

SYMPOSIUM

CALIFORNIA — LABORATORY
OF LEGAL INNOVATION

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EDITOR'S NOTE

A group of distinguished jurists and law professors was invited by the California Supreme Court Historical Society to discuss the leading role of California in legal innovation. The occasion was the panel program sponsored by the Society at the California State Bar Conference in Monterey on October 7, 2006. Brief excerpts of the speakers' remarks were published at that time,¹ but the full content of their presentations has remained unpublished until now. On the following pages, the speakers' oral remarks have been joined with the written materials they prepared for the event to provide a complete record of their presentations. Collectively, it remains the leading source of scholarship on this aspect of California legal history.

— SELMA MOIDEL SMITH

¹ *CSCHS Newsletter* (Fall/Winter 2006), four-page color Supplement, <https://www.cschs.org/wp-content/uploads/2014/08/2006-Newsletter-Fall-Monterey-Supplement-updated.pdf>.

SELMA MOIDEL SMITH: Welcome to the panel program of the California Supreme Court Historical Society, “California — Laboratory of Legal Innovation.” We appreciate the honor conferred by the presence here today of Chief Justice Ronald George, and I especially want to acknowledge Society President Ray McDevitt.

We will start [turning to the speakers seated at the table] with Justice Elwood Lui, who, by the way, is entitled to a nice vote of confidence and congratulations by reason of receiving the Bernard Witkin Award yesterday from the State Bar of California. Next is Kathryn Werdegar, associate justice of the Supreme Court of California. Following is Justice Joseph Grodin. Following is Professor Gerald Uelmen, and last, at the end, is Professor Robert Williams who comes to us from Rutgers University, Camden, New Jersey, to participate with us.

After their presentations, our speakers will be in discussion with each other, and then we will open it to questions from the floor. At the end of the program, you will notice that in your handouts you have evaluation forms, and I just want to make clear at this point that the degree of your



L-R: (SEATED) SELMA MOIDEL SMITH, JUSTICE ELWOOD LUI; (STANDING) JUSTICE JOSEPH R. GRODIN, PROFESSOR ROBERT F. WILLIAMS, JUSTICE KATHRYN M. WERDEGAR, JAKE DEAR, PROFESSOR GERALD F. UELMEN, SOCIETY PAST PRESIDENT JAMES SHEKOYAN, AND CHIEF JUSTICE RONALD M. GEORGE.

Photo: Howard Watkins

enthusiasm will govern entirely the amount of food you will receive at the reception. [laughter]

You will note from your handouts that you were expecting to hear Professor Harry Scheiber from Berkeley. It so happens he had oral surgery yesterday and, needless to say, was not in condition to participate. As a result, we have a very kind and generous man by the name of Professor Gerald Uelmen from Santa Clara University School of Law. He is filling that spot as substitute speaker with great graciousness and generosity. We have not required a paper from him in that interval, but he will be speaking on his own specialty of criminal law in the context of our program. You are having passed out here the long bio for Professor Uelmen that you can add to your handout pages. With all of that in hand, and my thanks again to Professor Uelmen and to all of the participants in this panel, I would now like to have Kathryn Werdegar, associate justice, begin the program.

KATHRYN WERDEGAR: Thank you so much, Selma, and indeed, thank you for all of your work in bringing this program to pass. I would like to say to those of you in the audience, good afternoon and welcome to the California Supreme Court Historical Society's program, "California as a Laboratory of Legal Innovation." As you've just heard, I'm Kathryn Werdegar. It's now my great pleasure to introduce our moderator today, Justice Elwood Lui. It's a cliché, but Justice Elwood Lui truly needs no introduction, but I'm going to do it anyway, because I want to. Justice Lui is with the law firm of Jones Day. He's a partner in charge of the San Francisco office, and he's part of the firm's Management Committee. He handles appeals in complex litigation in state and federal courts. He has been named as one of the 100 most influential attorneys in the state of California. Justice Lui served as a justice of the Court of Appeal for the Second District and a judge of the Los Angeles Superior and Municipal Courts. He was appointed to serve as a justice pro-tem of the California Supreme Court for several cases. Justice Lui retired from the state judiciary in 1987, but he has never retired from public service. He served as a Supreme Court special master of the State Bar disciplinary system. He has taught as an adjunct professor at two university law schools in Southern California. As Selma just mentioned to you, just yesterday at the State Bar Lunch, Justice Lui was justly awarded the Bernard E. Witkin Award, and I actually had been hoping he would wear his medallion, but I guess his modesty has prevented that. So here is Justice Lui.

ELWOOD LUI: Thank you very much, Justice Werdegar. I'd like to acknowledge the presence of Justice Carlos Moreno from the Supreme Court as well as Justice Kathryn Todd of the Court of Appeal in the Second District and Beth Jay, the chief of staff who makes the Supreme Court operations work for the chief justice.



KATHRYN WERDEGAR: And Justice Jim Marchiano —

ELWOOD LUI: I'm sorry. And Justice Marchiano [presiding justice, First District Court of Appeal, Division One].

Our first presenter today is Justice Kathryn Werdegar. Justice Werdegar was appointed to the Supreme Court in 1994. She previously served on the First District Court of Appeal in San Francisco. After graduating with honors from the University of California, Berkeley, Justice Werdegar attended law school at Berkeley's Boalt Hall, where she stood first in her class and was the first woman elected to be the editor-in-chief of the law review. She completed her studies at George Washington University, also graduating first in her class. Before assuming the bench, Justice Werdegar worked in the U.S. Department of Justice in Washington, D.C., as director of the Criminal Law Division of the California Continuing Education of the Bar, as a senior staff attorney for the California Supreme Court, and as a professor and associate dean at the University of San Francisco School of Law. It's my pleasure to turn the microphone over to Justice Werdegar.

KATHRYN WERDEGAR: Thank you. In discussing with Court staff the concept of "California as a laboratory of legal innovation," the question arose whether there were some objective way that we could measure the influence of the California Supreme Court on other state courts, since we thought that influence might at least in part serve as a proxy for innovation. We asked LexisNexis if they could do a *Shepard's Citation* analysis to determine



the extent to which the California Supreme Court's cases have been followed in other jurisdictions. LexisNexis did the analysis for the California Supreme Court and for every other state supreme court in the country, and they did it for the period of 1940 to 2005. We then took the raw data and distilled it into graphs. The data covers the sixty-six-year period that embraces the Courts of Gibson, Traynor, Wright, Bird, Lucas, and our own Chief Justice George. Although how often a case is coded by *Shepard's* as having been followed certainly does not tell the whole story of whether the decision was innovative, it does show that by this one measure at least, the California Supreme Court has been and continues to this day to be the most influential supreme court in the country. To present the graphs that were the result of this data, I would like now to invite Jake Dear to join us. Jake is head of the Chief Justice's Chambers, and he is chief supervising attorney at the Court. He is in his twenty-fourth year at the California Supreme Court, having served as staff attorney for the late Justice Mosk, the former Justice Grodin, the former Chief Justice Lucas, before joining our present chief's staff. Jake and our Court Reporter Ed Jessen, also with us today, have done an amazing job in conceiving and designing this project. So now we will see the charts that prove the fact. Thank you, Jake.

JAKE DEAR: Thank you, Justice Werdegar, and it's a pleasure to be here this afternoon. Right before I flick on the light and show you the first of four graphs,² I'll just mention a couple other things very quickly: One, for the social scientists in the group, the methodology behind this is just as interesting as what I'm about to show you in terms of the results. Ed Jessen and I will be at the Reception afterwards and will be happy to talk with you about



² The graphs — and their accompanying written materials — are not included here. Instead, for the final published version of the Dear-Jessen study, see Jake Dear & Edward W. Jessen, “*Followed Rates*” and *Leading State Cases, 1940–2005*, 41 UC DAVIS L. REV. 683 (2007), https://lawreview.law.ucdavis.edu/issues/41/2/essay/DavisVol-41No2_Dear.pdf; and *Measuring the Comparative Influence of State Supreme Courts: Comments on Our “Followed Rates” Essay*, 41 UC DAVIS L. REV. 1665 (2008), https://lawreview.law.ucdavis.edu/issues/41/4/addendum/41-4_Dear-Jessen.pdf.

that and also share with you our full draft of our paper that we'll be submitting to publication sometime soon, so questions about that can come up afterwards. Secondly, I just want to mention something about the "follows." Many of you are aware that *Shepard's* codes cases, and has for over a hundred years, as "distinguished," "criticized," "limited," "harmonized," "followed." "Followed" is the designation that's used when *Shepard's* determines either that a prior case is treated as controlling authority or is found to be persuasive authority. What we've done in these graphs is look for the version of "followeds" that constitutes persuasive authority. We've eliminated from our data bank all of the cases, for example, that are followed by California Courts of Appeal, following the California Supreme Court; there's nothing very remarkable about that, is there? The California Court of Appeal, if it's not following the California Supreme Court, is acting outside of the law, and so we expect to see those kinds of follows. Therefore, we removed all follows from the court of the originating jurisdiction — California, Ohio, Texas, New York — from the data. We also removed all of the federal follows, the reason being that when a federal court entertains a diversity jurisdiction case, under *Erie v. Tompkins* principles and such,³ you can never really tell why a case is being followed. It might be followed because the court finds it persuasive; it might also be followed, however, because the state decision is controlling authority that the federal court thinks is terrible authority, but it's controlling authority and needs to be followed. We removed the federal cases from the study for that reason, so all we're going to be looking at are the cases that Lexis found from the years 1940 to 2005 for each one of the state supreme courts that issued an opinion that was in turn followed by an appellate decision of another state.

There are 24,300 such opinions that Lexis located, and we'll see them here in the graphs. Now, whenever I show this graph to somebody who is not originally from California, the first thing you do is you look for your home state. I showed this to my son, who happens to have been born in Louisville, Kentucky, and unfortunately he had to move all the way to the right-hand side of the graph to find Kentucky, but that's just the way it goes. So this represents the 24,300-plus cases decided since 1940 that *Shepard's* has designated as having been followed by at least one court outside of the

³ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

originating jurisdiction case. California leads pretty dramatically: 1,260 cases. The next state is Washington, which shows 942. The state in the third position is Colorado. After that comes Iowa, Minnesota, Kansas, Massachusetts, Wisconsin, Oregon, New York around number ten — a little bit surprising to some. Now, that a case is followed one time in its life is interesting but maybe not all that revealing, so a further probing consisted of looking at the same data over the same period and asking how many cases filed by the various fifty state courts have been followed multiple times over this same period, and that'll be Graph 2. This graph shows two things: First, the lighter-numbered bars are the cases that have been followed three or more times by these authoring jurisdictions over the sixty-six-year period of the study. You see California again leading the pack with 160 cases that were in turn followed three or more times. The next position state is Washington, followed by New Jersey, Kansas, Minnesota, Massachusetts, Arizona, Wisconsin, Oregon, Colorado, New York, and trailing on down to the end. The darker bars on the graph scrape a little bit further below the surface. How many decisions have been followed *five* or more times from these authoring jurisdictions during the same sixty-six-year period of the study? Again, looking at it that way, California has forty-five. The next-highest state is Washington with seventeen, followed by Arizona with sixteen, New Jersey fifteen, Oregon thirteen, Minnesota eleven, Wisconsin eleven, New York six. That's a sixty-six-year look at the data. The next question you might ask is "What have you done lately?"

Graph 3, which I'll put on right now takes a look at the most recent twenty years of the data, and it shows again the California Supreme Court with sixty-one, Washington in second place at fifty. At this point I'm tempted to say that Washington is punching above its weight in terms of its population, number of cases that come up to the court and present appropriate matters that eventually can lead to a leading and followed case. It's really quite remarkable what this chart shows for Washington. Next is Massachusetts, Kansas — Kansas is a little surprise: they're growing more than corn; they're growing some follows — New Jersey, Arizona, Colorado, Minnesota, Wisconsin, Illinois, Iowa, Connecticut, New York. It's a little surprising to me how New York shows on all of these graphs. These three graphs are horizontal looks at what all fifty states have done during a defined period of time.

The fourth graph will show a California-only look at the data, and it's basically a vertical look at that data. It's going to compare the productivity, the production of cases that were followed three times, and five times, by the tenure of the six most recent California chief justices. The first thing that you notice here is that the Wright Court is basically in a tie with, or slightly under, the Lucas Court in terms of producing opinions that were followed at least three times by out-of-state courts. On average, every year of the Wright Court, as this graph explains, produced five opinions that were in turn followed three times or more by other state jurisdictions. Also, every year, the Lucas Court did the same, a slightly higher number actually for the Lucas Court. Let me add a caveat here. Just as it's somewhat problematic to compare baseball stats of Babe Ruth and Hank Aaron, because they played in different times under slightly different circumstances, it's also a bit problematic to make this comparison. There are a number of factors that go into the mix here, and we get into that in Ed's and my evolving paper, much more than what we see in the outline that we gave you. But basically, we think that these stats are fairly accurate.

What Graph 4 also shows you is that the Traynor Court and the Bird Court were basically tied in terms of opinions that were followed three times and five times. Each one produced on average annually around three opinions that were followed by other states three times, and so forth. What the graph also shows is that, of course, for the current Court, the data is in its infancy. There's a real substantial gestation period that we've noticed in looking across this data, and it will probably be ten years before we'll have an assessment in terms of the George Court, but it looks very much like — and I'm happy to report, Chief, who's in the back of the room there — we seem to be on a par with historic trends. Now, these figures show one thing. They show kind of objectively what a number of people have talked about over the years. There's always been the perception that the California Supreme Court has been a leader, and this tends to show that. We can quibble about some methodologies and such, but some of the real interesting things about this data are follow-up questions: Why does this happen? The little summary paper that we've given you gets into four reasons that Ed and I have come up with for the why. I suspect that the panelists will get into and approach some of those reasons as well. So, with that, I'll turn the matter back over to Justice Werdegar.

KATHRYN WERDEGAR: Thank you, Jake, and I know how much work went into those graphs, and they are beautiful. Well now, I would like to lend some color to what we've just seen with respect to the graphs, and, in doing so, I'd like to mention, out of what I think I can call the top forty-five cases — those would be the top cases in the years we're talking about that have been followed three or more times — I'd like to draw your attention to just five of them to illustrate the point. And the decisions I'm going to mention were innovative when handed down, and they've proven to be influential based on the data that Jake's been describing. The names are probably familiar to you. I'll start with tort law, an area that especially lends itself to judicial innovation, and the first one is *Greenman v. Yuba Power Products*, decided in 1963.⁴ *Greenman* was the first case ever to impose the principle of strict product liability on manufacturers. *Shepard's* codes *Greenman* as having been followed by the courts of eight states, and I'll point out that being followed is a very much more selective coding than just to be cited. *Greenman* has been cited 1,799 times as of a few weeks ago, and numbers are probably ongoing. But the *Shepard's* eight followeds don't really tell the whole story about the influence of *Greenman* because thirteen years after *Greenman* was decided, the so-called *Greenman* doctrine of strict product liability for manufacturers had been adopted by thirty-seven states. *Greenman* has been described as the single most dramatic legal change in tort law ever. Now in the tort realm also there's *Dillon v. Legg*. That was decided in 1968.⁵ And *Dillon*, you'll recall, allowed bystander recovery for negligent infliction of emotional distress. *Shepard's* codes *Dillon* as having been followed twenty times, more than any other state court cases ever have been coded as being followed.

