major social problems long have required not judicial but legislative solutions that often involve fiscal resources; not surprisingly, statutes increasingly occupy the attention of modern appellate courts.

Justice Joseph R. Grodin's slim and eminently readable account of his own career, *In Pursuit of Justice*, is an unusually valuable variation on previous reflections by appellate judges. One reason for its interest is the scene of Grodin's experiences: the California courts, which, like all state courts, span the whole range of common, statutory, and constitutional law. California's courts comprise the nation's largest judicial system. Over 900 California judges on general jurisdiction courts dispose of about 2.3 million nontraffic cases a year,⁴ compared to the approximately 213,000 cases⁵ handled by the 1,218 federal judges and magistrates in article III courts.⁶

The range of issues that California's and other states' courts face makes the agenda of the United States Supreme Court seem narrow and specialized by comparison, as of course the constitutional structure made it. As Justice Brennan stresses in the book's foreword, state courts have the final word on most private law issues, from property and commercial transactions to family relationships and personal injuries (pp. xi-xii). State courts handle issues of state and local public administration, such as education, property taxation, land use, election laws, and "home rule," that have no federal equivalent. Yet state courts also are responsible for the same large issues that have held center stage for a generation — due process, equality, privacy, freedom of expression and religion — either under the state or the federal constitution. The agenda facing courts like California's encompasses both the old jurisprudence and these contemporary concerns.

⁴ See 1987 CONFERENCE OF STATE COURT ADM'RS & NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANN. REP. 88, 116, 222. If traffic and other minor violations in courts of limited jurisdiction are counted, the California statistics are 1669 judges and 15.2 million total dispositions. See *id.*

⁵ See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1989, at 179 (109th ed. 1989).

⁶ See 1988 DIRECTOR OF THE ADMIN., OFFICE OF THE U.S. COURTS ANN. REP. 53, 55 (compiling 1987 statistics for authorized judgeships and total magistrate positions).

The California Supreme Court in the period before and during Grodin's tenure tackled both parts of this wider agenda with energy, style, and a sense of national leadership.

In Pursuit of Justice touches on the California court's creativity in expanding enterprise liability in favor of consumers and employees.

The court used doctrines of strict tort liability, warranty, and implied covenants but also called for balancing policy considerations based on relative ability to avoid, bear, or insure against losses — an approach for which Grodin's enthusiasm exceeds mine.⁷ But the book is not the California version of *The Nature of the Judicial Process*. In two chapters, titled "Common Law" and "Do Judges Make Law?," Grodin introduces readers to the classic themes most familiar to judges and law students, but he is not writing as a theorist or for theorists. Instead he offers something in shorter supply: a thoughtful, articulate, and jurisprudentially sophisticated professional's firsthand account of gaining, performing, and eventually losing judicial responsibility in practice.

A graduate of Yale Law School and the London School of Economics, Grodin joined and soon headed the San Francisco labor law firm of Mathew Tobriner, who preceded him to the California Supreme Court. Grodin briefly served on Governor Jerry Brown's Agricultural Labor Relations Board, and soon thereafter Tobriner persuaded Brown to appoint Grodin to the state court of appeals. In 1982, Brown promoted him to the California Supreme Court. Since his 1986 reelection defeat, Grodin has turned to his original choice of career, teaching law.

Except for this last transition, the bare biographical facts might equally describe a highly qualified appointee to the federal bench, who would thereafter spend a productive and uncontroversial career on the Ninth Circuit, exercising judgment within the verbal bounds set by the United States Supreme Court in federal cases and the opinions of state courts in cases under state laws. What distinguishes Grodin's story from the professional memoirs of a federal judge is the tension between judicial institutions and popular passions that characterizes many elective state courts and that ended Grodin's judicial career.

⁷ For one of our discussions of judicial method, see *THE COURTS: SHARING AND SEPARATING POWERS* 42–47 (L. Baum & D. Frohnmayer eds. 1989).

California in 1934 was the first state to replace competitive election of appellate court judges with gubernatorial appointment followed by periodic retention elections, part of a proposal made by the American Judicature Society (p. 165). It rejected — rightly in Grodin’s view and mine — the Society’s plan to limit a governor’s appointments to a list of consensus choices of a commission, which could be expected to pick traditional over unconventional nominees, and provided instead for confirmation of the governor’s appointees by a commission composed of the chief justice, the attorney general, and the senior presiding justice of the appellate courts. The system has not always been unpolitical; in 1939 a conservative attorney general, Earl Warren, blocked confirmation of an eminent Berkeley professor, Max Radin, for alleged left-wing sympathies, leading to the appointment of his colleague Roger Traynor. But Grodin had no difficulties winning confirmation to the [Court of Appeal] and later to the Supreme Court, supported even by Attorney General George Deukmejian, who later as governor campaigned for the defeat of his predecessor’s appointees.

The final chapter of *In Pursuit of Justice* tells the story leading to the 1986 vote that ended Grodin’s service on the California court along with that of Chief Justice Rose Bird and Justice Cruz Reynoso. Grodin’s account is not detailed, but some of the background of that cataclysm can be found in Preble Stoltz’s *Judging Judges*,⁸ a critical account of the period following Chief Justice Bird’s appointment in 1977 and of an ill-advised, lengthy, and needless commission investigation of political charges against the California Supreme Court while Grodin was still on the lower court. Grodin does mention that friends of Governor Brown and Rose Bird wished that Brown had started her as an associate justice, but the book does not speculate what the consequences might have been if, for instance, Justice Stanley Mosk, a former trial judge and attorney general, had become chief justice. A chief with longer judicial and political experience might have known enough to shrug off press rumors or simply deny their innuendo, and also could have rallied the state’s judges and the legal profession to the defense of an independent judiciary. To thrust Jerry Brown’s rather demonstratively chosen chief justice into that role was no fair test of her judicial potential. The

⁸ See P. STOLTZ, *JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT* (1981).

California experience makes the case for leaving the choice of a chief justice, at least where the court has a genuinely nonpartisan tradition, to the justices themselves, who best know each others' talents and the demands of the job.

Although acknowledging that personalities matter, Grodin recognizes that the future of his court was decided by larger social developments, specifically by the shift of the public agenda to criminal law enforcement and the death penalty. In other times and other places, the fate of elected judges may have turned on passions aroused by farm foreclosures, by labor strife, by school desegregation and busing, or simply on partisanship or the organized efforts of the personal injury plaintiffs' and defense bars. In California, votes against Supreme Court judges sharply increased in 1966, after the court struck down a popularly initiated constitutional amendment barring fair housing laws as contrary to the federal Fourteenth Amendment, a decision which was later affirmed by the United States Supreme Court.⁹

During recent years the dominant focus of judicial elections, at least in the western states, has been on public expectations that the judge will function as part of the criminal justice system rather than as an umpire between the state and the accused. For state supreme courts, this means a focus on their interpretations of constitutional guarantees, most of which exist to protect individuals against government officers in pursuit of crime. In this setting, majoritarian democracy, the independence of elective courts, and the fragility of state constitutional law intersect. For good reasons, these themes occupy the final chapters of Grodin's book, and they deserve the attention of constitutional theorists, whose view of "countermajoritarian" judicial review (as of all constitutional problems) is singlemindedly fixed on the lifetime federal Supreme Court.

In 1972, the California Supreme Court held the death penalty to be contrary to the state's guarantee against cruel or unusual punishment.¹⁰ Also during the 1970s the court sometimes applied the exclusion of evidence under the state's constitutional restraints on police arrests and searches more strictly than federal decisions under the corresponding

⁹ See *Mulkey v. Reitman*, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), *aff'd*, 387 U.S. 369 (1967).

¹⁰ See *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

Fourth Amendment. Conservative California politicians seized upon “law and order” as a potent political issue, as candidate and President Nixon did nationally. Unlike Nixon, however, they could translate counter-libertarian populism into direct action. California not only has elective judges; it also allows amendment of its constitution by a simple majority of the votes cast on a proposal placed on the ballot by an initiative petition. In this manner Californians amended their constitution in 1972 to reinstate the death penalty and in 1982 to place in the constitution a clutter of specific procedural details under the collective heading “Victims’ Bill of Rights.” Similar initiatives later were adopted in Oregon. Ironically, old-line legislative institutions were more protective of people’s long-term constitutional rights than populist majorities eager to sacrifice their rights to the cause of punishing criminals. Grodin notes the destructive effect that the obligation to review every death penalty case has had on the California and other state supreme courts’ important work in other areas (p. 101). Moreover, as these constitutional initiatives passed, the margin by which California Supreme Court justices won retention elections steadily declined, until Bird, Reynoso, and Grodin lost their judgeships in a 1986 campaign in which the death penalty was the centerpiece.¹¹

In his chapter on judicial elections and elsewhere, Grodin reflects on the conundrum of judicial “accountability” with characteristic objectivity and good sense.¹² One may, of course, observe that any kind of election inevitably politicizes the courts to some degree and that judges whose opinions, like the California courts’, proudly embrace the realists’ preferred style of explicit policy-making should not be surprised to have their policy choices challenged much like any legislator’s. Indeed, as Grodin reports (pp. 175–76), California politicians (including Governor Deukmejian and other lawyers) advised people to vote for or against judges on the basis of

¹¹ Elsewhere Grodin has written that “examination of the 1986 California retention data led to the conclusion that Californians were almost exclusively concerned with the substance of the judge’s decisions, particularly in death penalty cases and criminal cases,” citing an exit poll showing that sixty-six percent of those who voted against Rose Bird did so because she was too “soft on crime” and sixty-four percent because they “did not like her position on the death penalty.” Grodin, *Developing a Consensus of Constraint: A Judge’s Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 nn.29–30 (1988).

