

CALIFORNIA — LABORATORY OF LEGAL INNOVATION

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EDITOR'S NOTE

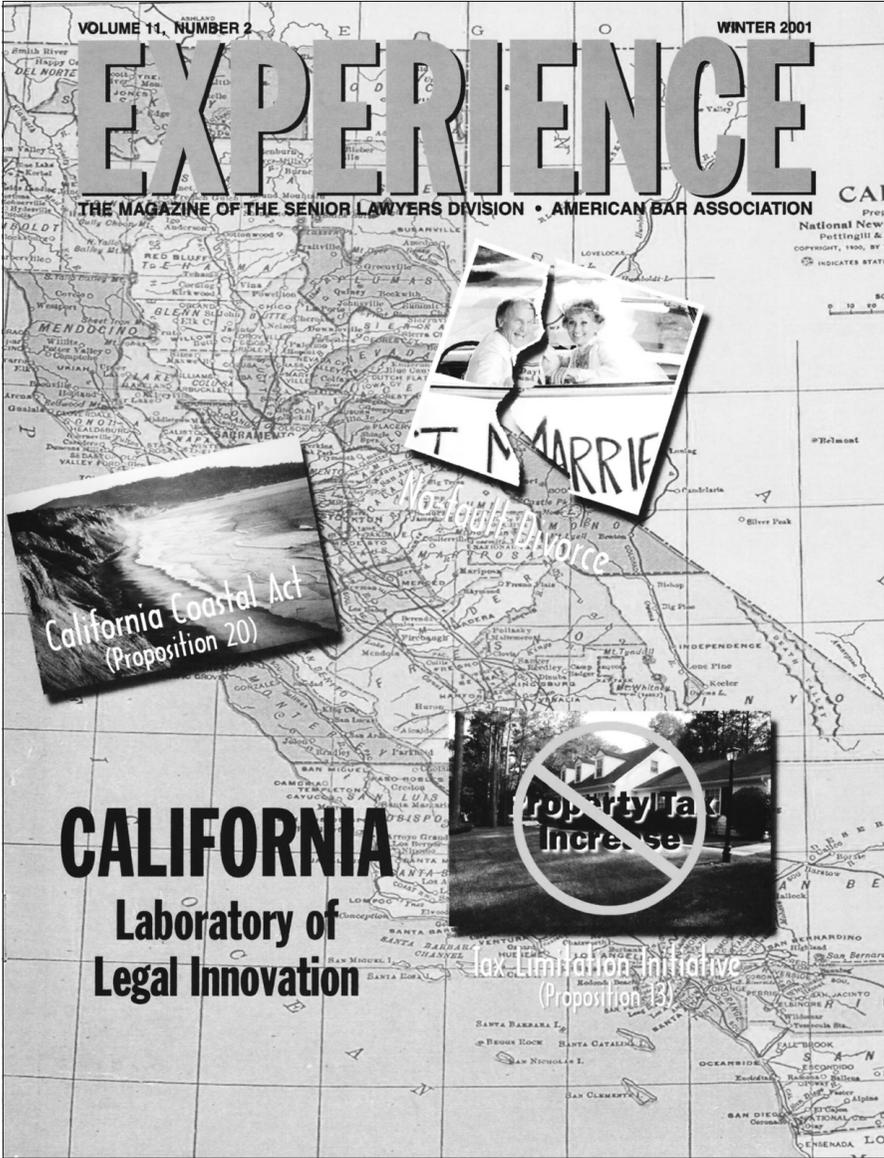
The following article first appeared in the ABA magazine *Experience* in 2001.¹ As chair of the *Experience* Editorial Board at the time, I had invited Harry Scheiber to prepare an article on the theme of California as a leading legal innovator. Later that year, he obtained permission from the ABA to republish the article in the *Yearbook* of the California Supreme Court Historical Society (the predecessor of *California Legal History*), but he did not do so by reason of a pause in publishing during the transition from the *Yearbook* to this journal, both of which he served as founding editor.

Subsequently, when I proposed the same topic for the Society's annual program at the 2006 State Bar Annual Meeting in Monterey, Professor Scheiber was scheduled to present this research,² but emergency oral

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¹ 11 EXPERIENCE 4 (2001).