Finally, in the tort realm, there's *Tarasoff v. The Regents of the University of California* in 1976.⁶ In *Tarasoff*, the California Supreme Court for the first time stated the duty of a mental health professional to protect others against a reasonably foreseeable serious risk of danger by a patient and that was, I recall, quite an earthshaking decision when it came down. *Tarasoff* has been followed by seventeen out-of-state decisions. Now, lest you think otherwise, I want to point out that not all of the California Supreme Court's

⁴ 59 Cal. 2d 57.

⁵ 68 Cal. 2d 728.

⁶ 17 Cal. 3d 425.

most influential tort decisions are ones that expanded tort liability. An example of that is *Cedars-Sinai Medical Center v. Superior Court*.⁷ In *Cedars-Sinai*, the Court declined to impose tort liability for a party's intentional destruction of evidence. *Cedars-Sinai* has been followed as many times as *Greenman*, and there are more.

Employment law is another area that is rich in innovation, and our good fortune is that we have an expert here who is going to speak to us about innovation in California employment law. Another area is criminal law, and we are very fortunate to also have an expert — that's Professor Uelmen, who is going to speak to us about criminal law and how California has been an innovator. I'll just mention the well-known case of *Wheeler*. In *Wheeler*,⁸ in 1978 — and I'm rather surprised that it's relatively that recent — for the first time the Court looked behind a peremptory challenge and stated the rule that you cannot exercise your peremptory challenges on the basis of race when you're challenging prospective jurors. *Shepard's* codes *Wheeler* as having been followed ten times, but an even greater import of *Wheeler* is that in *Batson v. Kentucky*,⁹ which the United States Supreme Court decided ten years later, they followed substantially the reasoning of *Wheeler*.

Now, as I suggested and Jake alluded to, a coding of followeds doesn't really tell you everything about whether a case or jurisprudence is influential. It's only part of the picture. The influence of some landmark cases is manifested not in how many decisions follow it, but in modifying behavior or motivating legislative action. For instance, in 1952 the case of *De Burgh v. De Burgh* gave birth to a revolution in family law.¹⁰ In *De Burgh*, the Court allowed both parties to get a divorce even though both were at fault. In so doing, the Court abolished the 100-year-old doctrine of recrimination pursuant to which nobody could get a divorce if you both were blameworthy. Can you imagine living under that system? [laughter] Actually, I think in its analysis the Court acknowledged that this doctrine of recrimination was honored more in the dissembling and the breach than in the fact, and they decided to be forthright about it and to declare that no longer would that be the case. Now, *De Burgh* does not show up on our list

⁷ 18 Cal. 4th 1 (1998).

⁸ 22 Cal. 3d 258.

⁹ 476 U.S. 79 (1986).

¹⁰ 39 Cal. 2d 858.

of top forty-five followed cases, but the decision had a dramatic impact. It ultimately led to the legislative enactment of no-fault divorce, first in California and later throughout the country.

Finally, some innovative cases turn out not to be influential. *Perez v. Sharp*, decided in 1948, is an example.¹¹ In *Perez*, the California Supreme Court struck the state's anti-miscegenation statute as violative of equal protection, the first high court to reach such a conclusion. This clearly was an innovative decision, but was it influential? Not by the *Shepard's* followed measure. In the nineteen years between *Perez* and *Loving v. Virginia*,¹² when the United States Supreme Court struck Virginia's statute, most state courts tried to avoid the issue of the legality of interracial marriage. The three courts that cited *Perez* did so only to reject its holding. Even the United States Supreme Court in *Loving v. Virginia* mentioned *Perez* only once, deep in a footnote, so there was innovation with, at least by any measure we've spoken about so far, no influence.

Now, looking to the future, in light of the subject matter or the issues in our cases now pending before us or likely to come our way, it seems that California will continue to be in a position to be an innovative Court, but whether we actually will fulfill that remains to be seen. I want to point out to you some of the issues before us that might allow us, should we choose to do so, to fulfill that role. The most obvious example of a high-profile issue sure to come our way was in the gay marriage decision that was just handed down two days ago [by the Court of Appeal].¹³ Issues already before us include whether an arbitration provision that prohibits employee class actions for violation of wage and hour laws is enforceable.¹⁴ Another is whether a physician, on First Amendment religious grounds, can refuse to provide reproductive services to a lesbian.¹⁵ Another novel issue — this is pending before us right now — is whether California can ban the importation and trade of wildlife (kangaroos), when the wildlife in question, the kangaroo, has been de-listed under the federal Endangered Species Act.¹⁶

¹¹ 32 Cal. 2d 711.

¹² 388 U.S. 1 (1967).

¹³ *In re Marriage Cases*, 143 Cal. App. 4th 873 (2006).

¹⁴ *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007).

¹⁵ *North Coast Women's Care Medical Group v. Superior Court*, 44 Cal. 4th 1145 (2008).

¹⁶ *Viva! International v. Adidas*, 41 Cal. 4th 929 (2007).

In other words, does the doctrine of federal conflict preemption require California to allow the importation of kangaroos for the fashioning of sneakers? And the list goes on.

In closing, I must point out what I think is obvious to all of you, and it's not that the California Court is the only branch of our government that is innovative. Innovation comes from our legislature and the people of the state through the initiative power. Proposition 13 is a very well-known example. My fellow panelists are going to touch on this to a greater extent. But I'll just notice that the process continues. It's been reported that Prop 64, enacted two years ago, has ignited a momentum across the country to draft similar amendments putting limits on consumer class actions, and the *San Francisco Chronicle* reported just a couple of weeks ago that the new legislation mandating that California reduce its greenhouse gases will — and I'm going to quote to you — “serve as a catalyst for other states and the federal government to curtail fossil fuel emissions and will spur the development of innovative technologies and policies.”¹⁷ We'll just have to wait and see, but there you are. And thank you very much.

ELWOOD LUI: Thank you, Justice Werdegar. Our next speaker is Justice Joseph Grodin. Justice Grodin is a distinguished emeritus professor at the University of California Hastings College of the Law and a former associate justice of the California Supreme Court and presiding and associate justice of the Court of Appeal, First District. He graduated from UC Berkeley, obtained his law degree from Yale, and received his doctorate in labor law and labor relations from the London School of Economics. After graduating from law school, Justice Grodin practiced in San Francisco for seventeen years and then became a professor at UC Hastings for another seven years. In 1975, he became one of the original members of the California Agricultural Labor Relations Board and served in that capacity until 1979 when he was appointed to the bench. Upon leaving the bench in 1987, he returned to teaching at Hastings and, with leaves at Stanford Law School, became an emeritus professor at Hastings in 2005. He continues to teach, write, and serve as an arbitrator and mediator. Justice Grodin.

JOSEPH GRODIN: Thank you very much, Justice Lui. In my written materials [*included here after Justice Grodin's oral remarks*], I tried to play

¹⁷ Jane Kay, “A Critical Step” on *Warming Impact*, BEE (Sacramento), September 1, 2006.

around with this data which I find interesting and subject to an almost infinite variety of interpretations. But I don't intend to talk about that right now, but rather to focus, as Justice Werdegar indicated, on the field of labor and employment law and innovation in that area, and I intend to go beyond my written materials. I served on the Court of Appeal with a very fine justice who did not care much for oral argument. He prepared



very carefully for cases, read the briefs, went through the record, made up his mind, knew what he wanted to do, and he was quite impatient in oral argument, and so he developed a sort of one-two punch. When a lawyer started arguing things that were in his brief, this justice would say, "You've made that point very well in your brief, counsel." On the other hand, if the poor lawyer tried to say something outside of the brief, he would say, "This court does not hear arguments that were not stated in the brief." [laughter] So, with my apologies, I am going beyond my brief.

My story starts with the Constitutional Convention of 1879 and with a lawyer who has now become quite famous by the name of Clara Shortridge Foltz who had the misfortune but, as it turned out a misfortune which catapulted her into the legal hall of fame, of being rejected from my school, Hastings College of the Law, because the Hastings Board of Directors at that time believed that law was no profession for a woman. Clara was not a person to be put off by such an event. She brought suit in state court. She won. Hastings had the bad grace to appeal. While her appeal was pending before the California Supreme Court, the 1878 Constitutional Convention which led to the 1879 Constitution was in progress. It was dominated by, or at least heavily influenced by, the Workingmen's Party of San Francisco. The Workingmen's Party had its roots in organized labor. Its agenda was not, from a modern perspective, wholly progressive. It produced, among other things, some provisions that were virulently racist, but it was also kind to Clara Foltz. It proposed to the convention, and the convention adopted, a — for that time quite remarkable provision which is still in our Constitution though in expanded form — declaring that all persons have the right to pursue any business or occupation without regard to sex. This

was an early version of the Equal Rights Amendment. It was the first of its kind in the country.

On the legislative front, and here I'm following Justice Werdegar's suggestion that if we want to talk about the influence of this state's legal system, we need to talk about more than the courts; we need to talk about the Constitution, about the initiative process, about statutes, about the interplay between the Legislature and the courts. The Progressive Movement was in dominance in the early part of the twentieth century in this country, and in this state it was responsible for a number of innovations, including our initiative referendum process, but also in terms of the field I'm talking about. The Worker's Compensation Act of 1913 was a landmark law, not the first, but probably the most progressive of worker's compensation laws in the country at the time. The California Legislature continued to be in the forefront in developing protections for workers, for example, through an unusual statute that was adopted in the 1930s which made it unlawful for an employer to discriminate against employees for political affiliation or activity.

On the judicial front, nothing much happened in the area of employment law or, for that matter I suppose one might say in any other area of the law, in the courts and perhaps for that reason the statistics we have start with 1940. In 1940, Cuthbert Olson was elected governor of California, the first Democratic governor since 1900, and in his first year in office he appointed as chief justice of the California Supreme Court a member of his cabinet, Phil Gibson, and [as associate justice] an obscure Boalt Hall law professor by the name of Roger Traynor. From that point, I think it's fair to say the California Supreme Court began to take off. We'll be talking during our discussion period about the why's of all this, but in passing let me observe that for the first time in the mid-thirties, California amended its Constitution to eliminate contested elections for appellate courts. And that had the effect, among other things, of providing justices with a longer period of tenure than was previously the case, and that perhaps had something to do with what happened.

In 1944, there came before the Court a case on the boundary between employment law and labor law. It was in the middle of the Second World War, and California shipyards were operating at peak capacity, but they needed more skilled workers, and workers from the South, many of them

black, flocked in to apply for those jobs. The problem was that the shipyards were under contracts with the skilled crafts unions. Those contracts contained closed-shop provisions requiring union membership as a condition of employment, and the crafts unions in those days did not admit Blacks to membership. But the unions couldn't be seen as impeding the war effort, so what the Boilermakers Union did was to establish an auxiliary local union to which black boilermakers could belong. They could pay their dues, their initiation fees. They would have no voice or vote in the affairs of the union or the election of officers. Black workers, represented in part by a lawyer named Thurgood Marshall, brought suit under a variety of theories. The case went to the California Supreme Court, and Chief Justice Gibson in a unanimous decision, in a case called *James v. Marinship*,¹⁸ rejected the union's argument that it was, after all, a private association which had the right to establish its own rules with respect to membership. The Court reached back into early common law doctrines of public utility, held that a labor union was in the nature of a public utility, and that, while it could have a closed shop, it couldn't have a closed union at the same time. Today, that proposition seems commonplace, but at the time it was quite revolutionary.

What we now call employment law, the law governing the individual employer–employee relationship, scarcely existed in the 1950s when I began to practice, but it was beginning to grow, at first through the common law and later through the courts. The centerpiece of the common law view of the employment relationship was the principle that employment is at will. This principle, in the absence of a labor union, empowers employers to determine terms and conditions of employment, subject only to the law of supply and demand. It is this principle which California courts came, in certain cases, to question. The first case to modify the at-will principle involved, ironically, a labor union as employer. The executive board of the Teamsters Union in San José fired the union's business agent, a man called Petermann, after he testified before a legislative committee in Sacramento, allegedly because the union disagreed with his testimony. Petermann sued for what we would now call wrongful termination. The trial court dismissed the suit, relying upon the principle of at-will employment, but the Court of Appeal for the

¹⁸ 25 Cal. 2d 721 (1944).

Second District, in a 1959 opinion by Justice Fox, reversed.¹⁹ The reasoning of the Court of Appeal was that to fire an employee for giving testimony the employer does not like is contrary to public policy and for that reason unlawful, giving rise to a cause of action and damages in tort. *Petermann* was the source nationwide for what was to become known as the public policy exception to the at-will rule. Two decades later, in a case called *Tameny v. Atlantic Richfield*, Justice Tobriner wrote an opinion for the California Supreme Court, widely cited and followed, confirming and at the same time broadening the public policy exception.²⁰

In 1972, by initiative, the California Constitution was amended to add the word “privacy” to article I, section 1, which previously had protected the right to pursue and obtain happiness and safety. The 1972 amendment said we have a constitutional right to pursue and obtain privacy as well. That amendment has had profound implications for employment law because it has provided a basis for the Court over time to recognize rights of privacy in the workplace, not only against governmental intrusions upon privacy but, in accordance with the ballot arguments which appeared at the time, against intrusions by private employers as well. About the same time as the Supreme Court decided *Tameny*, it decided also another important labor case, *Gay Law Students Assn. v. Pacific Tel & Tel*.²¹ The telephone company had the policy that it would not employ “manifest homosexuals” in customer-contact positions. This was before the California Fair Employment and Housing Act was amended to protect against discrimination on the basis of sexual orientation, and the Court, in an opinion by Justice Tobriner, acknowledged that the FEHA’s ban on sex discrimination did not apply. Nonetheless, the Court found the telephone company’s policy unlawful on two grounds. One was an extension of the public utility concept that was the foundation to the Court’s opinion in *James v. Marinship*. The other was a Labor Code prohibition on *political* discrimination that I mentioned. What did political discrimination have to do with manifest homosexuals? Well, the Court reasoned, at that time, back in 1959, for a gay or lesbian person to come out of the closet to become a manifest homosexual, whatever that meant, was often a political act, and therefore the

¹⁹ *Petermann v. International Brotherhood of Teamsters* 174 Cal. App. 2d 184 (1959).