¹² See, e.g., *id.* at 1982–83.

agreement or disagreement with the court's decisions, and many voters who paid lip service to an independent judiciary also agreed with that advice. This view of "accountability" implies, among other things, that judges and judicial candidates must be free to state their views on controversial issues short of the point of disqualification from a concrete case. The Oregon Supreme Court some years ago amended the judicial canon accordingly.¹³

But more is wrong with judicial elections than the effect of anticipated or subsequent popular reaction on a court's independent judgment. One thing wrong, as Grodin found to his dismay, is the financing of judicial election campaigns, a process that Grodin calls "one of the worst experiences of my life" (p. 174). The groups that targeted the three justices for defeat spent more than \$7 million on a media campaign, much of it from economic interests for which the emotional issue of the death penalty served as a smokescreen for objections to California's liability case law. The less than \$1 million raised for Grodin's campaign is by California standards a trivial sum for a statewide election. But there is nothing trivial about a judicial candidate's need to solicit such sums for a judicial office from lawyers and interest groups whose identities are known to the candidate and reported in campaign records.

Some see in the funding of election campaigns a more specific threat to judicial independence than in the judges' fear of voters' opinions. But campaign fundraising also reveals the ironies of pursuing reform simultaneously through abstention and disclosure: judges may not personally ask for campaign contributions, but they must accurately report and therefore know these contributions, and it is common courtesy to thank the contributors. I have heard judges agonize whether to disqualify themselves because a litigant's lawyer raised funds for their campaigns; from the perspective of a judge's colleagues, recusal to avoid an "appearance of impropriety" sometimes looks easier than working on the case. Whether fundraising by lawyers for a judge's campaign leaves with the donor or the judge any implied expectation beyond fair and conscientious performance depends on a state's political and professional culture more than on general theories.

¹³ See Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2001, 2005–06 (1988).

Grodin rightly keeps his eye on the larger question of the voters' capacity to assess a judge's, particularly an appellate judge's, performance by criteria other than each voter's agreement or disagreement with the judge's "voting record" in controversial cases (p. 176), and he concludes, as others have, that popular election campaigns are too high a price to pay for periodic review of judicial performance.¹⁴

In Pursuit of Justice is neither an essay on modern jurisprudence for professionals nor an autobiographical apologia. In 188 pages of deceptively simple prose, written from the perspective of a sophisticated participant, the book succeeds in sketching the role, the work, and the political setting of an important, uniquely American institution that academics and the national media often dismiss as a lesser and disorderly adjunct of the nation's real judicial system — that is to say, the federal courts. Addressed to the lay reader (which ought to include first-year law students), *In Pursuit of Justice* particularly should be read and used by teachers of government, social studies, or journalism as an introduction to the world of appellate courts. The book's most important and disturbing question is left implicit: what a system that sacrifices the judicial service of an exceptionally qualified, thoughtful, and dedicated jurist like Joseph Grodin to the ambitions of politicians and the heavily financed emotionalism of a plebiscite tells us about our views of law and of a judge's role.

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¹⁴ Grodin has written:

These are the special risks to the integrity of the courts and the judicial function that are likely to be posed by a judicial election campaign that is conducted in accordance with the premise that judges are nothing but politicians running for office. Is there any way to have elections and avoid that risk? I am dubious. So long as there is money to be made in election campaigns by professional consultants, and so long as the thirty second television spot continues to be the most effective means of communicating campaign arguments, any prospect of debates focused on appropriate criteria seems unlikely. If this looks like an argument for doing away with judicial elections altogether, I plead guilty.

Grodin, *supra* note 11, at 1981. For further discussion of judicial elections, see Feerick & Vance, *Becoming a Judge: Report on the Failings on Judicial Elections in New York State*, 9 PACE L. REV. 199, 202 (1989); and Hill, *Comments on Thompson and Observations Concerning Impartiality*, 61 S. CAL. L. REV. 2065 (1988).

HONORING JOSEPH R. GRODIN:

The Roads Taken and Thoughts about Joe Grodin

ARTHUR GILBERT*

The exceptional Joe Grodin. On the one hand, he is the reflective scholar, the inspiring professor, the discerning adjudicator, the insightful philosopher, the prolific writer. On the other hand, he is the analytical lawyer, the tough negotiator doing battle in the rough-and-tumble world of labor relations. And on the other hand, he is the explorer in nature's wilderness, nourishing his soul in the surroundings of towering mountains, rippling rivers, and soothing forests. Wait a moment . . . that's three hands.

But that proves my point. There is nothing ordinary about Joe Grodin. He is *sui generis*. Does anyone know a philosopher who helped draft a city's plumbing code? The plumbers and pipe fitters of San Francisco can thank Joe Grodin.

Joe has managed to keep in homeostatic balance his many interests despite Governor Jerry Brown's intrusion on two occasions. The governor interrupted Joe's commune with nature in 1975 to appoint him to the newly

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formed Agricultural Labor Relations Board. At the time Joe and his wife, Janet, were backpacking in Garibaldi Provincial Park in British Columbia. It has been reported that The Royal Canadian Mounted Police were sent to find the Grodins. At the campsite Joe was reading from Lord Byron's *Childe Harold's Pilgrimage*,

“There is pleasure in the pathless woods,
There is a rapture on the lonely shore,
There is society where none intrudes,
By the deep Sea, and music in its roar:
I love not Man the less, but Nature more”

Just then, a Royal Canadian officer approached and said, “Mr. Grodin, I presume?”

In 1979, the governor once again intruded during a sojourn with nature. Joe and Janet were preparing for a raft trip down the Colorado River during a trip to the Grand Canyon National Park. The governor was trying to reach Joe. An appointment to the Court of Appeal as an associate justice was in the offing. Great timing, Jerry. A telephone call to the local hotel where they were staying confirmed the governor's wishes. Joe and Janet then rafted down the Colorado for a week smiling all the way.

It occurred to me that, right after Jerry Brown appointed me to the Los Angeles Municipal Court over forty years ago, I also took a rafting trip down the Stanislaus River. Then, we could experience white water, roaring and frothing in some parts of the river, and then spreading out in a calm blanket of serenity in other parts. Perhaps that mutual appreciation for the outdoors created a bond.

A short time later, and in quick succession, Joe was appointed the presiding Justice of Division Two of the First Appellate District and, shortly after that, to the California Supreme Court. Either Joe had less time for hiking, or the governor's timing was better, but, on both occasions, he was readily available for the governor's call. That call could come at any time during the day or night. Perceptive potential nominees knew to keep their phone lines free during the final days of Jerry Brown's first administration.

I first met Joe the morning of December 27, 1982, the date of our mutual confirmation hearings. Joe and I were both nominees, he for the California Supreme Court, and I for the Court of Appeal. There were numerous

hearings scheduled that day for nominees to newly created positions on the Court of Appeal. The attorney general at that time was George Deukmejian, one of three members who sat on the Commission on Judicial Appointments. The other members were the Chief Justice and the most senior presiding justice of the particular district involved. The atmosphere was tense. Deukmejian voted against some of the nominees.

I suspect the nominees who received a “thumbs down” from the attorney general were those who had refused to answer a series of written questions he had sent them in advance of the hearings. Some of us responded to the questionnaire with a respectful explanation why we thought it would be inappropriate, if not ethically improper, to answer a few of the questions.

I do not know if Joe received such a questionnaire, but the vote for his confirmation was unanimous. No wonder. In his previous confirmation hearings, he had received a unanimous vote, and he had proven to be a brilliant justice on the Court of Appeal. His balanced point of view, his respect for precedent, his sound judgment and carefully crafted opinions impressed all the members of the commission.

We congratulated each other on our mutual confirmations and, through a smile and a wink, gave each other a mental high five.

During Joe’s short judicial career, he made a significant contribution to our jurisprudence. A few examples include: *Pugh v. See’s Candies, Inc.* (1981) 116 Cal.App.3d 311, a beautifully crafted opinion which established that so-called “at-will” employment agreements can be wrongfully terminable. My friend Professor Christopher Cameron pointed out in his, “Essay, No Ordinary Joe: Joseph R. Grodin and His Influence on California’s Law of the Workplace,” that Joe drew upon “well established doctrines of contract law in rejecting” what had been the “conclusive presumption of at-will employment.” (52 *Hastings Law J.* 253 at 266, Jan. 2001)

Joe wrote important opinions in other areas of the law. On the Supreme Court, he authored *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, which established the Court’s obligation to give proper notice before issuing a peremptory writ in the first instance. This decision has been cited over 1,000 times. No doctrinaire liberal as some have mischaracterized him, he wrote *In re Lance W.* (1985) 37 Cal.3d 873, establishing that the voter initiative, Proposition 8, which abrogated California’s “vicarious exclusionary rule,” did not violate equal protection.

His only dissent on our high court was in *People v. Overstreet* (1986) 42 Cal.3d 891. Joe disagreed with the majority who had reversed an enhanced sentence for a defendant who had committed a new crime while he had been released on his own recognizance. Joe's dissent emphasized that the purpose of the Penal Code section at issue was to "impose an increased sentence upon persons who commit additional crimes while released on bail or own recognizance." (P. 903) Conservative voters who voted not to confirm Joe, along with Justice Reynoso and Chief Justice Bird, apparently overlooked this case.

In the famous *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, he established methods for courts to use in determining whether settlements in civil cases involving multiple parties meet the legal standard of good faith.

Joe loved oral argument. My wife, Barbara, and I can attest to that, not as litigants, but as dinner companions. Dinner with Joe is an adventure, filled with enlightenment and good-natured give and take. In comparison, the acclaimed movie, *My Dinner with Andre*, is a tedious bore. Although the atmosphere was always friendly and relaxed, my mind stood at attention.

Many of these dinners occurred at the home of Professor Herb Morris. Herb and his wife, Margie, prepared gourmet meals. It was usually during dessert that we began a lively conversation covering the arts, literature, philosophy, politics, and even the law. Joe's wife, Janet, a talented and well-known artist, is, like her husband, warm, gracious, and unpretentious.

During one of our early dinners, Joe said he was thinking about writing a law review article about the California Supreme Court's practice of depublishing certain Court of Appeal opinions. I was not shy in expressing my distaste for what I thought to be an odious practice. I looked upon it as an illegitimate way our high court controlled its case flow.