² The other speakers were Kathryn Mickle Werdegar, Associate Justice, California Supreme Court; Jake Dear, Chief Supervising Attorney, California Supreme Court;



Joseph R. Grodin, former Associate Justice, California Supreme Court and Distinguished Professor Emeritus, UC Hastings College of the Law; Robert F. Williams, Distinguished Professor of Law, and Associate Director, Center for State Constitutional Studies, Rutgers University School of Law, Camden; and Gerald K. Uelmen Professor of Law (and former Dean), Santa Clara University School of Law (who substituted for Professor Scheiber). The moderator was former (and again, 2015–) Court of Appeal Justice Elwood Lui, then partner at Jones Day.

surgery prevented his appearance. Excerpts of the other panelists' remarks were published in the Society's *Newsletter*,³ but neither Professor Scheiber's spoken nor written words reached their intended California audience. With the present volume of *California Legal History*, his ideas find their home in the Society's publications.

Professor Scheiber's historical overview is confirmed by the passage of time — as is his prescience regarding innovations to come. Although such a work might be updated over time to include later developments, it must ultimately become a historical document that speaks from the perspective of a given moment. In that spirit, it is presented here without revision, as it first appeared, but with the addition of citations and notes.

— SELMA MOIDEL SMITH

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The great social critic and journalist Carey McWilliams famously termed California “the great exception,”⁴ asserting that the geographic conditions, cultural mix, economic structure, and social milieu of the Golden State made it unique even in a nation rich in diversity and contrasts. It might be a bit misleading to speak of California law as “exceptional,” because in our federal system every state government can be, if it so wishes, a “laboratory” (as Justice Brandeis said⁵) of policy experiments and legal innovation. In an earlier day, before the national government assumed its modern form with such large boundaries of authority, there was even greater room than now for states to compete for the crowning title of “the great exception.” And California has risen boldly to the challenge, both in modern times and earlier days.

Even in the state's first constitutional convention, held in Monterey in 1849, one delegate denounced the tendency shown by some toward

³ Autumn/Winter 2006, Special Supplement, available at <https://www.cschs.org/wp-content/uploads/2014/08/2006-Newsletter-Fall-Monterey-Supplement-updated.pdf>.

⁴ CAREY McWILLIAMS, *CALIFORNIA: THE GREAT EXCEPTION* (1949).

⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

“servilely” copying the constitutions of other states. This convention was capable of originality, he shouted, and it would be shameful to permit a California constitution to be merely composed of borrowed legal “shreds and patches” (quoted from *Hamlet*).⁶ This kind of thinking has had a continuing vitality in the life of the law, as in other respects, in the Golden State’s history.

When California law has been different, moreover, it has often been the bellwether of legal change nationally. Probably every one of the fifty states can point to a few areas of law in which it developed new doctrine accepted by other states. But California has a record, probably unique in the number and subject-matter range, of legal innovations — instituted by the Legislature and the courts alike — that have broken new paths. The degree to which other states have followed California’s lead has been dramatically manifested in some vitally important aspects of private law, such as the field of torts. In modern constitutional law, too, the California Supreme Court has often interpreted fundamental law with positions that the Supreme Court of the United States would eventually adopt.

In the spirit of innovation, the new state’s legislature placed on its agenda various proposals for codification of the laws even before California was admitted formally to the Union. The playbook for codification had been written earlier by the noted legal reformer David Dudley Field in New York State. But Western states were the ones that ran with the ball. The purpose was to demystify and clarify the law for a republican citizen, supplanting both substantive vagaries and the Byzantine procedural complexities of the common law system. The debate went on in California throughout the two decades after statehood was achieved, climaxing after 1863, when Governor Leland Stanford called for “thorough revision and codification.”⁷ California lawyers and historians are generally pleased to report that not only did the Legislature finally respond by approving a series of codification commissions in the 1860s, but it also outran New York to the goal line by adopting civil, penal, and political codes in 1872. The process was not

⁶ J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER 1949 51 (1850).

⁷ ANNUAL MESSAGE OF LELAND STANFORD, GOVERNOR OF THE STATE OF CALIFORNIA, AT THE FOURTEENTH SESSION OF THE LEGISLATURE 8 (January 1863).

complete, and clarification continued throughout the following century through both judicial and legislative action; but California's adoption of Field's code was an example followed by a growing number of states.