²⁰ 27 Cal. 3d 167 (1980).

²¹ 24 Cal. 3d 458 (1979).

prohibition against discrimination against employees for political action or activities was applicable. The FEHA has since been amended to apply that principle more broadly, but at the time the Court's opinion stood as the first judicial protection, I believe, for homosexuality in the country.

The Court of Appeal for the First District decided *Pugh v. See's Candies*,²² which involved the application of contract principles to the at-will rule. More specifically, it considered whether an employee whose employment was presumptively at will might overcome that presumption on the basis of a promise, express or implied, of continued employment. Our Court held that Pugh was entitled to proceed to trial on his allegation that the circumstances in that case gave rise to an implied promise on the part of the employer not to terminate him without cause. Six years later, in *Foley v. Interactive Data*, the California Supreme Court confirmed what had become known as the *Pugh* exception to the at-will principle.²³ It also reconfirmed the public policy exception, although holding that it had no application to the facts of that case, and it limited the application of what had become a third exception to the at-will rule — based on the Covenant of Good Faith and Fair Dealing — holding that the violation of the covenant did not give rise to an action in tort. Despite these qualifications in the *Foley* opinion, California common law remained, and still remains, probably the most favorable in the nation to claims by employees of job security, notwithstanding the at-will rule.

Finally, let me briefly mention the California Fair Employment and Housing Act. Here we have a pattern of innovation which is a joint product of action and collaboration by the legislative and judicial branches. I teach employment discrimination law, and I tell my students that if they represent a plaintiff in an employment discrimination case and they only talk about Title VII without mentioning the FEHA, they're holding themselves open to a malpractice charge. The FEHA is broader in coverage, it provides more substantial remedies, it's broader in its definition of discrimination. Its substantive protection in certain areas, especially age and disability, go well beyond the federal statute. And the California Supreme Court has applied the FEHA with sensitivity to the intended role it plays as a supplement to federally protected rights and generally has not hesitated

²² 116 Cal. App. 3d 311 (1981).

²³ 47 Cal. 3d 654 (1988).

to depart from federal court interpretations of Title VII, not only where the language differs, but more broadly on the basis of differences in assessment of how the statute should be interpreted in order to achieve the goals of the Legislature. The Court has been in constant communication with the Legislature with respect to interpretation of the FEHA. The Legislature has responded to court decisions by modifying the FEHA in several respects to provide broader coverage or to give greater protection against discrimination. The result of this continuing partnership between the courts and the Legislature has been the development of an independent state jurisprudence of employment discrimination that I think, again, it is fair to say, is the most advanced in the nation. I have some thoughts about judicial innovation and how we go about explaining it, but I propose to leave that for our discussion period.

WRITTEN REMARKS BY JUSTICE GRODIN:

1. The Relationship Between Innovation and Influence: The Statistics

Jake Dear and Edward Jessen have presented a fascinating array of data which tends to show the extent of influence that California Supreme Court decisions have had on courts of other states by examining the LexisNexis characterization of a case being “followed.” While I have some doubts concerning both the reliability of the characterizations and the inferences which can be drawn, I put those doubts aside in the same spirit that one might put aside one’s doubts concerning the reliability or significance of baseball data. It’s interesting, and possibly it can lead to some insights.

I notice from the data that the cases which appear to have had the greatest impact in other states are clustered predominantly in the two decades from 1960 to 1980. For example, of the cases in the study spanning a sixty-six-year period from 1940 to 2005, I notice that two-thirds of the twenty-four cases that might be called the “blockbuster” cases — those which I have defined, somewhat arbitrarily, as having been followed from six to twenty times — were decided during that two-decade period. Only two of these cases were decided before 1960, suggesting that the cluster is not attributable to the amount of time which has elapsed since the case was decided. If one includes the cases which have been cited five or more times, the percentage decided during that two-decade period declines somewhat,

but is still disproportionately high (well over 50 percent) compared to the sixty-six-year period covered by the study.

I notice also that authorship of the blockbuster cases is predominantly concentrated in two justices. Attached as the Table of Blockbuster Cases [see p. 24] is a list of the twenty-four cases, accompanied by a brief description and the name of the justice who wrote the opinion. If each time a case is followed in another state a “run batted in” is scored, then two players — Justice Tobriner and Chief Justice Traynor — were responsible for two-thirds of the 150 RBI’s hit during the peak 1960–1980 period, Tobriner being first with 74 RBI’s and Traynor being second with 25.²⁴ I have not done this analysis for cases cited five or more times, but it might be useful for someone to do so.

This data suggests to me (though I concede it is open to other interpretations) that there was something unusual about the 1960s and 1970s, and about these two justices, in relation to the influence of California Supreme Court opinions on the opinions of other state courts. I think everyone would agree that Justices Traynor and Tobriner were outstanding judges for any period, but I suggest their batting averages were aided by the times. The period of the ’60s and ’70s was a turbulent period in our society. It was also a turbulent period in the development of certain areas of the law. The common law of torts and contracts was in a state of flux. In torts, the largely circular concept of “duty” was giving way to the dominance of “foreseeability” as the touchstone of liability, and in contracts the special problems posed by inequality of bargaining power and the lack of opportunity for bargaining in certain contexts was being recognized through the concept of “contracts of adhesion.” Legal commentators, the public, and ultimately and inevitably the courts perceived a need to protect consumers, make accident victims whole, and in general to protect individuals against what

²⁴ It is not my purpose here to rank the importance of judges, or assess their performance; indeed, I doubt the statistics are at all useful for those purposes. For those who are interested in numbers I am informed, I believe reliably, that if one were to look at all cases decided over the sixty-six-year period covered by the study which have been followed 3 or more times, one would find the following: In terms of the number of cases, Mosk would be first with 27, followed by Tobriner (16), Lucas (14) and Traynor (12). In terms of the numbers of followings (RBI’s), Tobriner would be first with 109, followed by Mosk (107), Lucas (69) and Traynor (61). It would be interesting to see when these cases were decided.

was widely viewed as the sometimes arbitrary power wielded by the public and private institutions of our society. The '60s and '70s were also a period in which the U.S. Supreme Court, in company with state courts around the nation, developed additional procedural protections for criminal defendants, relying upon either the federal constitution or (in the case of state courts) upon state constitutions. The California Supreme Court played a leading role in those developments — a fact I suspect could be demonstrated through examination of the leading casebooks of the period. And, within the California Supreme Court, Chief Justice Traynor and Justice Tobriner, along with Justice Mosk, were the predominant intellectual leaders during that period. This in itself may account for some of the respect their decisions received, but it must also be acknowledged that they there were playing, one might say, to a receptive audience.

Since the 1970s there has not been as much expansion of doctrine, either in the common law area or in the area of criminal procedure. Indeed, common law cases have gradually given way to cases involving interpretation of statutes, and such cases are less likely to produce followings by other state courts.²⁵ Criminal procedure has been largely federalized, and reliance upon the state constitution has been restricted in California by publicly supported constitutional initiatives. The opportunities for blockbuster influence may not be as great. I would not suggest that the only way a judge can have influence on other state courts is to write something innovative that pushes the law ahead in new directions. That proposition is belied by the many followings of California decisions that place limitations on the applicability of new doctrines, or which simply elaborate existing law in a way that other state courts find instructive. But it is apparently less likely that such decisions will produce the kind of effect that is found in some of the earlier cases. My hypothesis, tentatively offered, is that the cases most likely to produce multiple followings are cases which point the law in new directions.

2. *Beyond the Statistics*

The statistical analysis of “followings” does not fully capture either the innovative contributions of the California courts or the extent of their

²⁵ I concede, however, that there are still a good number of common law tort cases which produce followings; perhaps this is a ripe area for further analysis.

influence, as the proponents of the analysis explicitly recognize. For more complete understanding of the extent to which California courts have been a “laboratory of legal innovation,” it is necessary to look beyond the statistics to groups of cases involving particular issues or particular subject areas, and also, as Professor Scheiber demonstrates, to the interplay between the courts and the state legislature, as partners in innovation. For example:

a. Independent state constitutional analysis. As shown in the excellent papers of both Professors Williams and Scheiber, California courts were in the vanguard of the movement toward recognizing the independent significance of state constitutions, and the potential for positing decisions on independent state grounds. And it is common for courts to look to the decisions of other states premised on identical or similar constitutional provisions. Because the language of state constitutions differs, however, an interpretation which could be characterized as “innovative” may not show up in the “followed” column. One might look instead to a more qualitative analysis — casebooks, for example, or scholarly articles.

b. Federal constitutional analysis. State courts are frequently called upon to interpret the federal constitution as it applies to the case before them, and in the absence of authoritative U.S. Supreme Court guidance their interpretations can be said to be part of the “laboratory” of judicial innovation. Again, as shown in the Scheiber and Williams papers, California decisions often foreshadowed developments in the U.S. Supreme Court, but that sort of influence will not appear from examination of the decisions by other state courts.

c. Employment Law (see oral remarks).

3. *Some General Observations*

Whether a particular state’s legal culture has produced “innovation” is of necessity a rather subjective inquiry, and any attempt to measure the extent of innovation, much less to produce meaningful comparisons between one state and another, presents a daunting challenge. With respect to the courts, no doubt numerical analysis can be useful, as a starting point, but it needs to be supplemented with an understanding and evaluation of the context and the numerous variables that may affect the numbers. It would be interesting, for example, to examine and correlate the numbers with the subject

matter of the cases — a task which I have attempted in only a most superficial and limited way. My suggestion that the judicial process has moved away from common law adjudication needs to be tested, as does my suggestion that this movement has something to do with the extent of reliance by courts of other states. In any event, it seems clear that meaningful discussion of a state's innovations in the law must take into account the legislatures as well as the courts. I leave this work to others more qualified than I.

TABLE OF BLOCKBUSTER CASES

(prepared by Joseph Grodin)

A list of the twenty-four cases decided by the California Supreme Court between 1940 and 2005 that (according to LexisNexis) have been “followed” more than five times by other state courts, arranged by opinion authors, in order of number of cases per author. The number preceding each case indicates the number of times it has been followed.

JUSTICE MATHEW O. TOBRINER

- (20) *Dillon v. Legg*, 68 Cal. 2d 726 (1968) (allowing recovery for negligent infliction of foreseeable emotional distress)
- (17) *Tarasoff v. Regents of U.C.*, 17 Cal. 3d 425 (1976) (psychiatrist has duty to protect potential victim against threats of serious violence by patient)
- (12) *Tunkl v. Board of Regents*, 60 Cal. 2d 92 (1963) (attempted exculpatory release provision in standard form used for admission to hospital held invalid)
- (9) *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413 (1978) (Plaintiff in design defect case need not prove product was unreasonably dangerous for intended use, but only that it was dangerous for reasonably foreseeable use).
- (6) *In re Marriage of Brown*, 15 Cal. 3d 838 (1976) (husband's non-vested pension rights constitutes community property subject to division upon dissolution of marriage)
- (6) *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263 (1966) (clause in insurance policy limiting duty to defend must be interpreted according to reasonable expectations of insured)

CHIEF JUSTICE ROGER TRAYNOR

- (10) *Seely v. White Motor Co.*, 53 Cal. 2d 9 (1965) (economic loss recoverable for breach of warranty by manufacturer, but not through doctrine of strict product liability)
- (8) *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57 (1963) (manufacturer of defective product strictly liable without regard to warranty)
- (7) *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601 (1962) (res judicata principles preclude plaintiffs from suing insurance company for loss of property plaintiffs had been convicted of stealing)
- (6) *Bernhard v. Bank of America*, 19 Cal. 2d 807 (1942) (analyzing the elements of res judicata)
- (6) *Pridonoff v. Balokovich*, 36 Cal. 2d 788 (1951) (plaintiff in libel action of author of libelous newspaper article may not recover general damages absent request for modification or retraction)

JUSTICE STANLEY MOSK

- (10) *People v. Wheeler*, 22 Cal. 3d 258 (1978) (prohibiting use of peremptory challenges to exclude prospective jurors on the basis of race)
- (8) *Mozzetti v. Superior Court*, 4 Cal. 3d 699 (1971) (police inventory of contents of vehicle prior to statutorily authorized impoundment constituted unreasonable search in violation of Fourth Amendment)
- (6) *Cobbs v. Grant*, 8 Cal. 3d 229 (1972) (Prior to surgery, physician has duty to disclose available choices and dangers)

CHIEF JUSTICE MALCOLM LUCAS

- (15) *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988) (affirming, applying, and limiting several doctrinal exceptions to principle of at-will employment)
- (7) *Lucido v. Superior Court*, 51 Cal. 3d 335 (1990) (Res judicata principles did not bar the People from prosecuting defendant for indecent exposure despite justice court's finding at hearing on revocation of probation that there was insufficient evidence of that crime)

CHIEF JUSTICE DONALD WRIGHT

- (13) *Ray v. Alad*, 19 Cal. 3d 22 (1977) (purchaser of manufacturing business held strictly liable for defective ladder produced by its predecessor)

CHIEF JUSTICE RONALD GEORGE

- (7) *In re Alvernaz*, 2 Cal. 4th 924 (1992) (overturning conviction for ineffective assistance of counsel)
- (6) *Temple Community Hospital v. Superior Ct.*, 20 Cal. 4th 464 (1999) (no tort action for spoliation by person not a party)

JUSTICE JOYCE KENNARD

- (8) *Cedars-Sinai Med. Ctr. v. Superior Ct.*, 18 Cal. 4th 1 (1998) (no tort action for intentional spoliation of evidence committed by a party, where victim knows or should have known of spoliation before trial or decision on the merits)

JUSTICE RAY PETERS

- (6) *Rowland v. Christian*, 69 Cal. 2d 108 (1968) (discussing parameters of liability of property owner for injury caused by dangerous condition on premises)

JUSTICE RAYMOND SULLIVAN

- (6) *Gruenberg v. Aetna Ins. Co.* 9 Cal. 3d 566 (1973) (insurance company liable in tort for breach of covenant of good faith and fair dealing)

CHIEF JUSTICE PHIL GIBSON

- (6) *Lucas v. Hamm*, 56 Cal. 2d 583 (1961) (lawyer who negligently drafted will liable to intended beneficiary)

JUSTICE MARCUS KAUFMAN

- (6) *People v. Bloom*, 48 Cal. 3d 1194 (1989) (criminal defendant who chose to represent himself could not complain of ineffective counsel)

ELWOOD LUI: Thank you, Justice Grodin. Our next speaker is Professor Robert Williams, a distinguished professor of law at Rutgers University School of Law in Camden, New Jersey. He received his Bachelor's degree from Florida State University in 1967 and his Juris Doctorate from the University of Florida College of Law in 1969. He's practiced law with Legal Services in Florida and has represented clients before the 1978 Constitutional Revision Commission. Professor Williams received an LLM from New York University School of Law in 1971 and an LLM from Columbia

Law School in 1980. He's the author of *State Constitutional Law: Cases and Materials*, published by Lexis Law Publishers (2006) and *The New Jersey State Constitution: A Reference Guide*, published by Rutgers University in 1997, and also is an author of numerous journal articles about state constitutional law and legislation. He's also our one visitor who is going to critique our observations in California about the leadership we have in state courts' opinions. Professor Williams.