Joe wrote his article, "The Depublication Practice of the California Supreme Court," 72 Cal. L. Rev. 514 (1984). In typical Grodin style, he looked at the practice from all sides. He noted its shortcomings and candidly admitted it caused him discomfort. He ended his article with a tepid endorsement. "[I]f the choices are to grant a hearing or to deny and leave published an opinion that could lead to compounded error, the depublication alternative is preferable, though certainly not ideal." (P. 528) I hope that is a sign he will not vote to depublish this piece I am writing about him.

Joe writes so persuasively that his law review article almost convinced me that depublication can have a salutary effect. But I credit Joe's article with launching my 27-year career as a columnist for the *Daily Journal* legal newspaper. My first column entitled "It Never Happened" was a protest against the depublication rule. I guess the Supreme Court did not read it, and I suspect Joe is still not keen on the practice. Currently, depublication is used much less than in the past.

Joe's influence extends to some of the most unexpected places. My colleagues in my division of the Court of Appeal and I visited Cuba in early 1991. I had finished my drink at the La Bodequita bar where Hemingway drank and swore and drank some more. And I swore, a happy swear under my breath and made my way back to the hotel where I climbed the well-worn marble stairs to the veranda and sat in a wicker chair, comfortable, but not too comfortable, and looked up at the trees in front of the veranda where the wind gently touched the branches and let my mind run with the bulls when a hotel employee interrupted and said good naturedly, "Buena suerte viejo, she is here, La Señora is here to see you."

She stood in front of me, shielding me from the glare of the street, white from the sunlight. "Señor Juez," she said. "I have come to interview you for my radio show."

Her first question shook me out of my reverie.

"Do you know my favorite professor, Joseph Grodin?"

"You know Joe?" I asked in astonishment. Her equally astonished response was, "You know Joe?"

I began interviewing her. She had been a student of his at Hastings Law School. She practiced law for a while, and then married a Cuban and moved to Havana. "Professor Grodin taught me to think deeply about the law and how it can effect change in a civilized society," she said. "His class was fun and stimulating. He is the best." She turned off the recorder and told me she had had enough of Cuba and was returning to California. I was offered her job on Cuban radio. I turned it down. "Viejo," indeed.

Like the young interviewer, we are all enriched by the wisdom of Joe Grodin. His books and articles challenge us and compel us to see issues from a variety of viewpoints. No doubt that broad approach to deciding issues was influenced by the work of the philosopher and logician Morris Cohen. For Joe, Cohen's core message is that the true liberal always keeps

an open mind and is open to the possibility that one's own opinions could be wrong and other opinions could be right.

This approach is not advised, however, for those of you who read Joe's *High Sierra Hiking Guide* that he wrote with his daughter, Sharon. Have it handy while you hike the Sierras. You will not lose your way.

Joe has mentioned that certain exceptional jurists have been interested in broad philosophical issues. These include his mentor, Mathew Tobriner, and Benjamin Cardozo, Oliver Wendell Holmes, William Brennan, and Richard Posner. I would add Joe himself to this impressive list. And, yet, despite the depth of his academic credentials, I think Joe would agree with John Lubbock's insight, "Earth and sky, woods and field, lakes and rivers, the mountain and the sea, are excellent schoolmasters, and teach some of us more than we can ever learn from books."

Robert Frost's *The Road Not Taken* is a problematic poem often misinterpreted. The speaker looks into the future and sees himself reflecting back on a more recent past, if not the present. He misinforms us

“. . . with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I —
I took the one less traveled by”

Even the most adept at statutory interpretation will not have an easy time with Frost's mischievous use of language. But however one may interpret this masterful poem, it is a good reference point when we think of Joe Grodin. He can look back, not with a sigh, but a smile. He took both roads and still travels them with joy in his heart.

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HONORING JOSEPH R. GRODIN:

On My Teacher, Joe Grodin

NELL JESSUP NEWTON*

I started law school in 1973. I had worked at a labor law office (Levy & Van Bourg) as a secretary and knew Joe Grodin by reputation as one of the best and most respected labor lawyers in the Bay Area (he was then at Brundage, Neyhard, Grodin & Beeson). I lived in Berkeley and commuted for the first several weeks until I found an apartment in the city. On the first day of law school, I transferred from the bus at the old Transbay Terminal to a streetcar that was fairly crowded. I was clutching a number of law books and the guy standing next to me commented that it looked as if I were a first year student and asked where I was going to law school. I said UC Hastings and he stuck out his hand and said “Joe Grodin — I teach at Hastings.” I don’t think he was expecting my starstruck answer — “Joe Grodin, *the* Joe Grodin? It’s an honor to meet you.” I planned to be a labor lawyer so we talked about the labor law community all the way to Hastings. I also did not realize that professors in those days were extremely formal and the “Kingsfield” method of teaching predominated. This method

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of belittling students to goad them to study harder is, in my opinion, ineffective and inhumane and is no longer followed by the vast majority of law teachers. At that time it would be unthinkable to call a professor by his first name (and all but one of Hastings' professors were men at that time).

I got to know Joe very well during the second year. I was practically living in the *Hastings Law Journal* library and Joe's office was on the same floor of the building. He came by frequently for coffee and loved to sit with us and discuss labor law, constitutional law, and politics. It was the year of Watergate so we had a lot to talk about. Our civil procedure teacher had told us that presidential privilege wasn't really a procedure concept and he didn't know anything about it, but Joe spent hours talking about the legal aspects of Watergate with us. Although he was decidedly liberal in his political views, he was absolutely terrific in making us see and argue the other side. I remember going to his office furious about a decision that I felt trampled on worker's rights and I was almost mad that he didn't agree with me, but instead challenged my easy assumptions and conclusions. By the end of the second year we had asked him to become the law journal's advisor. Joe was the most cerebral of any of my professors. He was happy to discuss doctrine but happiest exploring the philosophical underpinnings of the rules as well as the impact various institutional decisionmakers had on the development of the law.

I have many happy memories of our conversations with Joe about matters high and low, from the moral and political arguments for and against public unions to the finer points of Crazy Eights, a card game the journal staff had been addicted to. He was a great advisor to the journal, keeping out of internal matters, but prepared to give counsel when we brought a difficult issue to him.

Joe was an advocate for students at UC Hastings at a time of great transition for the school — he was one of a handful (I think there were four) faculty hired on a newly created tenure-track as the school began to transition away from the "65 Club" model, which featured teaching by professors who were retired from other great law schools and served on a contract basis. Giants in their fields they were, but perhaps given the length of their service at other schools, they were not particularly focused on student learning or other concerns, at least so it seemed to us. In addition,

during the heyday of the 65 Club there was very little faculty governance, and the deans called most of the shots.

I moved to Washington, D.C. after graduation in 1976 and became a law professor myself. Although I cannot say I ever became the teacher he was, Joe was one of the role models who most influenced my teaching and my interactions with students. (And yes, to this day, when I introduce myself to a student I do so by saying, “My name is Nell Newton”). I returned to Hastings as chancellor and dean in 2009. One of the first emails I received welcoming me back came from Joe, and we had a warm relationship during the three years I served at Hastings. He was always willing to speak to groups of alumni and frequently packed the house. Naturally, he is particularly good at Q & A sessions — the harder the question and the thornier the issue, the more his face lights up as he formulates an answer that will continue the conversation. It was such a great joy to work with Joe again after so many years. I will always treasure his friendship.

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HONORING JOSEPH R. GRODIN:

Joseph Grodin's Contributions to Public Sector Collective Bargaining Law

ALVIN L. GOLDMAN*

INTRODUCTION

The Labor Law Group, established in the early 1950s, is a unique consortium of labor law professors, and usually a practitioner or two, devoted to improving labor and employment law teaching and scholarship. Its primary activities have been publication of course books and sponsorship of conferences on important new developments. All royalty income goes into a trust fund used solely for carrying on the Group's work. By luck more than by merit, I was invited to join the Group around 1969. Because I had practiced labor law for only a few years on the East Coast before entering law teaching in Kentucky and because I have never been a diligent reader of scholarly articles, the name Joseph Grodin was unfamiliar to me when, around 1971 or 1972, the late Professor Benjamin Aaron proposed him for membership in the Labor Law Group.

This article is one of a group published here on the occasion of the UC Hastings College of the Law Tribute Honoring Distinguished Emeritus Professor of Law and former California Supreme Court Associate Justice Joseph R. Grodin, November 12, 2015.

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Realizing that most of us were from the east, south and mid-west, Ben, as I recall, explained that his nominee had recently entered law teaching full-time at Hastings and, though still a young man, had already distinguished himself as a leading California practitioner.¹ Ben most likely also noted his candidate's adjunct teaching experience, a few of his publications, and probably mentioned his doctorate from the London School of Economics. The potential value of this addition to the Group was immediately recognized,² and we unanimously invited him into membership with a plea to Ben to persuade him to accept our invitation. About a year later the Group met in Denver. It was there I met Joe and Janet Grodin for the first time and discovered the broad range of their interests³ and accomplishments as well as their congenial personalities. In time, my wife got to meet them both and we developed a friendship that Ellie and I cherish.

The scope and intensity of Joseph Grodin's intellectual drive have resulted in his making important contributions to developments in a variety of areas of law. Because our relationship grew out of a shared interest in labor and employment law, this essay focuses on his work in one subcategory of that field — the law of public sector collective bargaining representation.

DEVELOPING THE LAW OF PUBLIC SECTOR COLLECTIVE BARGAINING

Prior to joining academe, Joe had published pieces dealing with private sector labor-management law. At the time he began teaching fulltime, his scholarly efforts initially shifted to public sector labor-management relations, an area of growing importance that was in need of more academic scrutiny and law school course materials. In time, as a scholar, law teacher and jurist, Joe Grodin helped meet both needs.

While on leave of absence from his law firm, Joe taught labor law, constitutional law and administrative law at the University of Oregon. Despite

¹ Joe's time in practice was especially long and impressive in comparison with the experience of all but two or three of the Group's academicians.