FAMILY LAW

Among the modern landmarks of legal innovation in California, perhaps none is more widely known than the adoption of no-fault divorce under California's Family Law Act of 1970. This was followed by a series of decisions by the California Supreme Court, and also additional statutes on family law, that provided for basic reforms in the rules of child custody, child support, and domestic partnership. In 1976, the attention of a national public was riveted on the adjudication of the famous 1976 case of *Marvin v. Marvin*,⁸ when the California Supreme Court ruled that oral agreements of an unwed couple would be enforceable under common law principles of contract. The court followed with a string of decisions in the 1980s extending constitutional protection to the right to choose a life partner (unmarried but living together as a couple), giving unmarried couples protection against discrimination in employment and in the economic marketplace more generally, and banning discrimination against gays and lesbians in adoption law. Colorado, Vermont, and Hawaii have gathered all the headlines in this area of legal innovation in recent days, but their controversial moves in the field of family law and homosexual rights have their beginnings out on the West Coast, in the familiar legal territory that is California's seedbed of new law. One cannot add community property law to the list, however, despite its renown as a California institution, because it was not a California innovation but rather an adoption of Texas law.

THE ENVIRONMENT

Environmental law and policy is another area in which California has been the bellwether nationally. In coastal zone and offshore environmental protection, California was far out in front, not because of action by the courts or the Legislature but because of a popular initiative in 1972, "Prop. 20," which was unique for the time in providing new doctrines

⁸ 18 Cal.3d 660.

and legal instruments for coastal zone management. In its essential elements, this product of the direct ballot in California would be a model for the provisions of the national Coastal Zone Act adopted by Congress three years later.

In the movement for the more comprehensive regulation of environmental issues, the national government led the way in the 1970s during the Nixon administration. But California's legislature followed suit quickly [with the California Environmental Quality Act of 1970 — "CEQA"], and it was not long before the California judiciary came down with a series of decisions that dealt boldly with some of the hottest issues of unfinished business left to the courts by the legislative process. The California courts made agency compliance subject to judicial scrutiny, fashioned standing doctrines that expedited challenges to both private and governmental action by public interest groups and others, and interpreted broadly the requirements for environmental impact statements. The California court also took a strong position on "public trust" principles in regulatory law and the environment, in this instance referring to the state's heritage of Spanish and Mexican civil law concepts. These judicial rulings were closely watched and taken widely as precedent by other state courts that were sympathetic to the requirements of an effective system of environmental protection. As a broadly noticed scholarly commentary asserted in 1980, the California judiciary had placed itself "on the cutting edge of preservationism" nationally.

CONSTITUTIONAL LAW

Judicial action on environmental law in California was matched in its influence during the 1970s by the prominence of the state supreme court's constitutional decisions. To cite one especially important case, *Serrano v. Priest*,⁹ the state high court ruled in 1976 that education was a fundamental right, and that the state's local property tax structure for support of schools violated the equal protection guarantee. Finding wide disparities in levels of local support produced by the tax, the court required the Legislature to devise a new system that would provide more nearly equal school

⁹ 18 Cal.3d 728.

financing — pointing the way to similar decisions in other states, including most recently, for example, the widely noticed actions in this area of law taken by the Ohio Supreme Court.

The *Serrano* decision was one of a larger body of rulings by the California court that the justices based on the state's own constitution rather than the federal constitution. At that time and earlier, it was common for the state courts to resist "liberal" doctrines that the U.S. Supreme Court had applied to the federal government itself. (The California court itself resisted applying the federal exclusionary rule in state trials, for example, declaring in a 1942 decision that the Fourth Amendment did not apply to the states, and despite similar language on search and seizure in the federal and California constitutions, "California is free to interpret its own constitution" on such matters.¹⁰) In *Serrano* and other cases in the 1970s, however, the California court introduced its own "liberal" interpretations of state constitutional language, going beyond what the increasingly conservative U.S. Supreme Court was interpreting as the requirements of similar or identical language in the federal document. Thus, the *Serrano* court declared that the equal protection provisions of California's constitution "are possessed of an independent vitality Accordingly, decisions of the U.S. Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law."¹¹ Hence the California court chose not to apply a contrary finding on equal school financing that a year earlier had been handed down by the federal Supreme Court in *San Antonio School District v. Rodriguez*.¹²

Application by the high courts in many states of this doctrine of "independent and adequate state grounds" became a prominent feature of the landscape in American law in the 1970s. It was a development largely driven by decisions of the high courts in three or four states in that period, but preeminently so by California's Supreme Court. One of the most respected and influential expositors of the state grounds doctrine, both in scholarly forums and in decisions of the California court, was Associate

¹⁰ *People v. Gonzales*, 20 Cal.2d 165, 169.

¹¹ *People v. Longwill*, 14 Cal.3d 943, 951 n.4 (1975).

¹² 411 U.S. 1 (1973).