ROBERT F. WILLIAMS: Thank you very much, Justice Lui. I am honored to be here as a participant on a panel that contains people of such distinction. I'm humbled to be here, and I appreciate very much the invitation. I want to say a special thanks to Selma Smith who, over my travels in the last six or eight weeks, has worked tirelessly to keep me in the loop and, I think, literally provided a homing beam for me to arrive here late last night and make it to this room today, so I want to thank you on behalf of myself and, I think probably, all the rest of the panelists.



I've taught law in New Jersey for twenty-seven years, and I've spent a lot of that time as, frankly, a partisan of the New Jersey Supreme Court, so I feel today a little bit like a college football coach appearing at a postgame press conference after a sound beating, but I'm going to follow the approach of those college football coaches by extolling the virtues of the victor but making one or two comments about the game, and, of course, I'm referring to the data that were summarized earlier in the program. I'm wondering if there's a chance that these data might have a little "But, see . . ." with the New Jersey data that says, "Well, we didn't have a real supreme court at all between 1940 and 1950. We didn't really have a supreme court that operated in New Jersey until 1950," but I'll talk to you about that in detail later.

But I do want to talk about the California Supreme Court in the context of what we've come to call the New Judicial Federalism.²⁶ I think a lot of you

²⁶ The broad outlines and features of the New Judicial Federalism are outlined in a wide range of legal literature. For example: *Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Randall T. Shepard, *The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U.L. REV. 421 (1996);

are aware of this phenomenon. I want to highlight eight or nine key points in the development of this phenomenon over the last thirty years or so. By the New Judicial Federalism, we mean the realization by state courts that they may look at the state constitutional declaration of rights or bill of rights and interpret it to provide more rights even than those provided under the United States Constitution by the U.S. Supreme Court.²⁷ In saying this, I don't mean that the New Judicial Federalism always involves state courts going beyond or being more protective than what the United States Supreme Court says about federal constitutional rights. What I really mean to say is that state courts recognize the potential for such an outcome, that lawyers in those states recognize the viability of such arguments, such as that a search-and-seizure case might be won under the state constitution when the same argument has already lost in the United States Supreme Court.

Thirty years ago, this was kind of an unusual concept, and, depending on the nature of the practice of the lawyers in this room, it might even sound unusual to you now, but it's been an extremely important development in our federal legal system. It's interesting because this sort of a notion that you could have rights under a state constitutional interpretation that might be more protective, oftentimes more liberal but not always, than the federal minimum national standard — you could never make that argument except in a federal country like ours. So, this kind of argument is beginning to be made in eight or ten other federal countries out there that have states or the equivalent of states which have their own constitutions. I was skimming a new article for our law journal the other day at my vacation cottage (somehow, they found me there — I'm on sabbatical; that's why I've been traveling around — please don't tell the taxpayers of New Jersey). I read a new article about the newly emerging state constitutions in the Sudan — I'm no expert on the Sudan; I think a lot of us think of it as a place where a genocide is going on and what have you — there are state

G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997); Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211 (2003) and Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U.L. REV. xiii (1996).

²⁷ "Over the years, state judges in numerous cases have interpreted their state constitutional rights provisions to provide more protection than the national minimum standard guaranteed by the Federal Constitution." Williams, *Third Stage*, *supra* at 211; See also Williams, *Looking Back*, *supra*.

constitutions being drafted there — this was an article written by a South African professor — that some of these newly drafted state constitutions actually outlaw the horrendous practice of female genital mutilation. They can't get it into the national constitution of the Sudan, but some pockets of rights protection are developing there. It remains to be seen if they'll be enforced or not, but back to Justice Grodin's point, if I was a lawyer in one of those states in the Sudan and I failed to make an argument based on the new state constitution in the Sudan, I think I'd be committing malpractice.

Back to the U.S. context, the central feature of this phenomenon of the New Judicial Federalism was probably an article written by Justice William J. Brennan of New Jersey [laughter] in the *Harvard Law Review* in 1977,²⁸ a few years before I started teaching these things, and as I've said in my outline and materials [*included here in their entirety as footnotes to Professor Williams' oral remarks*], the first case that Justice Brennan relied on was, of course, a California case, the famous *People v. Disbrow*. I'm not going to read the quote, except a line from it — here's 1976, the California Supreme Court saying, "We pause . . . to reaffirm the independent nature of the California Constitution and our own responsibility to separately define and protect the rights of California citizens, despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution."²⁹ Now, we have to be careful — this sounds very odd to people — no one would say the California Supreme Court could interpret the California Constitution to provide *fewer* rights than are required by the federal constitution. As an academic matter in fact, you could, but you couldn't enforce it. What we're talking about is *more* rights, *more* protection, above the national minimum standard, and here's the California Supreme Court in 1976, and it's not the first time it said it — but I emphasize it here because it was the centerpiece of Justice Brennan's famous article, which may be the most important development in the New Judicial Federalism.³⁰ For a United States Supreme

²⁸ *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498–99 (1977).

²⁹ 16 Cal. 3d 101 (1976), 114–15. *See also*, 90 HARV. L. REV. at 500, *citing* *People v. Brisendine*, 531 P.2d 1099 (Cal. 1975).

³⁰ Justice Brennan's article was referred to as the "Magna Carta of state constitutional law." Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

Court justice to write this in the *Harvard Law Review* is a very big deal, once again relying on the California Supreme Court. That decision, *People v. Disbrow*, it seems to me was an intentional attempt at teaching the bar, the rest of the judiciary, possibly the citizens of California, and clearly it taught people outside of California. So, it was very influential, helped along a little bit by Justice Brennan there. In my outline, I follow a little bit of the influence of Justice Brennan's article,³¹ but I'm not going to bother with that now, except to go outside my brief, too, to say that Brennan actually said toward the end of his life that he thought this phenomenon of the New Judicial Federalism was the "most important development in constitutional jurisprudence of our time." That's a big idea, coming from him.³²

Now, back to my point that you could only have this phenomenon in a federal system where you have a national government with a national constitution and governments within the national government also operating under their state constitutions.³³ This is what leads to the notion that you can have these laboratories of federalism, these bubbling experiments going on out there, if that's not a disrespectful way to describe your Court, cooking away, attempting different solutions to legal and societal problems.³⁴ You're not going to see that image in France or England, or any of the other countries that are unitary, that don't have states that have

³¹ Justice Brennan's article is among the most often cited law reviews. Ann Lousin, *Justice Brennan: A Tribute to a Federal Judge who Believes in States' Rights*, 20 J. MARSHALL L. REV. 1, 2n.3 (1986).

³² Justice Brennan updated his views in 1986, initially relying once again on a California case. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) citing *Robins v. Pruneyard*, 23 Cal. 3d 899 (1979), *aff'd*, 447 U.S. 74 (1980).

³³ For example, *Pruneyard* upheld by a 9–0 vote the California Supreme Court's decision to recognize free speech and assembly rights in privately-owned shopping malls. Justice Rehnquist noted that the federal constitution did not "limit the authority of the state to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.*, at 81. For this proposition, Justice Rehnquist cited *another* California case, *Cooper v. California*, 386 U.S. 58, 62 (1967).

Although expressing a truism, Justice Rehnquist's statement for the majority placed the United States Supreme Court's imprimatur on the New Judicial Federalism.

³⁴ The California Supreme Court had an early record of concern with state constitutional rights. See Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 HAST. CONST. L.Q. 141 (2004). California was also an

sovereign authority and their own constitutions. The “laboratory of experiment” metaphor goes back, most people say, to Justice Brandeis in the 1930s, dissenting in a case.³⁵ It’s interesting, there’s even Justice Holmes, eleven years earlier, who talked about “social experiments . . . in the insulated chambers” of the states.³⁶ It makes me think a little bit of those old Frankenstein movies late at night, but let’s hope the results are better. There are a few nay-saying scholars who challenge this laboratory metaphor; I’m not going to dwell on what they say because I don’t agree with it.³⁷ They have a point. This isn’t science; you’re not required to adopt the outcome of favorable experiments, and all that. Oh, yeah, yeah, but lay off. Political scientists call it “the diffusion of innovation.” That’s not a bad term, and they study how these things move through the country. Some of them look specifically at judicial innovations. I do a lot of work with political scientists. I love them, but I don’t like the way they only look at outcomes. They don’t understand the nature of legal argument and the nature of following precedent. We know that the hard cases sometimes can go one way or the other despite the precedents, but they tend to only look at outcomes without thinking about this. If people are interested, I’ve cited some of that material in my outline.³⁸

early leader in the New Judicial Federalism. JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 68, 118–30 (1989).

³⁵ Justice Brandeis made the reference to states as “laboratories” in 1932. “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³⁶ *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting, discussing “social experiments . . . in the insulated chambers afforded by the several States”).

³⁷ James A. Gardner, *The “States-As-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U.L. REV. 475 (1996).

³⁸ Political scientists refer to the adoption of successful measures tested in the “laboratories” of other states as “diffusion of innovation.” See Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174 (1973); Symposium, *Policy Diffusion in a Federal System*, PUBLIUS, Fall 1985 (Robert L. Savage ed.); Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969). There is also a specialized literature on diffusion of *judicial* innovations among the states. See James N. G. Cauthen, *Judicial Innovation under State Constitutions: and Internal Determinants Investigation*, 21 AM. REV. POL. 19 (spring, 2000).

Let me point to some of these highpoints in what I think are the contributions of California,³⁹ and not just the courts, to the advent of this “most important development in constitutional jurisprudence of our time.” In 1972, all of you know, the case *People v. Anderson* declared the death penalty in this state unconstitutional, based on the California clause banning “cruel *or* unusual” punishment,⁴⁰ not “cruel *and* unusual” punishment, the way the Eighth Amendment to the federal constitution reads. That case had a tremendous stimulating effect — it also had a backlash that you all are aware of — a tremendous educational effect on the legal system in this country. It, first, underlined the fact that state constitutional rights clauses often read differently from the federal clause that all of us are so much more familiar with,⁴¹ that we’re required to study in law school — nobody’s required to take my course on state constitutional law; I never understood that, but I can’t get our faculty to make it required. But what could be a more convincing lawyers’ and judges’ argument than, “Hey, the text just reads differently.” It doesn’t mean everybody agreed with the outcome of *People v. Anderson*, but in federal law you had to show that the punishment was not only cruel but it was also unusual. In California, you didn’t have to do that. So, this began the attention to differing texts in state constitutional rights adjudication.

It also alerted people to the adequate and independent state ground doctrine, once again that you would never have except in a federal system, so that when a state court decision is based on a state ground that’s independent of federal law, the state case is not reviewable by the United States Supreme Court. *People v. Anderson* was a *cert-denied* in the United States Supreme Court, and as I’ve quoted in my outline from a book by a guy that nobody heard of at the time, Bob Woodward, *The Brethren*, Justice Douglas, a couple of days after *People v. Anderson*, dismissed a hundred pending death penalty cases in the

³⁹ Not only did the Westward Movement carry innovations toward the West Coast, but after the frontier was settled, in the words of Frederick Jackson Turner, the Eastern states felt the “stir in the air raised by the Western winds of Jacksonian democracy.” FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* 1982 (1920). The same can be said now of the New Judicial Federalism.

⁴⁰ 6 Cal. 3d 628 (1972).

⁴¹ This approach underscored the importance of textual distinctions between the state and federal constitutions. Analysis of textual distinctions is one of the central features of the New Judicial Federalism.

United States Supreme Court, [saying], there's no death penalty in California anymore; these cases are out.⁴² And the Supreme Court could say nothing about it. This was a California-based decision. I've indicated in my outline that I think it was the beginning of the "rights protective" version of the adequate and independent state ground doctrine.⁴³ The adequate and independent state ground doctrine *used* to stand for the proposition that a criminal — it went beyond criminal law, but in the criminal context — a criminal defendant had not properly raised a federal constitutional claim — there was a state rule that said you had to raise it, and that was an adequate and independent state ground.⁴⁴ People were executed in this country based on that. If I may say, the liberals and the criminal defense lawyers discovered this doctrine, turned it around, and said, "Hey, I *won* my case in the state court. It's based on state law. The Supreme Court has no business hearing it." And the Supreme Court has been pretty careful to honor that over the years. In my outline, I go through this business, but I'm not going to cover it here.⁴⁵ It's something that's — later, in

⁴² "[T]he California Supreme Court decided that the state's death penalty violated the California constitution's prohibition against 'cruel or unusual punishment.' Douglas's chambers got advance notice of the decision, and within three days, Douglas had distributed a *per curiam* draft dismissing the one hundred California cases that were awaiting the Court's ruling." BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 212 (1979).

⁴³ *People v. Anderson* stimulated academic interest in, and development of the adequate and independent state ground doctrine as a "rights protective" doctrine. *See, e.g.*, Scott H. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972); Jerome B. Falk, Jr., *Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Donald R. Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CAL. L. REV. 1262 (1972); Edward L. Barrett, Jr., Comment, *Anderson and the Judicial Function*, 45 S. CAL. L. REV. 739 (1972).

⁴⁴ Older, "rights depriving" approach. *See, e.g.*, *Williams v. State*, 88 S.E. 2d 376 (Ga. 1955), *cert. den.* 350 U.S. 950 (1956) (federal review denied, even for obvious federal constitutional violation of racial discrimination in state jury selection, where failure to raise pre-trial objection deemed an adequate and independent state ground). *See* STEPHEN L. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT* 198 (1970) and Walter Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1021 (1959).

⁴⁵ Earlier California cases had been vacated and remanded, without reaching the federal constitutional issue, where the state court opinion was unclear as to whether it was based on federal or state constitutional law. *Mental Hygiene Dept. v. Kirchner*, 380 U.S. 194, 196–97 (1965); *California v. Krivda*, 409 U.S. 33, 35 (1972).

the *Michigan v. Long* decision⁴⁶ — been sort of resolved in a way that’s a little easier to apply than it was in the earlier years.