² Indeed, I was awed by his credentials.

³ The Grodins' passion for music, the graphic arts, wilderness hiking and Judaic learning, occasionally are encountered in metaphors, analogies and quotations found in Joe's writings.

a newcomer's burdens of preparing for teaching in three demanding areas, he managed to co-author⁴ an article⁵ describing the general contours of the field of collective representation for government sector workers. The article was primarily directed at a newly adopted Oregon statute and provided what amounted to a guidebook for those operating under the state's complex public sector bargaining legislation, regulations, and attorney general's opinions. It also presented suggestions for improving the new law by removing identified statutory ambiguities, gaps, and uncertainties. Additionally, Professor Grodin and his co-author offered a number of broader observations about public sector collective bargaining laws. For example, using Oregon's experience, they noted how political and institutional rivalries often add complexities and uncertainties to these statutes.⁶

A brief footnote in the Oregon article addressed the potential value of strikes in most public sector bargaining. This was an important issue the future jurist would face a little more than a decade later. In a concurring opinion in *El Rancho Unified School Dist. v. National Education Assn.*, Justice Grodin observed that the common law justification for barring public employee strikes was based on the assumption that it interferes with the legislature's activity in establishing the terms of government employment through statutory and administrative fiat. However, he noted that by authorizing a procedure for bilateral determination of local government employee wages and benefits through collective bargaining, the legislature had removed the common law's justification for the work stoppage prohibition.⁷ A few years later, in *County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.*,⁸ Justice Grodin joined the California Supreme Court's plurality opinion that took this reasoning a step further and announced that the state common law no longer assumes that a strike by public employees is unlawful "unless or until it is clearly demonstrated

⁴ Typical of Prof. Grodin's sense of decency, he gave full co-author credit to Mark Hardin, a third year law student, rather than follow the common practice of merely dropping a footnote to acknowledge the efforts of a student assistant.

Mr. Hardin had a distinguished career aiding abused and neglected children and served as Director of Child Welfare at the ABA Center on Children and the Law.

⁵ "Public Employee Bargaining in Oregon," 51 OR. L. REV. 5 (1971).

⁶ 51 Or. L. Rev. at p. 9.

⁷ 33 Cal. 3d 946, 963 (1983).

⁸ 38 Cal. 3d 564 (1985).

that such a strike creates a substantial and imminent threat to the health or safety of the public.”⁹ Among other considerations, the opinion examined the economic realities of public sector collective bargaining and found that government entities that had engaged in collective bargaining had demonstrated that they have sufficient negotiating leverage so that work stoppages are a fair counter-balance for generating reasonable settlements.

When he began teaching fulltime at Hastings, Professor Grodin followed up on his Oregon study by preparing a comprehensive survey of California’s primary public sector bargaining law that he published as an article in the *Hastings Law Journal*.¹⁰ Noting that California had entered this field earlier than most other jurisdictions, he expressed disappointment that his home state’s core legislation in this area, the Meyers–Miliás–Brown Act, lacked a comprehensive, intelligible, and forward-looking framework for public sector labor relations. One egregious gap, he observed, was the lack of a structure for resolving questions of a labor organization’s representational status — a problem he had encountered while still in law practice.¹¹ Another major problem was the lack of a precise list of prohibited actions that violate representational rights. These problems persisted until, gradually, over the next four decades, the California Legislature partially mitigated them by adopting amendments, consistent with some of Professor Grodin’s recommendations, that a) established an administrative agency with specialized expertise to adjudicate and remedy prohibited employment practices and conduct elections,¹² b) delineated in greater detail the protections afforded the right to representation,¹³ and c) provided mechanisms to facilitate bargaining impasse resolution.¹⁴

The California courts, on the other hand, were much quicker to embrace Professor Grodin’s careful analysis of the Meyers–Miliás–Brown Act’s intent which gave the courts a basis for coping with critical gaps in the statutory language. They similarly were guided by his suggested approaches to

⁹ 38 Cal. 3d at 586.

¹⁰ J. Grodin, “Public Employee Bargaining in California: The Meyers–Miliás–Brown Act in the Courts”, 23 *HASTINGS L.J.* 719, 720–22 (1972).

¹¹ *Id.* at 743–46 and text accompanying footnotes 114–119.

¹² *Id.* at 728–29, 745; Cal. Gov. Code § 3541.

¹³ *Public Employee Bargaining*, *supra* note 10 at 727–28, 746–48; Cal. Gov. Code § 3506.5, 3508.5.

¹⁴ *Public Employee Bargaining* at 755–60; Cal. Gov. Code § 3505.4–5.

interpreting particular provisions in which the language of the Act was burdened by vagueness. Accordingly, the Hastings article was cited and followed frequently by the California courts.¹⁵

In noting the Meyers–Miliars–Brown Act’s absence of statutory impasse resolution procedures, Prof. Grodin’s Hastings article observed that many public employee bargaining laws provided for fact-finding with recommendations and impasse arbitration.¹⁶ Prof. Grodin soon explored the potential value of those approaches in a study he made of a new amendment to the Nevada public employment bargaining law.¹⁷

The Grodin study of the Nevada statute explained that while fact-finding had been part of the state’s public employment collective bargaining law for several years, a significant number of Nevada public employers had been ignoring fact-finding recommendations.¹⁸ This led the state legislature to adopt an amendment allowing the governor, on the request of either party, to make the fact-finder’s recommendations binding on all sides regarding any or all deadlocked issues in local government collective bargaining. Thus, if requested prior to the commencement of fact-finding, the

¹⁵ Decisions citing and approving the Grodin article’s analysis include *L.A. County Civil Com v. Superior Court*, 23 Cal. 3d 55 (1978) and *Public Employees of Riverside County v. County of Riverside*, 75 Cal. App. 3d 882 (1977) (holding that rules adopted by local entities must be consistent with the purposes of the Meyers–Miliars–Brown Act); *Vernon Fire Fighters v. City of Vernon*, 107 Cal. App. 3d 802 (1980) (unilateral changes in terms of employment are a *per se* violation of the duty to meet and confer in good faith); *Solano County Employees’ Assn. v. County of Solano*, 136 Cal. App. 3d 256 (1982) and *International Assn. of Fire Fighters Union v. Pleasanton*, 56 Cal. App. 3d 959 (1976) (injunctive relief should be granted where a local government made changes in the terms of employment without conferring with the employees’ representative).

The *Public Employee Bargaining* article on the Meyers–Miliars–Brown Act has been declared “the single most frequently cited authority on how the statute works.” C. Cameron, “No Ordinary Joe: Joseph R. Grodin and His Influence on California’s Law of the Workplace,” 52 HASTINGS L.J. 253, 267 (2001).

¹⁶ *Public Employee Bargaining*, *supra* note 10, at 759.

As noted below, impasse arbitration is more commonly called “interest arbitration” to distinguish it from grievance arbitration. The award in interest arbitration is an imposed settlement of the unresolved terms of the negotiating parties’ contract. The award in grievance arbitration is a judgment establishing whether one of the disputing parties was wronged, and if so, what remedy should be provided.

¹⁷ J. Grodin, “Arbitration of Public Sector Labor Disputes: The Nevada Experiment,” 28 INDUS. & LAB. REL. REV. 89 (1974).

¹⁸ *Id.* at 91.

governor could transform fact-finding into binding impasse arbitration.¹⁹ Prof. Grodin's study observed that while other states had procedures for ascertaining whether to require the parties to submit to final, binding arbitration of a public sector bargaining impasse, Nevada's law was unique in placing this authority in the hands of an elected official.

At the time of the study there was too little data for a statistical analysis of the amendment's impact on Nevada's public sector collective bargaining system. Therefore, Prof. Grodin approached his task by examining the circumstances in which public sector bargaining impasses posed an opportunity to apply the new law, the outcomes, and the parties' own impressions of any changes in the dynamics of collective experiences under the amended statute. He also conducted interviews with neutrals involved in Nevada's arbitrated cases inasmuch as their conduct was bound to influence the parties' subsequent negotiating conduct.²⁰

The Grodin study sought to ascertain whether the prospect of binding arbitration had a chilling affect on the efforts of local governments and employee organizations to resolve their differences through bargaining rather than rely on a settlement imposed by an arbitrator. He found that the evidence leaned in the opposite direction and attributed this in part to the Act's efforts to guide both the decision as to whether to require binding arbitration and the guidelines imposed on arbitrators.

The Nevada Act set out criteria to be considered by the governor when electing whether to impose arbitration in seemingly deadlocked negotiations. Although Prof. Grodin contended that those statutory guidelines were too vague to be meaningful, he found that in the first couple of years operating under the amended statute, two considerations were important in the governor's decisions to impose or not impose binding arbitration. One was the governor's impression of whether in the past the parties had given due consideration to fact-finding recommendations. The other was whether their bargaining to date was consistent with what he judged to be a good faith, reasonable effort to resolve differences at the bargaining table.²¹ Prof. Grodin observed that these elusive elements in the governor's

¹⁹ *Id.* at 89–90.

²⁰ *Id.* at 99–101.

²¹ A history of ignoring fact-finding recommendations was likely to result in imposing binding arbitration whereas bargaining efforts considered by the governor to

decision left the parties with considerable uncertainty that itself may have propelled them to greater efforts to reach a negotiated settlement.