Justice Stanley Mosk (who has subsequently gone on to establish a record for longevity of service on the court). Discriminatory zoning, separation of church and state, leafleting in shopping centers, search and seizure rules, right to counsel, the right of privacy, the death penalty, and a host of other questions were decided on state grounds by the California high court in the 1970s, as the increasingly conservative national Supreme Court retreated from Warren Court premises and doctrines or else declined to break new legal ground in such areas.

Meanwhile, the California court was also pioneering in tort law, leading in the dramatic “tort revolution” that brought industrial liability to its dominant position nationally. Roger B. Traynor, who served on the court from 1940 to 1970, and was chief justice from 1964 to 1970, was the chief judicial architect of this important court-fashioned legal reform. Traynor also wrote opinions for the California court in a number of constitutional areas where the U.S. Supreme Court would eventually follow suit, for example, in striking down the state’s antimiscegenation statute¹³ some two decades before the federal high court adopted Traynor’s reasoning and acted similarly against such laws in *Loving v. Virginia*.¹⁴ In decisions interpreting the federal and state constitutions on the subjects of search and seizure, discovery rights in criminal cases, and discrimination in jury selection, the California court’s rulings were mirrored years later in the U.S. Supreme Court’s decisions.

CALIFORNIA DEMOCRACY

California also has won a name, admirably or otherwise, as the fountainhead of the “tax revolt” that has had such sweeping consequences for state government and the provision of social services and education in many states. The revolt began with the Golden State’s Proposition 13, adopted in 1978. Within only five years’ time, adaptations of the new tax-limitation law in California had been put on the ballot in sixteen other states. It is the process, and not only the message, in which California has been exceptional. There is no question that recent trends in the political process nationally have constituted a true “Ballot Initiative Revolution,” and again

¹³ *Perez v. Sharp*, 32 Cal.2d 711 (1948).

¹⁴ 388 U.S. 1 (1967).

California was the seedbed. Insofar as the state courts have been involved in this revolution, of the cases challenging procedural and constitutional aspects of direct ballot initiatives, according to one study, nearly 60 percent nationally were before the California Supreme Court.

What makes the initiative process all the more interesting, in California and in some other states with active direct-ballot process, is the very great diversity of subjects brought forward by this process for voter decision. In California, there have been what political scientists call “rights-enhancing” measures, such as a constitutional provision introducing a right of privacy, or, indeed, another that amended the Constitution to assert positively the doctrine of independent and adequate state grounds. Ironically, however, in subsequent years some of the most important California initiatives, both statutory and constitutional, have been “rights-reducing,” designed to reverse decisions of the California Supreme Court that extended to criminal defendants procedural rights that went beyond what decisions of the U.S. Supreme Court required of the state. So California’s unique style of legal innovation first drew upon a tradition of independent state law proclaimed by the courts, and then spawned a populist movement for direct voter action, repudiating some of the most important judicial products of that tradition. It is impossible, in light of this very mixed record in use of the direct ballot, to term the California electorate consistently liberal, conservative, or otherwise; perhaps “ornery” is the term that best describes it.

Nor has the record of participatory democracy been consistent in California’s distant past. When a second constitutional convention was held in 1879, the delegates came down hard on corporations and their immunities; the result contained some extraordinary “liberty-enhancing” provisions such as one protecting women from discrimination in pursuit of “any lawful business, vocation, or profession.” (This ostensibly unambiguous language was interpreted by the state’s high court, however, in ways that whittled away at its strength; and the provision was practically dormant until, in 1971, a unanimous decision of the California high court, *Sail’er Inn v. Kirby*,¹⁵ put a strong new interpretation on that provision and buttressed it by declaring gender discrimination a suspect classification under

¹⁵ 5 Cal.3d 1.

equal protection analysis.) But the 1879 Constitution also was accepted enthusiastically by the electorate because it included harsh restrictions on employment and civil rights for Chinese residents that amounted to some of the most blatant and vicious types of discrimination that ever disgraced the law books of an American state outside the slavery region of the Old South. All of the most prominent of these discriminatory articles in the 1879 document were subsequently struck down by federal appellate judges, including some of the leading cases of the U.S. Supreme Court in the 1880s.

Constitution writers, legislators, and judges in every state draw upon the law of other states in shaping their own legal rules and procedures. There is credit (and blame) enough to be widely distributed in this regard. But whether one considers questions of constitutional doctrine, procedure, private law, or lawmaking process, California stands out as a fascinating example of the extraordinary opportunity afforded by the structure and rules of the American federal system for a state to be a “laboratory of legal innovation.”

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