I want to move on, to the next thing that happened with respect to this *People v. Anderson* decision. It was overruled by a constitutional

⁴⁶ In 1983 the United States Supreme Court resolved the procedural approach to the adequate and independent state ground doctrine in *Michigan v. Long*, 463 U.S. 1032 (1983):

(1) “If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”

463 U.S. 1032, 1041 (1983).

(2) “These are not cases in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather, they are cases in which a state court has upheld a citizen’s assertion of a right, finding the citizen to be protected under both federal and state law. The complaining party is an officer of the state itself, who asks us to rule that the state court interpreted federal rights too broadly and ‘overprotected’ the citizen.

Such cases should not be of inherent concern to this Court.”

463 U.S. 1032, 1067–68 (1983) (Stevens, J., dissenting).

(3) The impact of *Michigan v. Long*.

(a) A survey of over 500 decisions, from all 50 states, between the 1983 *Michigan v. Long* decision and the beginning of 1988, concluded that “few states have adopted a consistent, concise way of communicating the bases for their constitutional decisions.” Felicia A. Rosenfield, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 *FORDHAM L. REV.* 1041, 1068 (1988). For a similar conclusion many years later, see Mathew G. Simon, Note, *Revisiting Michigan v. Long After Twenty Years*, 66 *ALB. L. REV.* 969, 970 (2003).

(b) In *Arizona v. Evans*, 514 U.S. 1, 24 (1995), Justice Ginsburg dissented and joined Justice Stevens’ criticism of the *Michigan v. Long* approach:

The *Long* presumption, as I see it, impedes the States’ ability to serve as laboratories for testing solutions to novel legal problems. I would apply the opposite presumption and assume that Arizona’s Supreme Court has ruled for its own State and people, under its own constitutional recognition of individual security against unwarranted state intrusion.

Justice O’Conner explained her *Michigan v. Long* approach in Justice Sandra Day O’Conner, *Our Judicial Federalism*, 35 *CASE WEST. RES. L. REV.* 1, 5–9 (1984).

amendment.⁴⁷ I think everybody knows that. You can't do that in federal constitutional law, realistically — theoretically, you could. In state constitutional law, you can do that. This was the first example in California, in 1972, within nine months of the decision. That's been followed by a lot of states out there. You get these decisions by a state supreme court interpreting the state constitution above the national minimum — majority rule, that's not the way we think of constitutional rights in this country, but it is how state constitutional rights work. You've had a lot of amendments — some more in California, as well — and in other states doing this, so it's an important feature of state constitutional law that we've learned from California.⁴⁸

California began the school finance revolution — United States Supreme Court, hands-off — 1973, a Texas case, California hands-on, followed by New Jersey and a number of other states.⁴⁹ One of the most important ar-

⁴⁷ In 1972 the California voters approved an amendment “overruling” *People v. Anderson*. CAL. CONST. art. I, § 27. JOSEPH R. GRODIN, CALVIN R. MASSEY, AND RICHARD B. CUNNINGHAM, *THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE* 60–61 (1993).

⁴⁸ In 1974 the California constitution was amended to add article I § 24: “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” Grodin, *et al.*, *supra*, at 59.

The next year the California Supreme Court observed: “Of course this declaration of constitutional independence did not originate at that recent election; indeed, the voters were told the provision was a mere reaffirmation of existing law.” *People v. Brisendine*, 13 Cal. 3d 528 (1975). *See also* *People v. Norman*, 14 Cal. 3d 929 (1975); Robin B. Johansen, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 312 (1977).

A 1978 attempt in Florida to adopt a similar constitutional provision failed with the rejection of the entire package of proposals by the 1977–1978 Constitution Revision Commission. Patricia Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U.L. REV. 610, 612 (1978) (“The purpose of this beguilingly simple proposal was to breathe new life into the declaration of rights of the Florida Constitution. It was to remind the bench and the bar that federal constitutional rights are only minimum guarantees. They do not exhaust the possibilities for human freedom.”).

Rhode Island copied California's provision in 1986. R.I. CONST. art. I, § 24.

⁴⁹ In 1971, the California Supreme Court initiated the state constitutional school finance litigation revolution. *Serrano v. Priest*, 5 Cal. 3d 584 (1971) (*Serrano I*); *Serrano v. Priest*, 18 Cal. 3d 728 (1976) (*Serrano II*). Kenneth L. Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720, 743–48 (1972).

eas of state constitutional litigation — are you close to getting on your feet, Justice Lui? Okay, I want to just — I didn't want to, but I will conclude with this: *The People v. Wheeler* case, that Justice Werdegar mentioned, illustrates another issue about the experimental laboratories. Actually, that case, as progressive as it was,⁵⁰ and as important as it was to other states,⁵¹ it actually inhibited the United States Supreme Court from reaching this.⁵² In my out-

⁵⁰ In 1978 the California Supreme Court banned the use of racially-motivated peremptory challenges. *People v. Wheeler*, 22 Cal. 3d 258 (1978).

⁵¹ *Wheeler* was followed the next year in *Massachusetts v. Soares*, 387 N.E. 2d 499 (Mass. 1979): “We are especially aided in this endeavor by the California Supreme Court’s recent decision in *People v. Wheeler* . . . , which has broken much of the ground for us.” *Id.*, at 510n.12.

⁵² United States Supreme Court continued to defer to experiments in laboratories of the states. *Guillard v. Mississippi*, 464 U.S. 867 (1983):

For the third time this year, this Court has refused to review a case in which an all-white jury has sentenced a Negro defendant to death after the prosecution used peremptory challenges to remove all Negroes from the jury

I write today to address those of my colleagues who agree with me that the use of peremptory challenges in these cases presents important constitutional questions, but believe that this Court should postpone consideration of the issue until more State Supreme Courts and federal circuits have experimented with substantive and procedural solutions to the problem

When Justice Brandeis originally analogized the States to laboratories in need of freedom to experiment, he was dissenting from a decision by the Court applying a now-discredited interpretation of the Due Process Clause to strike down an Oklahoma statute regulating the sale and distribution of ice. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–311 (1932). As Justice Brandeis recognized, an overly protective view of substantive due process unnecessarily stifles public welfare legislation at the state level. Since then, however, the power of the States-as-laboratories metaphor has propelled Justice Brandeis’ concept far beyond the sphere of social and economic regulation. Now we find the metaphor employed to justify this Court’s abstention from reaching an important issue involving the rights of individual defendants under the Federal Constitution.

Even though *Swain v. Alabama* has been roundly and regularly criticized by commentators, see sources cited in *McCray v. New York*, *supra*, at 964–965, n. 1 (MARSHALL, J., dissenting), in the 18 years since *Swain* was decided only two State Supreme Courts have interpreted their State Constitutions to provide criminal defendants greater protection against discriminatory use of peremptory challenges. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979).

line, I quote from Justice Marshall, dissenting, saying, you're experimenting with people's lives. The Supreme Court said, "Let's let the states work on this a little bit." Justice Marshall goes, "People are being executed," you know. And finally, in *Batson* the Supreme Court did follow the *Wheeler* decision.⁵³ I suppose I'll close by saying maybe the people at *Shepard's* should have another signal or — let me put it this way, it would be unusual to go to *Shepard's* and see a state supreme court decision and to look there and see a little "f" and the cite — this is a state court decision — is the United States Supreme Court. Maybe some other states other than California, and I hope we can say it in New Jersey, but I can't prove it yet. Thank you.

ELWOOD LUI: Professor Williams, thank you.

Our next speaker is Professor Gerald Uelmen, who is professor of law at Santa Clara University School of Law, where he served as dean from 1986 to 1994. He is also currently the executive director of the California Commission on the Fair Administration of Justice, established by the California Legislature to examine wrongful convictions in California and to propose reforms to improve the fairness and accuracy of our criminal justice system. He is a past president of the California Academy of Appellate Lawyers and of California Attorneys for Criminal Justice. Since 1986, he has authored an annual review of the work of the California Supreme Court, published each year in the *California Lawyer* magazine, which Justice Werdegar may comment about if she likes.

KATHRYN WERDEGAR: About his review? I wouldn't say a word. [general laughter]

ELWOOD LUI: He's also been an active practitioner in criminal cases, having served as counsel to Daniel Ellsberg, Christian Brando, and O. J. Simpson. This year, Professor Uelmen was named one of the top 100 lawyers in California by the *Daily Journal*. Professor Uelmen.

Contrary to my colleagues' assumptions, these two recent decisions by the California and Massachusetts high courts have not inspired other State Supreme Courts to deviate from the rule of Swain and experiment with new remedies for peremptory challenge misuse.

Id., at 867–70 (Marshall, J., dissenting).

⁵³ In 1986, the United States Supreme Court finally banned racially motivated peremptory challenges, *Batson v. Kentucky*, 476 U.S. 79 (1986).

GERALD UELMEN: Thank you. I'm really honored to join this distinguished panel, but I'm especially pleased to have an opportunity to congratulate Jake Dear and Ed Jessen on just a marvelous piece of research. This paper is fascinating. It breaks new ground. It will be widely cited. You know, counting how many [times] we've been cited is a favored pastime of law professors. We don't have Emmys or Oscars, but writing one of the most cited law reviews is a mark of great distinction for law professors. In an effort to confound this competition, I conspired with the editors of the *Brigham Young University Law Review* to publish an article in their symposium on legal humor, which we entitled, "*Id.*" The title of the article was I-D-period, in italics, and then we put in a footnote that this article can be cited with no further reference to the author or the law review, so I can now claim that I am the author of the most cited law review article in history. At last count, my article has been cited sixteen million times. [general laughter]



Despite its limitations, counting up citations may be the only objective measure that we have to count up the influence of a particular court. This may be the only game in town. Back in 1936, one of the pioneer researchers of judicial influence, Professor Rodney Mott, proposed five measures of the influence of state supreme courts. He said, well, we should look at the esteem in which these courts are held by law professors; we should look at how many of their opinions are used in law school casebooks; we should count up citations by other state courts; and we should look at the extent to which the decisions are cited or upheld by the United States Supreme Court. He also had a factor he called "prestige ratings" which I won't go into.

But law professors represent a pool of abysmal ignorance about state high courts. Everyone studies and salivates over every nuance of United States Supreme Court decisions, but scholars like Bob Williams are a rather rare breed in the academy. I think if we were to survey law professors as to the degree of esteem in which they hold any particular state supreme court, we would get a pretty uninformed set of opinions.

Casebooks: If that were the measure, we would have to say that the most influential decision ever written was *Pennoyer v. Neff*,⁵⁴ [laughter] and just as often as not, casebook editors use bad cases to illustrate their points. Just last week, my poor Evidence students were all required to read a case in George Fisher's evidence casebook of an old decision from the Supreme Court of Pennsylvania in which the Court explained that the past sexual conduct of women was relevant in assessing their credibility but not the past sexual conduct of men because, the opinion explained, many very distinguished men had rather adventurous sex lives.

Now, when we look at what happens in the U.S. Supreme Court, I find very rarely does the Supreme Court ever even cite the decision of a state court. In my recent assessment of the ten years of the George Court for *California Lawyer* magazine, I took a look at how the George Court has fared in the U.S. Supreme Court, and I was kind of surprised. The most remarkable aspect of U.S. Supreme Court review of state supreme court decisions is how little there is. During the Warren Court era, the U.S. Supreme Court reviewed an average of twenty-nine state supreme court decisions each term. Under the Rehnquist Court, the average fell to fifteen per term, so U.S. Supreme Court scrutiny of state supreme courts has declined across the board, and during the last ten years the high court has directly reviewed only two judgments of the California Supreme Court. One was affirmed, one was reversed. More often, California Supreme Court precedents are scrutinized by the U.S. Supreme Court in the course of reviewing judgments of lower courts or of federal circuit court rulings. Lots of California death penalty judgments get reviewed, but usually only after [Ninth Circuit Court Judge] Steve Reinhardt has granted a federal writ of habeas corpus. [laughter] And then, of course, the judgment of the state court is reviewed with a greatly enhanced level of deference.

Next week, the United States Supreme Court is reviewing the California Supreme Court decision in *People v. Black*,⁵⁵ but they're not reviewing *People v. Black*. The decision that will, I think, be reversed will be the unpublished decision of the California Court of Appeal in *U.S.*

⁵⁴ 95 U.S. 714 (1878).

⁵⁵ 35 Cal. 4th 1238 (2005).

v. Cunningham,⁵⁶ which followed *People v. Black*, so it wouldn't even be recorded as a reversal of *Black*. Incidentally, I looked at whether *Black*, which I labeled as one of the two worst decisions of the California Supreme Court in the last ten years, would qualify as a decision that has been followed by the high courts of other states, and lo and behold I discovered that the supreme courts in New Mexico and Hawaii actually followed *Black*, which suggests that the influence of the California Supreme Court may occasionally be a perverse influence, leading other courts astray. *Black*, incidentally, was criticized by six other state supreme courts, and it might be interesting to count up all of the state supreme court decisions that have been questioned or criticized by other state supreme courts. I would not be surprised to find that, when you count it all up, the same states that have the most decisions followed by other courts are precisely the same states that have the most decisions questioned or criticized by other courts. In any event, I think how a court fares in the U.S. Supreme Court today would be a very skewed measure of any court's influence, so like I say, I think this is probably the only game in town.

I was struck by how many of the followed decisions of the California Supreme Court are tort decisions and how few of them are decisions in my field, criminal law and procedure. If you look at the list of blockbusters, only five of the twenty-four cases listed there are criminal cases, even though one-half of the Court's docket is made up of criminal cases and has been for quite a substantial period of time. Now, why is that? In my field, I think the most influential state supreme courts are New Jersey, New York, Wisconsin — states that have been at the forefront of the movement that Bob described of using independent state grounds in interpreting the extent of constitutional liberties. And the reason that California is no longer in the forefront of that movement is because, by constitutional amendment, we have removed the California Supreme Court from that enterprise. No independent state grounds are available for the exclusion of evidence to protect constitutional liberties because of Proposition 8 in California (1982). With the enactment of Proposition 8, sixty California Supreme Court precedents bit the dust, and ever since we've had to march

⁵⁶ See *Cunningham v. California*, 549 U.S. 270 (2007).

lockstep with the United States Supreme Court, with no option to reject their interpretation of constitutional protections in the context of exclusionary rules. As the Supreme Court of the United States has demonstrated its hostility to exclusionary rules, manifested in cases like *United States v. Leon*⁵⁷ and more recently in *Hudson v. Michigan*,⁵⁸ many of the most influential state supreme courts have refused to go along and relied on their state constitution, but that is not an option available to us or to our Supreme Court in California.