Additionally, because the Act required the arbitrator to assess the local government's financial ability as well as its obligation to provide facilities and services protecting the community's health, welfare, and safety, Prof. Grodin found that, once a decision was made to require binding arbitration, the parties had further motivation to reach their own settlement. That motivation partly was to avoid the extra costs involved in presenting their case to an arbitrator whose expenses they would have to share equally. In part, too, the motivation was to avoid the costs of preparing for the arbitrator a budget-oriented presentation necessitated by the statute's emphasis on ability to pay.²² Additionally, Grodin found that this guidance helped press the parties to do a better job of preparing for bargaining and, thereby, facilitated more productive settlement discussions.²³

Prof. Grodin's conclusions found that the success of the amended approach was facilitated by the fact that the then-governor had a labor relations background. Therefore, the study suggested that to ensure that the system continued to function well it would be best to place the responsibility of deciding whether and when to impose binding arbitration in the hands of a person or tribunal with labor relations expertise. The Nevada law has since been amended to give this authority to a panel consisting of an accountant and a lawyer selected by the parties through the procedure of mutually striking names separately provided by the Nevada State Board of Accountancy and the State Bar of Nevada.²⁴ The wisdom of Prof. Grodin's suggested change, therefore, is dependent upon whether the appropriate expertise in the labor field is possessed by the persons proposed by the Accountancy Board and the Bar.

The growth of public employee collective bargaining was accompanied by an increase in work stoppages and work stoppage threats. This resulted in increased scholarly and political attention to the merits or problems of work stoppage substitutes, especially resolution of bargaining impasses by

reveal a good faith reasonable effort to negotiate a settlement were likely to result in declining to impose binding arbitration. 28 *INDUS. & LAB. REL. REV.* at 95–96.

²² *Id.* at 97–98.

²³ *Id.* at 98–99.

²⁴ Nev. Rev. Stat. Ann. §§ 288.200 to .202.

impartial third parties, a procedure most commonly known as interest arbitration. Although he had previously discussed interest arbitration in his writings, in 1976 Professor Grodin published a paper that comprehensively examined the theoretical issue of whether such arbitration violates the democratic principle that “governmental policy is to be determined by persons responsible, directly or indirectly, to the electorate.”²⁵ He explained that the issue is particularly compelling because issues involved in public sector collective bargaining “can involve significant elements of social planning.”²⁶

Prof. Grodin observed that, due to the complexity of modern government and the need to insulate some decisions from political intrusions, courts have been reluctant to place rigid constitutional constraints on legislative discretion to delegate legislative-type decisions. Accordingly, he focused not on what restrictions might be required by constitutional doctrine but rather on what, as a matter of sound policy, legislatures ought to do in delegating authority to interest arbitrators.²⁷

At the outset of his analysis Prof. Grodin confronted what may be the politically most delicate issue respecting legislative delegation of authority for arbitrators to decide collective bargaining impasses in the public sector: How can the legislature justify authorizing non-elected persons to resolve public employment pay disputes? His succinct but compelling answer stated that the arbitration system should “presuppose a policy determination that employees should be paid whatever they are ‘worth,’ in the same way that public agencies purchase goods at whatever price the market dictates.”²⁸ To help discipline the decisional process, he suggested a variety of guideposts such as the increase in the cost of living or private sector collectively bargained wages for employees doing similar work. Grodin labeled this approach “the proper wage model” and argued that in applying it an arbitrator should not weigh the public’s ability to afford the result; rather, fiscal shortfalls should require the public employer to respond by reducing the affected work force and services, shifting funds from other parts of its budget, raising taxes or borrowing.

²⁵ J. Grodin, “Political Aspects of Public Sector Interest Arbitration,” 64 CAL. L. REV. 678, 680 (1976).

²⁶ *Id.* at 682.

²⁷ *Id.* at 683.

²⁸ *Id.* at 684.

Being a realist, Prof. Grodin acknowledged a degree of artificiality in the proper wage model formula inasmuch as private sector wages for similar work often vary; the determination of whether work is “similar” often is subjective; some work is unique to the public sector; and the public sector often is the dominant source of some types of work and, therefore, the dominant influence of wage rates for its private sector counterpart. Additionally, he noted that even the more concrete cost-of-living guidepost poses a problem inasmuch as when those costs go up for employees, they also go up for government operations and, thereby, may impose a fiscal squeeze that limits the government’s ability to meet all of its obligations, including providing cost of living increases for its workers.²⁹

Political pressures, Prof. Grodin noted, give rise to demands that arbitrators not ignore the government’s ability to pay. Thus, that requirement was common in legislation mandating interest arbitration as a work stoppage substitute. However, his survey of existing public sector bargaining laws that used interest arbitration revealed that references to weighing ability to pay were vague as to how that factor is to be taken into account.³⁰ Professor Grodin expressed concern that this vague requirement regarding ability to pay inevitably shifts to the unelected arbitrator the burden of making broad public policy choices.

Of at least equal concern in Prof. Grodin’s analysis of public sector interest arbitration is the observation that many non-wage collective bargaining issues pose even more difficult problems of allowing social policy choices being delegated to the discretion of a non-elected decider. Examples such as school room class size or social worker case loads implicate broad educational or other policy choices while retirement and other employee welfare benefit programs can have long-range fiscal impacts that alter revenue-raising needs. This, argued Prof. Grodin, poses the need to structure the bargaining impasse system so as to preserve as much as possible the responsibility of elected officials to guide such choices, and he posed a number of suggestions toward this end. One is that statutes providing for interest arbitration should more specifically describe the weight

²⁹ *Id.* at 685. Depending on the government entity’s tax structure, a cost of living increase can, of course, be accompanied by increased government revenue from sources such as sales taxes.

³⁰ *Id.* at 687.

to be given to the public entity's ability to pay and identify the various income and expenditure elements that can be considered in weighing ability to pay.³¹ He also advocated consolidating interest arbitration for all employee groups with the same public employer inasmuch as they feed from a common pie.³²

The interest arbitration article additionally emphasizes the importance of judicial review to set aside public sector interest awards that violate the statutory constraints placed on the process. However, it also urges that initial review of challenged interest awards should be assigned to a state labor relations board in order to provide a more expeditious procedure enhanced by the benefit of specialized expertise and greater uniformity of results.³³ Further, the article warns that, because issues can change during the course of the arbitral proceeding, courts should avoid intervening prematurely. Accordingly, as a general rule they should not entertain efforts to enjoin the process on the grounds of non-arbitrability.³⁴

A decision by the Michigan Supreme Court, a few years later, demonstrated the care with which Prof. Grodin had weighed the competing considerations for evaluating public sector interest arbitration arrangements. That decision, which upheld the constitutionality of the state's interest arbitration system for police and firefighter bargaining impasses, cited the Grodin article as authority for stated arguments in both the majority and dissenting opinions.³⁵

DEVELOPING TEACHING MATERIALS ON PUBLIC SECTOR BARGAINING

Normally, in our country a lawyer's and jurist's foundation for understanding law and the legal process begins in law school and for many, perhaps most, that understanding is also primarily shaped by law school studies. Because most law school classes are centered on materials presented in the assigned course book, well-designed, thoughtful course books can

³¹ *Id.* at 695.

³² *Id.*

³³ *Id.* 699–700.

³⁴ *Id.* at 699.

³⁵ *Detroit v. Detroit Police Officers Asso.*, 408 Mich. 410 (1980).

be expected to significantly influence what is taught and how it is taught. Therefore, preparing course books can significantly influence developments in the particular area of law.

Within a few years after he joined the Labor Law Group, Joseph Grodin teamed with Donald Wollett to co-author the Group's revised course book on public sector collective bargaining, then a new area of law school study. The team of Wollett and Grodin provided a particularly valuable perspective inasmuch as these two scholars were also seasoned practitioners from both sides of the bargaining table. Don Wollett had been a partner in a major management firm in New York City;³⁶ Joe Grodin in a major union firm in San Francisco. Joe, Don, and other Group members produced further revisions of the Public Sector Bargaining book into the 1990s and, after Don retired from the task, Joe and others continued its revision and updating into the current century. Joe eventually retired from the project but its successor course book, now expanded to cover non-collective bargaining aspects of public sector employment, continues to be the source for teaching public employment collective bargaining law.

CONCLUDING OBSERVATIONS

Joseph Grodin's studies, discourses, decisions, and teaching in the area of public sector labor law are bound together by several threads that demonstrate his adherence to values and work habits he discussed in his book *In Pursuit of Justice*.³⁷

Both as Prof. Grodin and as Justice Grodin, he has been faithful to the principle that legal rules ultimately are the prerogative of democratically elected representatives. His regard for legislative authority is evident in the care with which he examined the competing interests that gave rise to the compromises reached in adopting the public sector bargaining laws he studied, thereby gaining more accurate understanding of the intent of

³⁶ Kaye Scholer Fierman Hays & Handler. Donald Wollett had experienced both perspectives inasmuch as he represented the National Education Association for about a decade. During the course of their team effort, Wollett's understanding of public employment collective bargaining was further enhanced by his serving for several years as the New York State Director of Employee Relations.

³⁷ University of California Press, 1989. See, especially, chapters 9 and 10.

those laws. It is also evident in his proposals for improving them through suggested legislative changes rather than creative judicial interpretations.

Additional evidence of Joe Grodin's efforts to preserve the central role of elective government is his examination of public sector interest arbitration. There his focus emphasized how to maximize labor peace and equitable results without unduly delegating to non-elected persons the authority to shape social policies.

Finally, both as a professor and a jurist, Joseph Grodin has also directed his efforts at discovering not only what is theoretically reasonable, but also what is practical. Thus, in determining what improvements have been attempted and what reforms would be beneficial, Prof. Grodin has tried to discover practitioner insights into the effect law has on the parties' conduct. His research and discourses have not been confined to the typical academic analysis of archived decisions and documents or weighing the logic of competing arguments. Rather, his studies have reflected his respect for those who put flesh on the legal skeleton by including interviews to learn about the experiences of the officials, lawyers, and other decision-makers who work within the statutory system.

Accordingly, the integrity with which Joseph Grodin serves California, our nation, and the study of law deserves our admiration and gratitude.