I think the other reason that we see less influence of the California Supreme Court in the criminal arena is the dominance of the death penalty docket as a proportion of the California Supreme Court's workload. Death penalty decisions are not where it's at in influencing other courts. You won't find any death judgments, I think, among the cases that are followed by other courts, and when you have to devote at least one-fourth of your docket to a backlog of over three hundred death penalty cases, it has a dramatic impact, I think, on how influential your court can be.

My final point: When we look for the explanations for this really profound demonstration of influence of our California Supreme Court, what explanations do we have other than the brilliance and productivity of the justices of the California Supreme Court and the professionalism and competence of its staff — which I think we *should* celebrate. Well, one factor that is frequently overlooked is the competence of the appellate bar of the state of California. I can attest beyond question that the appellate bar that practices in the state of California is the best in the country, and one reason that our Supreme Court gets an incredible menu of issues to decide is because we have a deep pool of expertise and excellent lawyers who are raising and litigating those issues and presenting them to the Court. So the excellence of the California appellate courts and the excellence of its appellate bar have a synergistic effect. We do feed on each other. We depend on each other. We don't always love each other, but we do need each other. Thank you.

ELWOOD LUI: Thank you, Professor Uelmen.

⁵⁷ 468 U.S. 897 (1984).

⁵⁸ 547 U.S. 586 (2006).

[Editor's note: the following remarks were prepared in advance by Professor Scheiber and were distributed at the event but not published until now.]

WRITTEN REMARKS BY HARRY N. SCHEIBER (Stefan A. Riesenfeld Professor of Law and History, UC Berkeley School of Law):

How Does Law Evolve? — The Many Dimensions of Legal Innovation in California History

In the debates at the 1879 California state constitutional convention, any number of delegates made a great point of saying that California ought to be original in writing its basic law, instead of merely copying provisions from other states' constitutions. These delegates declared — and many of them may well have actually believed — that they were shaping a document that would permit California to be a leader and not merely a follower in shaping American law. The Golden State, they asserted, ought to take a unique place as a model for the other states of the Union.



A Sacramento *Bee* writer expressed this same idea when the delegates were convening: He wrote that California was “the natural leader of the other States in every reform that proposes to solve the problems of social, commercial and political life” The convention’s duty was “to set the world an example, and show other States how they can emerge from the difficulties which time, indifference, and corruption have thrown around them”!⁵⁹

One hastens to add that these instances of enthusiasm for leadership in law reform in 1879 did not include a faith that the judiciary would play a major part in this process of being a model for other states of the Union. On the contrary, there was considerable sentiment at the time for focusing on California’s high court as itself a prime target of reform efforts because of the influence that the railroads, giant land and cattle companies, and other special interests had allegedly exercised on the operation of the court — the same kind of influence as that with which the special interests had so notoriously corrupted lawmaking in the state legislature. This

⁵⁹ *California Leadership*, BEE (Sacramento), May 17, 1878.

is a consummate irony of the 1879 Constitution-makers' view of California's Supreme Court, however. For as has been made evident in the earlier papers in this panel session, the California Supreme Court of the late twentieth century, from the Gibson Court to the present day, has had great influence nationally because of the unusual number and type of its decisions that have been cited, and, more importantly, the great number "followed" (that is, adopted) by the highest courts of appeal in other states.

I am certain that the convention delegates who gathered at Sacramento in 1878–79 would have been astounded by this judicial record. However that may be, the modern California high court for several decades after 1940 seized and has held a position of leadership in the doctrinal sphere for the reform and advancement of both common law and state constitutional law in the United States. At any time from the 1940s to very recent years, the record of the California Supreme Court could be cited with confidence as the case *par excellence* for illustrating how the "laboratories" vision of Justices Holmes and Brandeis actually worked — a vision of the states as the "laboratories of democracy," in which a single state's laws, expressing the citizenry's desire for social and economic innovation could be tried out on an experimental basis, providing a lesson or example from which other states could learn.

The great journalist and social critic Carey McWilliams once termed California "the great exception," asserting that the geographic conditions, cultural mix, economic structure, and social milieu of the state made it authentically unique, even in a nation rich in diversity and contrasts — but unique also because changes in political and cultural ideas were often coming to the surface well in advance of similar developments elsewhere in America. McWilliams wrote prior to the time when the California Supreme Court hit full stride as an innovating judicial body with national influence; but when the Court did emerge in that role, it gave further meaning to McWilliams's term "the great exception": for the justices of this Court broke new ground on multiple fronts in both the common law and constitutional law during the era of hectic growth and change in California society that began with World War II and has continued to our own day.

The earlier papers today, which report some truly impressive new research in the sources to provide new insights and evidence on the issue, give substance to the view long held by legal scholars and historians: the

view that the California high court's decisions have been cited and followed since the 1940s to a much greater extent than the decisions of any other state court. In the law, then, as in so many other spheres of social life and political thought and action, California has an established position as a bellwether for the nation.

(A caveat: I resist the temptation to be churlish by insisting too forcefully that raw numbers are only one way of assessing influence, even in the narrow sense of influence measured by decision citations: In fact, because Washington and Arizona are states that have been of much smaller population than California's, one could argue that the supreme courts of Washington and Arizona had *relatively* greater influence than the California court when adjusted by a per capita standard! This, it must be admitted, is not only churlish but only one of many ways, ranging from the playful to the ingenious, by which one can manipulate and interpret the statistics of court citation and "following." To their great credit, the authors whose work was presented earlier in this panel take great care to indicate the very considerable number of considerations that have to be taken into account, and the most salient alternative interpretations to their own that are "on the table" in the literature of court studies, before coming to firm conclusions about the degrees and types of "influence" that case data can be said to represent.)

The influence thus exerted by the California Supreme Court is routinely associated with what may be termed the "liberal" position of the 1940s–90s era — prior to the time when by the mysterious, and one may say poisonous, chemistry of media-driven and language-manipulated politics, the term "liberal" was transformed into a generalized put-down or smear word. The California high court in the post-1940 period for which it is best remembered (and documented) for its innovations and influence in other states was "liberal" in the sense that its shifting majorities were in a broad sense and a straightforward way favorable to the validation of state and local governments' regulatory powers in the economic sphere; they were receptive to the reappraisal of how what the ideal of "equal protection of the laws" should mean in its application in such areas of the law as public education or marriage law or criminal process; and they were concerned to bring the constitutional standards of personal liberty and freedom into

line with changing (and as they saw it, more enlightened) standards with regard to fundamental and inalienable rights.

The decisions of the Court in this “liberal” era are remembered and by many commentators celebrated as the product of a judicial “Golden Age.” For the Court’s critics, of course, these decisions and the Court’s record taken as a whole in the “liberal” period are the object of sometimes angry criticism — criticism that became especially intense once the Court had ventured into the treacherous territory of the death penalty, a volatile political issue on its own terms but one that also served as a proxy for the more general posture of the Court with regard to environmental regulation, government oversight of business practices, real estate development, and other “gut” economic issues of the day.

In time, historians may come around to the view that the Court’s “liberal” posture on race relations, business regulation, environmental protection, and the like was not a questionable departure from inherited judicial norms but instead should be regarded more as a manifestation of the spirit of the country with regard to law in the days of the FDR, Truman, Eisenhower, Kennedy, and Johnson presidencies: that is to say, the dominant political ethos at a time when — with the fresh memory of a world war fought in the name of democracy and freedom, and with the Cold War confrontation as the immediate backdrop, at least in states outside the hard-line racially segregated South — a broad commitment to human rights had merged very dramatically in American law with the much narrower inherited concepts of liberty and equality.

If there is ample time, our panel and audience might profitably explore more fully this question of how a court becomes in this way such a beacon light for the reform of law — an instrument for legal innovation that creates a more capacious view in constitutional doctrine for the ideals of equal protection and individual freedoms.

To be sure, in this instance the Court’s record also resulted from the initiatives taken by strong-minded individual justices who had a clear vision of judicial obligations that led them to act as they did. It is a complicated interpretive issue, but one that is worth our pondering in the context so vividly suggested by the authors of today’s earlier presentations. For example, I do not see how anyone can make good sense of Traynor’s position on the law and achievements in jurisprudence if one forgets that he once

wrote that many of the inherited doctrines of the common law needed to go out for “cleaning and pressing” — and that many of these doctrines probably would disintegrate immediately if subjected to the cleaning! As is so tellingly recounted in Justice Grodin’s book reflecting on his experience in the law and on the Court,⁶⁰ and in the reflections of Justices Sullivan, Newman, and Richardson that have been published in the California Supreme Court Historical Society *Yearbook* issues and the law journals, the posture and receptivity to reforms of law on their courts was in intimate ways related to their personal experiences in legal practice, politics, public office, and view of general ethical obligations — all in tension with taught and long-revered precepts that militated against any easy process of change. The phrase that stands out for me as a concise expression of this vital aspect of judging is a quotation of how one justice in conference on an important death penalty case explained what finally conditioned his position on the criminal process as it had treated a defendant in the case in question: “I just don’t want to live in that kind of society.”

I would like to offer now some very brief observations with regard to the record of California “as a laboratory of legal innovation” that I believe need to be kept in mind when we appraise the meaning of that record.

My first point builds directly on what Professor Williams has already suggested — that the history of legal innovation by the California Supreme Court is only one aspect of the larger history that concerns us when we seek to appraise the state’s overall record in breaking new ground in law. That overall record includes the statute law generated by the California Legislature, after all, not only judicial doctrines. In many instances historically, the statutes have been at least as influential on policy in other states as our high court’s decisions have been with other states’ judiciaries. (A major case in point, from modern times, would be the way in which California has led in many vitals ways in environmental law and the structure of its administration at the state level, or led, or at least joined in leading, in divorce law.) But apart from the judicial and legislative records, there is also that dramatic additional lawmaking dimension in which California has been an active (and often hyperactive) leader since 1911 — the use of the

⁶⁰ JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE* (1989).

popular ballot in initiatives, referenda, recall, and (let it be remembered) judicial retention.

Finally, there is the constitutional convention itself as an instrument of legal innovation. The delegates of 1878–79 whom I have mentioned, and no less those of the 1960s revision commission, each wrote new provisions that were of great moment for the governance of California itself but also were of importance insofar as they gave additional impetus to ideas already instituted by other states; and each expressed concepts that were new at least in their language or configuration. Standing out above the others was the provision in the state constitution as now in effect that reasserted the independent state grounds doctrine; for as we have been reminded so forcefully in this panel, this doctrine has had an enormous impact on the constitutional law of the state and also in reinforcing the concept's legitimacy in national constitutional law.

Let me offer now a few illustrations of how and why a full historical appraisal of “legal innovation” needs to embrace the evidence from what these other law-making institutions have done in the history of California law.

First, if one were to ask: “What has been the legal innovation in California that has had the greatest impact on law and policy in the United States more generally?” I have no doubt that most of us in a gathering of professionals in the law would think of the innovations of California's supreme court in the storied “golden age” of doctrinal reforms, the main subject of our first paper today. I think it is quite safe to say that a different answer is likely to come forth from an audience drawn from the general citizenry of either California or the nation today: Their answer, I believe, would be: Proposition 13 of 1978. This proved to be the trigger for what spread quickly as the national “Tax Revolt” which itself undergirded and impelled the more general assault on active government — that is, the political movement against the “liberal” legal doctrines and legislative policies to which I referred earlier, itself merging with the religious Right and its campaigns in the “cultural wars.”

In a larger sense, the success of Jarvis and Gann with Proposition 13 and a series of later direct ballots have given California a governing structure in which the Legislature's latitude for discretionary policy and spending has been dramatically reduced in the face of both tax limits and mandatory spending fields. This result, as has been variously celebrated by its

champions and deplored by its critics, gave a boost in other states with the direct ballot, with the result that there has been a dramatic increase in volatility in American politics generally and more narrowly with regard to the outcomes of the direct ballot in the law — witness the impact, however one may view it as to its desirability, of Propositions 8 and 115, with their basic revisions in the criminal code by popular ballot, in the history of the judicial system and criminal process in California. Even a long-time scholarly champion of the initiative and referendum such as the eminent political scientist and expert on state government, Professor Emeritus Eugene Lee of UC Berkeley, has come around, in a poignant conversion, to the view that we now have begun to suffer from this volatility in what he terms “an excess of democracy.”

As we have said, the results of heightened reliance on the direct ballot have been mixed. Provisions for protection of individual privacy and similar changes through the popular ballot, termed by some analysts as “rights expanding,” have been voted into state constitutions and their bills of rights — whereas other ballots have been “rights reducing,” most notably in California in the criminal justice reform ballots.

In another instance, a constitutional amendment initiative (Proposition 14) was passed by California voters that would have vested “absolute discretion” in any California property owner as to the sale, lease, or rental of his or her property — a precursor, as it were (albeit one drawn from the race-relations arena), of the “property rights” movement that has arisen so noisily in the economic and environmental arenas of today’s politics. Proposition 14, a striking instance of “legal innovation” originating in California was overturned in 1967 by the Supreme Court of the United States in its decision in *Reitman v. Mulkey*,⁶¹ — Chief Justice Warren joining with the majority in a decision declaring that the national constitution’s provisions for equal protection could not permit the voters of any state to engage in this type of “rights-reducing” activity through the ballot.

The very different outcome of federal appeals in the later cases involving a challenge to Prop 209 and its ban on affirmative action is an instructive counterpoint, illustrating further for us the complexity of the matter when we consider how federalism and judicial review have given room for

⁶¹ 387 U.S. 369.

— or, alternatively, derailed — home-grown efforts at legal innovation in California (or other states) — and as to where, on the overall historical balance sheet, one has to chalk up a “win” for either rights expansion or rights reduction.

Much depends, of course, on how one prioritizes rights — in Prop 14, it was property rights of individuals as defined to include the right to discriminate, that was “reduced”; in Prop 209, it was the question whether, in a similar dynamic, an overturning by popular ballot of state law with specific exception for recognition of federal requirements, was constitutional as written and administered. A vitally important enterprise in the prioritizing of rights had been engaged in by the federal courts under the framework given in the famous “Footnote 4” language that enshrined a special protected category for basic political rights. How this worked out in an independent state grounds context was vividly illustrated in the *Pruneyard* decision of the California high court,⁶² giving priority to speech as exercised by political advocates on the grounds of a privately owned shopping mall, when appealed to the Supreme Court — which upheld the California decision under our state constitution, at the same time not adopting the California rule for national law.