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HONORING JOSEPH R. GRODIN:

Open-Minded Justice

BETH JAY*

It is a privilege and a pleasure to be asked to write about Associate Justice, Professor Emeritus, and friend, Joseph Grodin. When he was appointed to the Supreme Court in 1982, I was a relatively new member of the Court staff. I already knew him, however, because I had worked with Associate Justice Frank Richardson, on whose staff I then served, on a dissent to a majority opinion that Justice Grodin authored while sitting as a Justice Pro Tem on the Supreme Court. At the time, he served on the Court of Appeal. During the development of the opinions in the case, he and I had occasion to discuss the issues, and entered into a friendly wager about the result when the United States Supreme Court granted certiorari. I won the bet, and collected my princely winnings: an ice cream cone in the flavor of my choosing.

What I remember most about that first encounter was not the ice cream, but the opportunity to discuss with him the subject matter of the

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* Retired Principal Attorney to California Chief Justices Tani G. Cantil-Sakaue, Ronald M. George, and Malcolm M. Lucas (1987–2015), Staff Attorney for Associate Justices Malcolm M. Lucas and Frank Richardson (1980–1987).

case. We touched on not only the specific facts and issues before the court, but also on broader questions reflecting the potential for abuse of an expansive interpretation of the application of the Federal Arbitration Act. More than thirty years later, I appreciate his farsighted concern about the overuse and misuse of consumer arbitration. Those were the first of many opportunities for me to see his thoughtful, informed and always curious intellect at work.

For a while I commuted from North to South Berkeley to carpool to the Court with Justice Grodin, Justice Otto Kaus, and Alice Shore, a member of Justice Kaus' staff. There was always a risk involved, because neither jurist excelled in driving as they did in jurisprudence, but the chance to sit in the back seat with Alice and listen to the two of them argue, inquire, and simply explore the law was better than any law school class. The two of them truly "loved the law," for its challenges, intricacies, structures, and the ultimate questions of justice and the demands of judging.

The United States Supreme Court this term appears poised to reconsider its 1977 decision in *Abood v. Detroit Board of Education*, holding that employees who decide not to join a union nevertheless may be compelled to pay union fees, except for those costs related to purely political activities. In a locally grown case, *Friedrichs v. California Teachers Association* (No. 14-915), the high court will be entertaining a challenge asserting that collective bargaining in all its aspects is political in nature, and thus the plaintiffs should not be compelled to pay any dues. The breadth of the Court's decision in interpreting political speech may have far-reaching consequences for unions, and the increasing reliance on the First Amendment as a rationale for permitting actions once not thought generally governed by the dictates of that provision. My interest in the case is a result of a long-ago insightful description of *Abood* by Justice Grodin during one afternoon commute, a discourse that Alice and I listened to closely, but then noticed that the other front seat passenger seemed to be thinking very deeply with his eyes closed. It had been a long day for the jurists in the car, but I think it is telling about how engaging Justice Grodin's approach to an issue can be that some thirty years later, I remember the case, parts of his description, and the excitement that he transmitted while discussing it.

Since returning to Hastings, Professor Grodin has presided over a casual lunch before teaching. Three of us, two of his former staff members,

Hal Cohen and Jake Dear (both still working on Chief Justice Cantil-Sakauye's staff) and I, have been consistent attendees. The lunches, held at restaurants in the Civic Center area, and often including others, typically prove to be spirited discussions over plates of Thai or Vietnamese food. The subjects range from the topic assigned for the seminar he is about to teach to a critique of the latest United States Supreme Court opinions, with an occasional movie or book review thrown in. They are freewheeling explorations, with ideas put forth and shot down or supported, and the unspoken freedom to voice any idea, whether fully thought through or only a trial balloon.

I have had the good fortune to work personally and directly with excellent jurists throughout my career at the California Supreme Court. I never served on Justice Grodin's staff, but he remains one of my favorite jurists and lawyers after some thirty-five years working at the Court. For him, the pursuit of the law is a pursuit of true intellectual passion. And as a jurist, he also understood and took seriously the distinct duties and obligations of serving as a judge.

These qualities, and their significance to the continued preeminence of the rule of law in our system, recently have been sharply put into relief, as I find my assumptions about a basic common civic understanding of the role of jurists all too frequently fractured. For years, I have watched as commentators inveigh loudly against judges who act against the so-called popular will as reflected in legislation, the latest polls, or those whose views agree with the disappointed commentator's. The appearance of this strain in ever more vociferous protestations by individuals seeking the presidency, after the seminal opinion in *Marbury v. Madison*, can in no way be taken for granted.

How dare four or five unelected judges overturn the will of the people? Isn't the majority supposed to rule? Lately, similar assertions have been posed stridently by individuals who aspire to the highest offices in our nation. The fundamental value of an impartial judicial system, governed by applicable law and precedent, at times seems as antiquated as the practice of ladies wearing white gloves when they went downtown. And it is not simply politicians and commentators who have raised my concern.

The first time I read Justice Antonin Scalia's majority opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), declaring Minnesota's

judicial ethics clause barring a judge's announcement of his or her views during an election unconstitutional as an infringement on First Amendment speech, I immediately thought about all that I had observed about judges in my many years working with the courts. Justice Scalia's opinion describes the exercise of impartiality by a jurist, and in doing so portrayed what seemed to me to be a cavalier acceptance that judges almost universally had essentially committed to reaching particular legal conclusions before and even after ascending the bench. Thus, impartiality in the judicial context generally refers only to bias against a party, but not as to conclusions about issues coming before a judge.

Even assuming impartiality could cover legal views, he concludes, guaranteeing such a state of mind would not amount to a compelling state interest; it contradicts common sense and experience that inform us that virtually every judge has some preconceptions about legal questions upon assuming the bench after a career in the law. Finally, as to impartiality connoting open-mindedness, he considers that to be not a common meaning of the term, and in any event concludes that, while such an approach at least suggests that each litigant might have a chance to prevail, it need not be discussed in the case at hand. He nevertheless dismisses out of hand the notion that a judge's statements announcing his views during a campaign might any way place on the successful jurist an unreasonable burden of remaining consistent with those stated views — as opposed to views stated either before the candidacy was announced or after assumption of office, whether in an opinion or in another forum.

I disagree with his approach to impartiality, for many reasons including those contained in the articulate dissents. The effect of his views have been further highlighted by retired Supreme Court Justice Sandra Day O'Connor's statements after leaving the court that she does not ordinarily second-guess her decisions, but the *White* case was one in which she had come to believe that the Court was probably incorrect. Moreover, it seems contrary to the approach taken by the justices whose working style I have most admired, including Justice Grodin. For them, the judicial role asks that they look first at the issue, next at the briefing, precedents, and applicable constitutional and statutory law, and only then decide on the outcome. Justice Scalia seems to anticipate a far less complex process: look at the issue, call up one's existing view on the matter, and then fashion an

analysis to reach that conclusion. This difference in approach was recently delineated in remarks made outside the Court following the decision in *Glossip v. Gross* (576 U.S. ___, No. 14-7955, decided 6/29/15). In his dissent to the majority's affirmation of the death penalty, Justice Stephen Breyer raised several questions about the death penalty as presently conducted. Thereafter, as reported in an opinion piece in *The Los Angeles Times* ("Justice Antonin Scalia 'wouldn't be surprised' if Supreme Court ends the death penalty," 9/25/15), Justice Scalia informed an audience of Tennessee students, "If the death penalty did not violate the 8th Amendment when the 8th Amendment was adopted, it doesn't violate it today."

Justice Breyer, in contrast, in an interview conducted by Marcia Coyle on September 25, 2015, as part of the City Arts and Lectures series in San Francisco (and available online on KQED, a local PBS affiliate), responded quickly to her suggestion that he had expressed the view that the death penalty was unconstitutional in his dissent in *Glossip*. To the contrary, he stressed, the dissent had raised numerous questions and expressed an interest in the opportunity to consider such issues, but only after full briefing, argument, and consideration — and he drew a contrast to "others" who had already reached their conclusions on the constitutionality of the death penalty without the benefit of such information.

I cannot remember the specific case or question, but I can remember clearly a conversation with then-Justice Grodin about an issue before the Court in which he explained how he had wrestled with the result, because as a matter of policy he might have selected a different approach. As a matter of law, however, he felt constrained to follow the precedents and authorities that applied in the area and ultimately to reach a decision that he otherwise would not prefer. In other words, he looked at the case with an open mind. He upheld the rule of law and engaged in a process similar to that described by Justice Breyer: consider all the information before him, and reach the appropriate result in the full and proper exercise of the judicial role. This is not to say that doing such analysis will ineluctably lead to the same result for any open-minded judge — but it is to say that the process of judging with an open mind is indeed an essential part of the judicial enterprise. And Justice Grodin, as jurist and as teacher, and in his daily life, has provided an example of the way it should be done.

For the past few years, I have been fortunate to join the Grodins, along with others including Jake and Hal, on July 4th. As the sausages grill, and beer is sipped, and topics are tossed around the group, the judge brings us to a pause and we begin the reading of the Declaration of Independence. Each time it is a revelation. Each time it is a reminder of the brilliance of our founding fathers. Each time it is a reminder of how fortunate we all are that men of good will and extraordinary intellect, such as Joe Grodin, have devoted themselves to the pursuit of justice and the rule of law. And how fortunate I have been to know him.

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HONORING JOSEPH R. GRODIN:

Walking with Grodin

JAKE DEAR*

My friend and colleague Beth Jay has written beautifully about the regular lunch conversations that we (with Hal Cohen) have had with Justice Grodin. She has focused eloquently on his integrity, vision, intellect, and compassion. Other contributors to this symposium, including former Chief Justice Ronald M. George, have highlighted some of Grodin's cases, theories, articles, and books — including, most recently, *The California State Constitution: A Reference Guide* (Oxford Univ. Press 2d ed., 2015) (with Michael B. Salerno & Darien Shanske), and one of my favorite books about law and process, *In Pursuit of Justice: Reflections of a State Supreme Court Justice* (University of California Press, 1989). But another book, which Justice Grodin coauthored with his daughter Sharon in the early 1980s — *Silver Lake* (High Sierra Hiking Guide No. 17, Wilderness Press, 1983), about the hiking trails of that area of the Sierra — reminds me of other dimensions, and this leads me to address him from a

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different perspective: Walking with, and learning from the man over the past three decades.