My final point relates to an earlier set of constitutional provisions as expressions of “legal innovation,” their place in the “rights enhancing” and “rights reducing” spectra, and their role in the evolving late nineteenth century drama of federal judicial review. I have reference here to a set of provisions adopted by the Constitutional Convention in the 1879 document and approved by the voters of the state — provisions that were explicitly designed to validate discrimination against the state’s Chinese residents and to resist or evade the commitments under federal treaties, the facial meaning of the Fourteenth Amendment, and established national policy. These provisions were struck down by the Ninth Circuit and the Supreme Court — the best remembered case being *Yick Wo v. Hopkins*,⁶³ overturning a San Francisco laundry regulation ordinance clearly aimed narrowly at the Chinese — in a series of Fourteenth Amendment decisions on equal protection, several of them at the hand of California’s own Justice Stephen Field.

⁶² *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979).

⁶³ 118 U.S. 356 (1886).

An ironic footnote to this unsavory history of innovation in the cause of discrimination is the fact that the 1879 delegates who argued for making state guarantees of rights independent of the national Constitution's Bill of Rights and other guarantees included a faction, among whom were some outspoken Confederate States veterans. Their real interest was in reasserting the general doctrine of "state rights" against the "liberal" movement toward expansion of rights that the post-Civil War Congress had taken up as a major cause in its larger Reconstruction policy. It was a classic case illustrating how "original intent" and the constitutional language resulting can establish a basis for rulings in future years by supreme court justices interpreting that language to warrant a course of jurisprudence very much different than what the original language had been intended to expedite and validate.

It was a further irony that the same national Supreme Court that overturned the anti-Chinese provisions and asserted protection of this minority group under terms of the Fourteenth Amendment was in those same years stripping the amendment of all its clear original meaning as a protection for African Americans. That process was given firm shape in the 1883 *Civil Rights Cases*,⁶⁴ on the road to *Plessy v. Ferguson*,⁶⁵ the notorious decision in 1896 that embedded the "separate but equal" doctrine into the U.S. Constitution and thus gave most of Jim Crow law and discrimination against Blacks in civil rights their constitutional protection for another eighty long years.

Such contradictions, complexities, ironies and some puzzlements are the inevitable result when one expands the definition of "legal innovation" to encompass the acts of legislatures, constitutional conventions, and the people themselves in popular constitutional making by ballot. The perspective that results is very different than occurs when one keeps the field of vision closely confined to a state's high court — in this case, our own California court, and mainly in its period of modern "liberally oriented" and very active law-making both in the common law and the constitutional field. The sources of legal innovation have varied historically, as one goes back to the 1878 period, as we have seen. The record would present even greater variety if we had

⁶⁴ 109 U.S. 3.

⁶⁵ 163 U.S. 537.

time here to consider, for example, the extraordinary creativity and active-style lawmaking by the California Supreme Court in the initial twenty years of Anglo-American rule under the 1849 Constitution in regard to mining claims, prioritizing of miners' versus agriculturists' property rights in torts and trespass, the public trust doctrine and pueblo rights, eminent domain, and criminal procedure.

It is, in sum, a record with many dimensions and a variety of outcomes. It has not been linear in its direction and thrust. It has been strikingly inconsistent over time in the results produced by the stream of state–federal legal confrontations in law, even in the history specifically of how independent state grounds doctrine originated and has been deployed.

The record of legal innovation, its permutations and variations, and its mixed effects both on California law internally and on relations with other states and with the national government, raises again the most interesting question of all, at least for us historians. This is the question of how, why, and in what ways in particular periods of its history, a state that has truly and accurately lived up to the “bellwether” and the “great exception” titles, has produced the kind of law — and innovations — that have come forward from its lawmaking and judicial bodies, not least the high court in the modern period to which most of our attention has been given in this session.

There is no simple answer. Rather than taking the posture of having a full and persuasive solution to that historical puzzle, I take courage in ending with that thought from an early occasion in my career: It happened at a panel on a subject which represents a narrow but interesting slice of today's topic. It was a panel at a UC Davis–sponsored meeting on the subject of legal innovation and agricultural development in the history of the Far West. I had the great honor of being introduced as speaker by Chief Justice, then retired, Roger Traynor, the legendary jurist whose career as judge is part of the warp and woof of all the talks on the modern Court we have heard today. In light of Chief Justice Traynor's reputation for oratory, which was no smaller than his reputation for erudition, all of us historians and others in that room were looking forward to what he would say in his assigned ten-minute slot as panel chair. We were certain he would provide an exposition offering important guidance on the approach we should be taking in analyzing the historical dynamics of legal change and innovation.

Roger Traynor did indeed give us his views — but to our amazement he took only about twenty seconds to do it. Let me quote his words. The papers in that panel, he said “confront questions much like the one I was once called upon to unriddle: *How does law evolve?*” He paused . . . then continued. “Well, how does a garden grow?” Another pause, . . . and then he ended with, “How does agriculture in the West evolve?” That was it. He sat down and graciously turned the podium over to us.

I have reflected on Traynor’s statement of the question many times over the years, and I am still at a loss to come up with a better description of what is involved when we give our own best efforts at “unriddling,” to use his word, of the processes of legal evolution, including the dynamics of legal innovation.

Traynor’s analogy with a garden’s growing reminded us that we have addressed ourselves today to a process with complex and multiple dimensions. Chemists, biologists and other scientists grapple constantly, of course, with this question, as to gardens in particular and the dynamics of their growth. The late Melvin Calvin, a UC Berkeley chemistry professor, won a Nobel Prize for successfully describing the process of photosynthesis. Professor Calvin thus gave the world a wonderful gift of knowledge; but it was never in doubt that his monumental work was about only a piece, albeit a key piece, of the larger process of plant life and growth, involving a vast and ramifying complexity of ecological relationships — physical, chemical, biological, atmospheric, and also human interventions: the gardener! — all of them essential components that must be considered in any explanation of how a garden grows.

The papers previously read in today’s session offer us an excellent example of how we can respond creatively to Traynor’s challenge — in this instance, to take on the complexity that inheres in legal change, as the first paper today does, by zeroing in with intensive analysis of statistics on a particular court and its judges, its decisions, and its influence. There were some answers and insights into one piece of the puzzle of how legal innovation has come forth and what its concrete impacts may have been.

I hope, however, that the comments and examples of legal change in California history that are offered in these remarks of mine will be a reminder of the need to go further and tackle the larger question of how, why, and with what results legal innovation has occurred — the question

that involves the more embracing “ecology” of the processes of change in legal development. That ecology involves the institutions, social forces, political ideas and events, individual personalities and intellects, and other factors at work in legal innovation; and they need to be integrated into the larger story that is so important an element in the history not only of California but of the nation in an age of rapid and sweeping socio-economic and cultural change.

ELWOOD LUI: Let me take the opportunity to ask a few questions and to perhaps question some of the theories that have been proposed between the panel members. Professor Williams, I’ll let you have the first shot in the interest of fairness and fair play. The score is — the baseball score; let’s change it to basketball — California, on Chart 2, 160-to-66. How do you compare — is this fact or fiction? Are there some influencing factors that make California — at least, statistically, you’re using independent sources, as they say, *Shepard’s* to demonstrate this — is it because we have more litigation in this state? What do you think about those? Do those statistics truly bear out the notions that we’ve been projecting in this seminar or not?

ROBERT F. WILLIAMS: Well, I think it’s hard to pinpoint *the* top court or *the* top legal system, but I think we can imagine the three or four or five at the top over the years, and I think it’s because of both objective factors and intangible factors. One of the crucial ones, I think, is what the judges on the high court think of themselves. What are they there to do? Are they there to push the Ten Commandments, if you get my drift? Are they there as a capstone of a long career as a trial and appellate judge where they followed precedent, and that’s what they intend to do, to close out their judicial career? Or, on the other hand, do they aspire to the highest court to really tackle hard issues, to really do something as judges? Actually, political scientists have done some interviewing about this (anonymously) of judges, and there’s really a difference in the judicial culture in different states. In the top states, California, New York (despite the numbers), Washington (it doesn’t surprise me when I see it, but it surprised me originally), New Jersey, the judges want to be a high court judge to actually accomplish something. In other states, high court judges are not there to do anything. So I think that’s one thing — what’s the culture? — and the culture in our state, in New Jersey, changed fifty years ago. I mentioned, we didn’t have a supreme court until fifty years

ago. It's been different over those fifty years ago. I think your state changed when you went to the appointed judiciary. So, some objective factors, not intangible factors, are appointed judiciary, the presence of an intermediate appeals court so that the supreme court can concentrate on major issues, staffing, preparation — we were talking at lunch — is the court prepared, have the justices discussed the matter before oral argument, before the draft opinions circulate or not. Do they have enough staffing? Something near and dear to my heart, does the personnel of the high court come sometimes from the academic bar? It sounds like in California, Traynor, Grodin, Werdegar, probably a lot that I'm missing, came out of the legal academy. You can imagine I support this greatly [laughter], although I think we have a better job than state high court judges. Appointed for a longer term. High-quality bar, as Gerry just said. High-quality law schools — what's going on in the legal system in the state — lots of high-quality legal literature in the state. In a state like California, you've got a lot of top law schools, a lot of top law reviews. A lot of it is about national stuff, but a lot of it is about California stuff. I think it's a mix of things, but I don't think it's fiction. I think the numbers say something very important. It's just harder to go behind and say, why do the numbers read that way? These are a couple of ideas that I have.

ELWOOD LUI: What about the differences in the political appointment process between New Jersey and California? Are your judges appointed by the governor, elected to the high court?

ROBERT F. WILLIAMS: In New Jersey, I think we have a system that's better than the federal system. Our judges are appointed by the governor for a seven-year probation period. They're appointed, and they have to be confirmed by the Senate. Then they have to be renominated and reconfirmed for a life appointment or until they're seventy. There's a funny story. Justice Brennan worked on drafting the judicial article of the New Jersey Constitution fifty years ago, and he put in the seventy-year-old retirement age. He came back at eighty-four and gave a speech and said he'd changed his mind. [laughter] You could see why I say it's better than the federal system. The only risk is that judges would not be reconfirmed because of political opposition to their decisions, and that's just not in the culture of New Jersey. It came close to Justice Robert Wilentz, who wrote the *Mount*

Laurel decisions⁶⁶ and some of those things, the early school finance decisions, but even he was nominated by a governor who said he hated the justice's decision — called him a Communist — he nominated him anyway, supported his confirmation, and he was confirmed. In California, do you have a mandatory retirement age? [responses: no] But you have — we could ask the person who's lived it — you have a retention election?

JOSEPH GRODIN: Yes, we do! [general laughter] As you were saying, it is not part of the culture of New Jersey to remove judges for political reasons. I was whispering to Gerry that it wasn't part of the culture of California, either, up until just about that time.

ELWOOD LUI: Professor Uelmen, I think you're right. As a member of the California Academy [of Appellate Lawyers], I have to agree with you that we have the finest appellate lawyers in the state. [laughter] What about our Court of Appeal? Our Court of Appeal was set up to be commissioners of the former Supreme Court until they organized the Court of Appeal [in 1903]. What about the general quality of our appellate courts, and have you seen any trends in the way the appellate court operation has helped to improve the decisions coming out of the Supreme Court, in your view?

EDWARD JESSEN: I think one of the most significant factors as to why California leads the pack has to do with the selection of the menu of the cases that the California Supreme Court is going to decide, and of course those cases working their way up through our intermediate Court of Appeal, which very often is the first place that a lot of these really cutting-edge issues are sorted out. When you try to compare a state like California with a state like New Jersey, we have a lot of advantages. We have advantages in terms of wealth, in terms of population, in terms of diversity of our population. These are the factors that the originator of this research, Caldeira, identified as what makes the most influential state court.⁶⁷ It's the issues that are percolating because of the nature of the population, the wealth of the population, the diversity of the population. And we've just got a lot

⁶⁶ *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*, 67 N.J. 151 (1975); *South Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*, 92 N.J. 158 (1983).

⁶⁷ Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83 (1983) (analyzing citation data from 1975).

percolating in California, so when our justices decide what cases are we going to grant a hearing on, the criteria they're applying are, what are the cutting edge issues, where do we need more guidance, how can we best spend the limited resource of our review? And I think by and large they do a pretty good job of picking the issues that are going to be the most significant, the most cutting-edge, and are going to be cited and followed by other state supreme courts.

ELWOOD LUI: Thank you, Ed. That provokes another question that I had in mind. In another time of my life, I served on the Court of Appeal, and we would go back annually at least one time to the New York University Appellate Institute. There, you get to meet and work with, and study with, for two weeks other appellate justices in the country. There was one seminar on writing opinions, and the overwhelming majority opinion from other states was that California had a screwy system; they had these intermediate appellate court judges writing lengthy opinions — twenty-five, thirty, forty pages — and why do they do that? I believe it was a Florida judge who said to me, “I just take two pages and say, ‘After review of the reasoned trial court decision, affirmed.’” And I’d say, “Well, how do you help people understand what you did?” And on another occasion, they would say to me, “Perhaps you put people to sleep with your thirty-page opinion, Lui.” But I’ve always benefited from reading decisions from colleagues, like Justice Grodin who wrote excellent opinions that were lengthy and well thought out. What is the California rule on reasoned opinions, and how did it help you as a Supreme Court Justice look at issues for determining cases for review and deciding cases, Justice Grodin?

JOSEPH GRODIN: Well, we do have a state constitutional provision — I don’t know whether it’s unique —

KATHRYN WERDEGAR: I’m told there’s only two states that have this. Jake, is that correct? [response: yes] Washington and California have a constitutional provision requiring that our cases be resolved by written decisions, with reasons stated. Now, I’m myself, surprised to hear only two states have that requirement. So we couldn’t, for instance, go to a *per curiam*, as a way of sorting out conflicts in the law, saying, “That one disapproved, this one affirmed.” So, there you are.

JOSEPH GRODIN: That was the product of an amendment to the state constitution — I forget the year. Prior to the constitutional amendment which added the language to which Justice Werdegar refers, it was not uncommon for the California Supreme Court to issue decisions which simply said “Affirmed” or “Reversed,” without any explanation at all. One of the most notorious cases was that involving the conviction of Abe Ruef, the mayor of San Francisco who served during the period of the (1906) earthquake and was indicted and found guilty on corruption charges. The conviction went up to the Supreme Court, and the Supreme Court, for reasons which were not stated but which appeared to many observers to be highly political, simply reversed. So we have this constitutional provision which requires opinions with reasons stated. That may have been an impetus for the courts to write reasoned decisions, but I don’t think it accounts for what I would characterize as a fairly scholarly analytical approach that is the tradition of the California Supreme Court. I think that has to be attributed more to the legal culture that Bob Williams talks about, and that is a practice I think you find stemming primarily from the 1940s and on, although that’s not to say there were not beautifully reasoned decisions before then. But I think it’s about that time that you found the California Supreme Court rendering decisions that were really designed to explain and persuade. I have to say I’ve been reading about the doubts that have been expressed about string theory — we thought perhaps we’d discovered the theory of everything — and now it appears that maybe we haven’t. The problem is that no one can think of a way of testing the theory. That is, no one can think of a way of demonstrating that the theory is false, and that is the very essence of the scientific process. And it occurs to me that the same is true here. To the extent that we have identified multiple reasons, all of which are quite plausible, for California being in the lead, we’ve reduced the possibility of isolating any of those factors and demonstrating it to be either true or false, which gives us an entirely free hand to talk about this.