The very first walk I recall was at a staff picnic on Angel Island, in the middle of San Francisco Bay, 1985. I wish I could summon forth some poignant vignette from our long hike that day, but my lasting image was simply of us — him, his wife Janet, and his entire chambers staff — picnicking in the sun-dappled shade, and having lively conversations as the afternoon lazed by and the bay wind picked up.

Another walk, a few months later, remains with me much more clearly. The Chief had assigned him a case concerning a facial constitutional challenge to San Jose's rent control law, and after much discussion I'd prepared a draft calendar memo for his review. The judge (inside the Court we sometimes use that simpler and slightly less formal term instead of "Justice" and I'll do that here), suggested that we take a quick walk to discuss it. Foregoing a constitutional around the fairly scenic and architecturally interesting Civic Center Plaza, he guided us out the back of the 350 McAllister state building where we passed through the depressing institutional green annex facing Golden Gate Avenue and into the adjacent and rather gritty Tenderloin area. Briskly up Golden Gate, with lefts on Hyde and Turk; cross Larkin; then another left, past the monolithic wind-tunnel-inducing federal building. All the while we were discussing — he more deeply than I — intricacies of the analysis in the San Jose case. Back at the corner of Larkin and Golden Gate, with the old state building annex now back in sight, he was in full absent-minded-professor mode, and neglected to notice that the pedestrian crossing light was red. He stepped off the curb, and started to walk across as a car whizzed by, far too close for comfort. I had put my arm across his chest to slow him down, and as we can all see, it worked. To this day, I'm not sure he noticed; he barely skipped a beat on his side of the discussion. It was, after all, a quite absorbing and challenging case — eventually decided by the slimmest of margins in his resulting opinion, *Pennell v. City of San Jose*, 42 Cal.3d 365 (1986).

In November 1986 the voters terminated the judge's lease, depriving themselves of one of the most principled, brilliant, and thoughtful justices they could ever hope to grace the California Supreme Court. As a result, however, our walks in and around the Tenderloin increased, because the judge eventually resumed teaching at nearby UC Hastings. Hal, Beth, and

I have, since then, walked with him (and sometimes a guest lecturer) to and from various pre-class lunches up and down Larkin, Golden Gate, and McAllister, where over pho and various rice-dish plates of the day, we have discussed the matters of the day, as well as the topic for that afternoon's class.

After these lunches, we amble back down the street to a point where we must part in order to return to our respective buildings: He to Hastings, we to the old state building. At this point, many times over these many years I've become rather melancholy, thinking: he should be walking with us. Only recently I have started to think of it differently and more positively:

He *is* walking back with us; he's in the building, and in the Court, by virtue of the dignified example that he has lived, the wisdom that he has displayed, the books and articles he has produced, the students he has taught and mentored — and yes, by virtue of the law that he was able to leave in the Official Reports during his too-short tenure.

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HONORING JOSEPH R. GRODIN:

A Trailblazer

JIM BROSNAHAN*

That night in the 1960s, almost fifty years ago, when the call came in around 5 p.m., it directed the recipient lawyers to gather at Joe Grodin's office. Three hundred and seventy-five people had been arrested on Telegraph Avenue in Berkeley. Some of them had been demonstrating, and some had been there to buy cigarettes, when they were unceremoniously rounded up. They would need lawyers. In those wild Berkeley days lawyers were not retained, they were mobilized.

From memory, that may have been the first time I met Joe Grodin. The large group of citizens had been taken to Santa Rita, a then failing institution, with some sheriffs who had returned from the Vietnam War with the idea that prisoners were to be beaten. The lawyers in Joe's office worked through the night and presented an injunction motion to Federal Judge Robert Peckham, who commanded the sheriffs to stop beating the prisoners. Judge Peckham then signed the injunction, and Santa Rita became a public issue with cries for reform.

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It was no accident we were summoned to Joe Grodin's office. At that time Joe was among the top labor lawyers, if not the leading one, on the side of the workers. Born in Oakland in 1930, Joe graduated with honors from UC Berkeley in 1951 and *cum laude* from Yale Law School in 1954. He immediately began practice as a labor lawyer, but also took the time to teach at Hastings College of the Law and the University of Oregon School of Law. Exploring his academic side, Joe got his Ph.D. in labor law and labor relations from the London School of Economics.

Surely there should be a full biography of Justice Grodin forthcoming before too long. The first chapters of Volume 1 will have to cover the scholarly student, the brilliant young labor lawyer, and his friendship with his mentor Justice Mathew Tobriner, who had worked as a labor lawyer until 1959, when Brown appointed him to the California Court of Appeal. Grodin's teaching and legal writing could be Volume 2. Two more volumes could be devoted to his time on the California Court of Appeal, his appointment to the California Supreme Court, and his judicial election, representing a tumultuous intrusion of politics, tearing off the cover of California judicial independence, which ended his judicial career. There could be a chapter on Justice Grodin's development of state constitutional jurisprudence. Joe followed another mentor, the prolific Justice Hans Linde of the Oregon Supreme Court, in his state constitutional interest. As the years went by, no one in California led more in the area of the California Constitution than did Justice Grodin. As long as I am hoping the reader will be inspired to read the full Grodin biography, I will go further and hope that contained in its pages will be a full exploration of Justice Grodin's broader legal thoughts, for they reflect many of California's developments during Joe Grodin's long career. When he discusses the Fourteenth Amendment, whether the listeners are students at Hastings, former colleagues on the bench, or lawyers having dinner, he is respected for the depth of his knowledge.

I wanted to give the reader some snippets about Justice Grodin as a legal scholar, and made the mistake of asking our firm's librarian to pull Joe's writings. It was as though I had entered the bottom of Niagara Falls for a shower. Justice Grodin has written on almost every subject in the broad book of California jurisprudence.

As I look upon his prolific writings, I am struck by how the young, determined workers' rights labor lawyer always turned to reason as his basis for expression. Additionally, his intellectual interests would not allow him to be limited to any one subject: Challenges to religious liberty. Should courts depublish opinions? Do arbitrators set social policy? How does the common law respond to social challenges? Enterprises affected with a public interest. Labor-management relations. The Taft-Hartley Act. The relationship between tort and contract. The history of our state constitution. Liberty and equality under the California state constitution. Freedom of expression. Agricultural labor in California. Same-sex relationships and state constitutional jurisprudence 2007. The constitutional right to pursuit of happiness. Appellate review procedures. The history of legal aid. Wrongful termination. How do American law and British law compare? Judicial selection, state and federal. Provocative thoughts on legal education. Privacy and the right of publicity. Pieces over time on Justice Otto Kaus, Justice Frank Sullivan, Justice Mathew Tobriner, Chief Justice Phil Gibson, Justice Jesse Carter, and Justice Frank Newman.

Justice Grodin even took his own judicial defeat and ran it through his thoughtful scholarly thinking, producing an important piece on judicial retention elections.

You can never be sure how much a graduate's legal education is going to affect his or her later achievements but, in Justice Grodin's case, I think it not accidental that when he attended Yale Law School the faculty was drenched in legal realism stressing increased understanding of the outside world. There was great early interest at Yale in the direction of emphasizing the relationship between law and social problems. John Dewey, the American philosopher of note, and Justice Benjamin Cardozo had written during the 1920s about the need to connect law and social problems. Both men were all about progress and the future. The law school that first acted on those pragmatic writings was Yale Law School. The dominant educational theme was that law should be seen as a method for progress, a kind of perfectionist institutionalism. In Joe Grodin's life, his mentor and law partner Justice Tobriner no doubt reinforced that approach. The law is not just about concepts. It is there to be of the greatest service to as many people as possible.

Matching legal rules with the people to whom they apply has always been given an empathetic quality in anything that Justice Grodin has done. But it may be the development of state constitutional law in particular that will be his lasting contribution, as it was for his teacher in this regard, Professor Hans Linde of Oregon.

Proponents of greater use of the California Constitution may believe it seems almost rude to ignore the existence, history and contribution of the early founders of California, who put the words into our Constitution for a reason. In the journal of the *California Supreme Court Historical Society*, Volume 3, 2008, Justice Grodin gives some history of what he calls, “the movement.” Stanley Mosk was a strong supporter of the use of state constitutions. Justice Grodin’s idea is that California courts should consider the state constitution before the judges consider the federal constitution. He shows frustration that this is not done more frequently. He believes the state constitution should come first. If California citizens and others have rights under the state constitution, they should not be dissolved by blind adherence to federal constitutional decisions. He points out the advantages of “the adequate and independent state grounds doctrine.” He believes the California Supreme Court has at times ignored state constitutional principles, usually without explanation. He bemoans the advocates who appear and don’t argue for state constitutional rights. He cites examples in which the federal courts send the case back to the California Supreme Court to consider state constitutional grounds. He cites *Serrano v. Priest*, involving funding of education; search and seizure cases involving search of garbage cans; and a variety of other cases involving our state’s constitution. With appropriate modesty, Joe Grodin refers to his thoughts on state constitutional jurisprudence and his writing about it as “kvetching.” In repeated articles he lays out various aspects of his state constitutional jurisprudential theories.

This piece does not do justice to Joe Grodin, California scholar, judge, and teacher, but it is an invitation for others to explore his enormous contribution to our state.

Is there no defect in this trailblazer? To retain my credibility, I will end with a short personal story. Joe Grodin wrote a book on the Sierras. It was a good book about the trails, lakes, views and wildlife. Many years ago I joined Joe and his daughter on a hike, west of Tahoe in the Desolation Wilderness.

We climbed up to Lake Genevieve and Crag Lake. As we went to cut back, east to rejoin our families, Joe suggested we leave the trail and take a shortcut that he knew. How could I not rely on such a naturalist, a person of deep mountain understanding? So off we went, taking a sharp left and leaving the trail behind. Within minutes we were climbing over a slide of boulders in sun-reflected heat that made me understand how a chicken feels in the oven. The rocks were so hot we didn't want to put our hands on them, though we had to because of the slant of the rock slide. It goes to show, nobody's perfect. So, I must admit, all of these years later, Joe Grodin has taught me all about the Fourteenth Amendment and one other important thing. Never, ever leave the trail, while hiking in the Sierras.

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HONORING JOSEPH R. GRODIN:

About Joe Grodin

EPHRAIM MARGOLIN*

I asked some friends about Joe Grodin: Gerry Uelman describes Joe as “a renaissance man, an intellectual, engaged in politics, culture, art and law, unpretentious, modest, curious and brilliant.” “Joe Grodin was a splendid Supreme Court justice and remains a terrific human being,” writes Professor Larry Tribe; “my mentor and one-time boss Mat Tobriner was Joe’s good friend, and any good friend of Mat’s became a friend of mine. May he live forever. Okay, so maybe not *forever*, but to the closest comfortable approximation.” “A more decent, fair-minded and compassionate human being is hard to imagine. California suffered a body blow when he was unfairly removed from the state supreme court,” writes Judge Alex Kozinski. Len Sperry believes him “brilliant, kind, caring, generous, and well married.” (Joe married Janet when she was twenty years old and they are inseparable ever since. I asked her for a one-sentence description

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of Joe. She said, “He is fascinating.”) I agree with them, and still think up inadequate appellations: “elegant,” “thought-full,” “enthusiastic,” “kind,” “personally warm,” and, simply, that Joe is my best friend.

As we grow older, our lifespaces narrow, but imagination expands. Herb Morris, Joe’s first-year law school friend, tempered his interest in legal positivism with speculation about a “snake-less” biblical Gan Eden (paradise). I turned increasingly from trial to appellate and state bar practice and then also moved to speculation about a snake-less paradise and modern-day repopulating the Ark. Joe and I frequently used to parse biblical stories together. Studying the Book of Ecclesiastes, Joe had been literal in his dissents. Studying the Book of Exodus, Joe raised his eyebrows, one at a time, and we argued. In the universe of everyday politics, we talked about the Iran deal and America post-Iran. I felt like arguing my “case” before the court. Sometimes, Joe would suddenly move into other areas of discussion: what is my “opinion about a certain Dworkin book?” In turn, I would ask him about his take on Yuval Harari’s *Sapiens* or about Assaf Gavron of Israel. A conversation with Joe resembles a modern version of a Socratic dialogue. Curious, unpretentious, brilliant. And warm. And both of us are older than Socrates but still his disciples.

As I write, Joe is reaching 85. “You are *so* young,” I blurt out from my 88 advantage. “I know,” he responds. By this September, Joe’s second volume on the California Constitution will be published. He continues teaching at UC Hastings College of the Law, arbitrating, writing, and defying the calendar. There is nothing better than moderation, including moderation. In between, we sip our café lattes. We praise Obama’s signing of the Amazing Grace, and wonder about opinions of the new judges on the California Supreme Court. Joe confesses to unease: “We are too comfortable,” he says, “in an un-comfortable world.” We turn to issues of *access* to justice, of *access* to politics. We worry about *fairness* in the legal delivery system (not just about *equality*). We turn to medical issues. Joe probes effective counter-arguments. He searches for substance. If our conversation turns too depressing, we shift to aesthetics: What is new in the opera, or in the latest classical music performances; what theater productions and art exhibitions should one see? Joe’s interests were never monochromatic.

Fifty-five years ago, Mat Tobriner introduced me to Joe. I did not know him in law school, since he enrolled when I graduated, in 1952. I did not know

him in his London years. In the late 1950s, I was doing some minor research for Mat Tobriner. It was before Mat's law office became Brundage, Neyhart, Grodin and Beeson. Tobriner introduced me to Joe, and Joe met me with a huge smile and a thorough cross-examination. He wanted to know about my experience clerking for the Supreme and District Courts in Israel and about my work as a private secretary for Menachem Begin, head of the Irgun Underground in Israel, as Begin was emerging into his public life. I could not stop talking. He asked sensitive questions. Later, I arrogantly tried to recruit him into the local ACLU, where I briefly chaired its legal committee. He did not need my help. Never giving up, I recruited him instead into the American Jewish Congress Commission on Law and Social Action. We were several dozen Bay Area lawyers dabbling in social justice issues: devising legal attacks on racial discrimination, arguing about due process, equal protection, separation of church and state, segregation, and anti-Semitism. (He tried unsuccessfully to get me interested in labor law.) He introduced me to Janet, his wife. Each of them summered separately at the Brandeis Camp. My friendship with Joe and Janet, now fifty-five years in the making, endured, grew, and deepened.

Two thousand years ago, in *Ethics of the Fathers*, Joshua ben P'rahyah left a set of three instructions, for which he is still remembered: "provide yourself with a teacher, acquire a friend; and judge every man charitably." (Mishnah 6; my translation.) Judging every man charitably defines for me an ideal of what judgeship means. This is what Joe did when he became a judge. He turned into a great judge. But he was more than a "judge." Like Tobriner, he was also a splendid teacher. He is a good human being. A good husband. A good father. And he is a good friend.

It is normal to strive to "provide yourself with a teacher." He was what a good teacher should be. Yet, even great teachers, as rare as they are, relate to students with unilateral authority. Finding a good friend is more difficult. True friendship is less unilateral than a teacher-student relationship. Friendship implies concern for the other, consideration, devotion, perseverance, and care. It is more than Hillel's teaching of "What is hateful to you, do not do unto others"; it is doing for the other more than you would do for yourself. In this sense, having a real friend is the rarest of luck. Keeping friendship alive for fifty-five years is an amazing accomplishment. A minor miracle.

When he studied at the University of California, Joe would drive to school and give rides to other, non-driving students. Friendships bloomed.

Janet remembers that driving his car, he still seemed looking at her sitting in the rear of his car. She must have looked back. She remembers telling Joe where he parked his car for he did not remember it. When they were married and Joe became a lawyer, Janet took up dry point, monotype, wood blocks, printmaking, painting in different techniques, and ended up juried into the Library of Congress. Her art decorates their home. Joe “tried to paint,” but it “was not very exciting.” Painting seems the only thing he ever tried in which he did not excel. In time, they had a daughter, Sharon, “curious and verbal at nine months,” a lawyer, grown into communal leadership. And, then a second daughter, Lisa, a great violinist. Lisa’s recording would play in the car as we drove to Inverness; she entertained at the Lawyers’ Club Retreat, and grew in stature. Sharon would join us occasionally when we studied some issue or book. In time, the Grodins multiplied and grandchildren became the apple of their eye. The Grodins seemed always together. The family celebrates holidays and travels the world together. Joe likes to travel: Aspen, Yosemite, Europe, East Coast, the Mediterranean. When Joe’s junior grandchild arrived in Scotland this year, he wrote his parents in wonder that “they drive on the wrong side of the street!”

Dinners and lunches with Joe were always fun. Generally, we meet in my office or, when Janet joins us, in San Francisco around major museum exhibits or concerts. At dinner Joe acts like a chief justice, making the food secondary. He takes care of Janet, fusses about her menu, in restaurants orders carefully a balanced meal, and always initiates a sparkling platonic dialogue. As I mentioned, he is into philosophy, literature, politics, theater, art, the Hebrew Bible — What books were read? What events crowd the mind? What do I think about the latest news, what about Putin? Why does Netanyahu seem “strident”? What of Obama’s style? How does daily news square with decency, logic, and general wellbeing? We visit the landscape of hearsay. And we share news about children, grandchildren, travel, the courts . . . Sometimes we meet at the Brosnahans’ jurisprudence café, with law as our subject, or with the Sperrys, where art and Len’s jokes become the main course, or we meet at my home, where both of us keep searching for better tomorrows. Since Joe likes to travel, I joined the Grodins in Ireland, where he was teaching, and I delivered a lecture on some utterly forgettable subject.

As a Court of Appeal judge, Joe would sometimes discuss with me a carefully camouflaged legal issue — whatever bothered him at the time,

after altering the underlying facts, for he would never talk about his real cases deeming them privileged. This could lead to strange outcomes. On one occasion, he discussed a criminal case involving Munchausen by Proxy. I opined that Munchausen by Proxy made psychiatric sense. Several weeks later, I was horrified to read Joe's opinion. Our conversation was about the reliability of psychiatric evidence, not about its applicability to the facts of the case. When the court opinion was published, I became aware that I failed to deal with the Fry test, an important issue for the criminal defense bar. I should have thought of the *Fry* case anyway, but we talked only about the psychiatric validity of the Munchausen by Proxy doctrine, and Joe never mentioned legal issues of admissibility.

At a 1986 meeting in the Zuni restaurant, with only Joe, Jerry Marcus and myself, Joe told us that he was approached by a rightwing political advisor who offered to help Joe escape the label of the liberal "gang of four" (Chief Justice Rose Bird, Mosk, Reynoso, and Grodin), if Joe disowned Chief Justice Bird, publicly endorsed capital punishment, and joined the opposition to her reelection. Joe was not beholden to Rose Bird. He did not blindly track her positions. On one occasion, if memory serves, he upheld capital punishment on the facts of the case. He never did anything blindly. He would not lockstep. He voted his own conscience. Moreover, her doctrinaire tone was not simpatico. But, asked for my opinion, I told him that one should never abandon colleagues in their need. Self-interest should not beat loyalty. Marcus opined that loyalty to Bird might cost Joe his judgeship. With Joe it was a matter of principle.

I worried about my advice when Joe was defeated. I came to the Fairmont Hotel, where Joe and Janet awaited the result of the vote and witnessed a great judge removed from office. I saw Janet devastated by the vote. Outwardly, Joe held his feelings private. He returned to teach law at Hastings and counsel clients in labor law. There was pain. Joe never discussed that vote again. At least with me. And life went on.

As Larry Tribe put it: "May he live forever." In spite of aggravations, political and physical. May he continue to seek logic in a grimly illogical world. And may he enrich BART by frequent trips to San Francisco.