I note that the paper Jake was talking about contains on pages twelve and thirteen some suggestions of possible explanations as to why California courts have been in the lead in these sorts of things, but I think if we’re talking about legal innovation more broadly than judicial innovation, if we’re talking also about innovative constitutional provisions, innovative initiative measures, innovative statutes, then the explanation has

to lie elsewhere. I'm not quite sure where it lies. I think diversity has a lot to do with it. California's diverse population, stemming from its very early days — if you've never been to Colton Hall, which is three blocks away from here and which was the site of the first 1849 Constitutional Convention, you should take the time to go down and visit it because on the second floor, where the Constitutional Convention took place, you will find spread out on the tables as if they're left there by the delegates going out for lunch, drafts of the Constitution that they were considering. And these were delegates that included relatively uneducated miners, highly educated people from Western colleges, Californios who didn't speak English, and they took the process of what they were doing very seriously. The same is true for the Constitution of 1879. I think that California has been a laboratory of experiment from the very beginning and that the explanations for that need to go beyond these more restricted or parochial considerations of why all of us are such great justices.

ELWOOD LUI: Professor Williams, do you have anything to add to that, and is there a similar type of diversity that you have in New Jersey that you can account for the preeminence of New Jersey? In any dimension, you see that New Jersey is up with California, throwing away the numbers — what do you account for the influence of New Jersey to the process of state court decisions?

ROBERT F. WILLIAMS: Well, remember I've only been there twenty-seven years. I don't think it has as diverse a population as California. Let me answer the question I want to answer rather than the question you asked. [laughter] It also is, I think, by contrast to California, a more moderate state, and this has an effect on judicial appointments by the way. Neither of the political parties has the extreme wings that I think you have out here in your political parties, and you probably have a couple other political parties we never heard of back East. You get a Republican governor, Christine Whitman, who's pro-choice, and she appoints a Republican chief justice, Deborah Poritz, who then strikes down abortion regulation statutes, and everybody goes, "Wait, these are Republicans; what is this?" And then you get a Democrat like Robert Wilentz, who's chief justice, who upholds the death penalty, and all this sort of stuff. And the same is true with the

Legislature. It has a few people on the wings of each party, but more or less it's pretty moderate on both sides.

JOSEPH GRODIN: Whereas we had the extremist rightwing Republican Earl Warren, who — [laughter]

ROBERT F. WILLIAMS: Right, right, famous, easy-to-predict fellow. You know, it's complicated because New Jersey has had a terrible record of corruption and all of that sort of thing, and most people think it's nothing but oil refineries that you have to drive through to get to New York. They don't know why we call it the Garden State. There is a reason for that where I live; it's a garden.

ELWOOD LUI: I didn't see the garden the last time I was there. [laughter]

ROBERT F. WILLIAMS: In our *judicial* culture, there is something to point to, and that's that this new judicial article — new in 1947, written partly by Justice Brennan and a guy called Arthur Vanderbilt who was at the time president of the American Judicature Society and dean of NYU Law School. They had a vision for the judiciary that was based on the United States Supreme Court, and they put in a highly centralized, very powerful state supreme court with maybe one of the most powerful chief justices in the country — I haven't double-checked all of your powers, Chief Justice George — but with a statewide appellate court, not districts, and gubernatorial appointments all the way down. This was actually intended to do exactly what it's done. If you could go back into the grave and talk to Vanderbilt or Brennan — they wouldn't have imagined the New Judicial Federalism [then], or any of this stuff — and if you said, “Did you imagine that you wanted to create a court that was a policy-making court?” — that would do what Gerry said, pick the cutting-edge topics of the day, and in the 1950s they were very different from now — they would say, “Yes, and that's what we said at the time.” You can actually see them saying that. Ours is a much newer system. It was actually designed that way, and it operates that way.

ELWOOD LUI: Well, what's remarkable to me, without having the benefit of these excellent graphs by Jake Dear and Ed Jessen, I would have, and I would have ventured a lot of people would have, just put down other states in the order. People who grew up in the West have been influenced by the Eastern establishment — you know, the Eastern states are the intellectual



L-R: PROFESSORS ROBERT F. WILLIAMS AND GERALD F. UELMEN,
JUSTICES JOSEPH R. GRODIN AND KATHRYN M. WERDEGAR.

Photo: Howard Watkins

power — but you don't see their presence in these charts as high up as California or New Jersey. Why is that? Any notion why you don't see Massachusetts way up there, you don't see Connecticut way up there, New York isn't as high as you would think it would be?

JOSEPH GRODIN: You know, I think a little more attention has to be paid than we've paid so far this afternoon to the subject matter of this innovation and the areas within which the Court has been innovative. If you think about it, what are the areas that a state court *can* be innovative in, in the sense of having influence upon other states, if you take that connection between innovation and influence. It's not likely to be in the statutory arena because the language of statutes varies from state to state, and increasingly the business of courts has been statutory interpretation. It is primarily in the areas of common law and constitutional adjudication, and the time beginning roughly in the beginning of the 1960s through the '70s, that was a period of enormous innovation in the common law in the areas that Justice Werdegar mentioned. The torts area, the expansion of product liability, the expansion of responsibility as in the *Tarasoff* case, that imposed affirmative duties upon people rather than simply the duty to refrain from acting

negligently. In the area of contact law, the concept of adhesion which led to rules which became protective of consumers and consumer transactions. All of that was a revolution brewing, and it just so happened that California was pretty much in the lead of that revolution.

KATHRYN WERDEGAR: I would agree with that. Courts, unlike legislatures and people who circulate initiatives, have to wait until the right case comes to us. And so, picking up on what Justice Grodin was saying, because of our population — everybody's mentioned it — the diversity of our population, our generally progressive pioneer spirit, the size of numbers, the richness of our inventory, we often are able, or have to, for the first time look at some of these issue that later go across the country. I mentioned the gay marriage case; we're not the first court in the country to look at it, but one of the very early ones, and I don't think that's just an accident. I think it has to do with our population and the people who are wanting to bring these issues to us, so that was just picking up on what you were saying.

May I just say also, I do feel that the independence of the judiciary, which goes back to what Professor Williams was saying about the appointment process, the tenure, the confirmation process . . . I hadn't heard of this other system where you're on probation for seven years, and then it's for life or until you're seventy — as opposed to contested elections, which everyone in this room I'm sure knows is a disaster for the judicial branch. We were talking about Pennsylvania at lunch today, and I won't even scare you with the stories of that. But we are a retention election state, and although our governors' politics differ, there's a real tradition of appointing really solid people, not political people who have tried to work their way into the judiciary by playing politics. It's the tenure of the judiciary, the independence of the judiciary, the richness of our possible inventory, and also legal aid societies and public interest groups that we have here that just very much want to bring these cases to us. That's part of it.

ELWOOD LUI: Professor Williams —

ROBERT F. WILLIAMS: I just had a question; it's quick. Has there ever been a candidate for governor of California — I should know this, but I don't — who's run against the Court, the way President Nixon ran against the United States Supreme Court?

ELWOOD LUI: Gerry, you respond to that.

GERALD UELMEN: George Deukmejian made a point of purging our Supreme Court so that he could make a number of new appointments. I don't know of anyone else who was quite that overt.

ROBERT F. WILLIAMS: It's never happened in New Jersey. The populace doesn't get whipped up against the judges the way it happens with federal judges — not that they can do anything about it with federal judges, but in some of the other states — it's not part of our political culture to attack the court.⁶⁸

ELWOOD LUI: Gerry, did you have something else you want to add on that?

GERALD UELMEN: I have a little comparison I just did that really struck me. When you look at the top ten state supreme courts in terms of the extent to which their decisions are followed, Jake's data shows that seven of those ten states are west of the Mississippi. When you compare the data that Caldeira did in 1975, three of the ten states were west of the Mississippi. I think that reflects what's going on here in terms of where the fulcrum of innovation and cutting-edge issues percolating has shifted, and Western states are just likely to get the menu of cases that are going to be more cutting edge than the old, staid, dried-up Eastern states. [laughter]

⁶⁸ On the political and academic backlash against the New Judicial Federalism, see Robert F. Williams, *Third Stage*, *supra*, at 215–19; George Deukmejian and Clifford K. Thompson, Jr., *All Sail and No Anchor — Judicial Review Under the California Constitution*, 6 HAST. CONST. L.Q. 975 (1979):

The growing use of the doctrine of independent grounds, combined with a minimum of judicial restraint, threatens irreparable harm to our system of government. It emasculates the people's right to govern through the legislative process, and substitutes for legislation the judicial decree process. This process destroys the people's sense of certainty in relying on the decisions of the nation's highest court.

Id., at 1009–10.

In 1986 three California Supreme Court Justices were defeated by the electorate, largely based on criticism of expansive state constitutional rulings, including death penalty cases. See Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988); John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81 (1987); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987). See also JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 162–86 (1989).

ELWOOD LUI: Justice Werdegar, if I may ask you as delicately as I can, what happens on Wednesday morning? You meet in a room, and the chief has the junior judge close the door, does hell break out, or does Justice Moreno come with his list of blockbuster cases that he wants to author, what happens? [laughter]

KATHRYN WERDEGAR: Oh, yes, that's how it starts out, Justice Moreno — [laughter] well, we have coffee, and we used to have muffins, and then we read this South Beach Diet, so now we just have coffee. [laughter] It's true. This is one time you can count the seven members of the Court coming together — well, no, and after oral argument we do, as well — every Wednesday, except when we hear oral argument. We heard oral argument this week, so next week we'll have two weeks' worth of petitions, so I can look forward to going home to a list of maybe two hundred, four hundred, petitions for review that are ready to be heard. In any case, we have the petitions, and we have our staff's analysis, and we have our own thoughts that we've given to it as we prepare for conference.

I'll just tell you the procedure because I had to learn it the hard way — no one told *me* — but you sit down. The chief announces the case, and you take them in order, but he votes last; the most senior judge, now Justice Kennard, votes first — “grant” / “deny” — and Justice Baxter then votes, and I speak, and Justice Chin, and Justice Moreno, and Justice Corrigan, and then the chief. And I always love it when it's three-to-three by the time it gets to the chief [laughing], but it's not so often three-to-three; we usually are in accord, because we have certain guiding principles as to what cases we're going to grant review. We do not look — despite Justice Moreno's hypothetical list of blockbuster cases he wants to write on — we do not have a view to what is going to make my reputation if I get assigned this case, or whatever. It's very clear. We're guided by a rule and by common sense, which is, if there are conflicting Court of Appeal opinions, that means the courts and the litigants and the citizens need our guidance. And then, in another respect, if it's an initiative, the state needs our guidance, and we can't wait for the Courts of Appeal to percolate and think about the issue. So, if it's an issue of statewide concern, we will take it, and if there's a conflict, we will take it. Often, what we don't take is a case where we feel perhaps the losing litigant in the Court of Appeal didn't get perhaps what was coming her way, but we really can't correct for error, and, as you

know, every citizen in the state has, as of right, that intermediate Court of Appeal. It was asked in Santa Barbara, where we just had oral argument — wonderful experience in our outreach mode, and I'd outreach there again anytime; it was just beautiful — but we have students ask questions, and I think one of the questions had to do with, well, if it's a celebrity case, like if it's Britney Spears' divorce, are we, "Oh, yes, we'll grant"; no, we've had a divorce case pass through, probably more than one, where the money involved was tremendous, but we're just looking at the legal issue; is there something there that needs to be resolved? So that's how our Wednesday mornings go. It's funny, sometimes the bigger the pile of petitions — it just works out — the fewer grants; and you get this skinny little pile, and you grant five cases. It just all depends on whether the issues need to be resolved. And one further point: There may be an issue that we do think ultimately is going to have to be resolved, but to go back to my point, we can't reach out. We can only work with what's brought to us. There'll be a case that we'll say is not a good vehicle — the facts are bad, the procedure is bad — but if it's important we think amicus will come in. Sometimes there's some reference to the quality of the lawyering that we see, and we want the best to be brought to us, but I will say amicus can always come in. We get about seven to ten thousand petitions a year, and we grant about three or four percent of those, and we decide about 115 cases a year.

ELWOOD LUI: Thank you. What about the somewhat of a controversial issue, but I think it's being handled appropriately — in New Jersey, do you have a rule on depublication, and how does that impact court decisions?

ROBERT F. WILLIAMS: We don't have a rule on that. I heard you talking about it at lunch, and I've read about it. We don't have that, so I can't say much about it.

KATHRYN WERDEGAR: Well, you mean every appellate decision that is handed down is published?

ROBERT F. WILLIAMS: Oh. No, I don't mean that, but they're not published and then un-published. Is there such a thing as depublication, literally, I mean?

KATHRYN WERDEGAR: Yes, in this state, it's up to the Court of Appeal whether to publish or not publish its opinion, depending on whether they

think the issue — and sometimes, if they have published it, the Supreme Court has been known to depublish it. But I'd like to ask you, if I might, what happens to the Court of Appeal opinions, are they published or not published?

ROBERT F. WILLIAMS: In our state, there's what is called the Committee on Publication, and it's made up of judges. The judge who writes the opinion can submit it — even trial judge opinions are published. It's true out here, isn't it as well? Some? None at all? [response: none at all] In the *Atlantic 2nd*, you can find trial judge opinions in New Jersey, not very many, but some. The Appellate Division opinions are published, depending on the decision of this Committee on Opinions. Most of them are published. What happens if you depublish a case and it's online?

KATHRYN WERDEGAR: In the state of California, now that we do have online, and so forth, every opinion that's handed down by any appellate court is available. But if it's overruled by the Supreme Court, then it becomes uncitable. We soon will be having a report as to the citability of opinions in California. It's led to some discussion. You might not realize that if every opinion that every Court of Appeal handed down in the state of California every year [were published], there would be thousands of opinions, so that poses a problem for the attorneys and their resources, and for the judges, but we're working with how to achieve a balance, to have opinions published and citable that really say something newsworthy and noteworthy, about the law, and we're working with that. I don't think any jurisdiction in the country has the number of cases that we have that are decided, so we have a rather unique situation.

JOSEPH GRODIN: Can I pose a question to the panel? What's so good about innovation? We've been proceeding on the assumption that innovation is a good thing, and in many cases I would argue that it is, but is it good in itself? Do we say, well, a judge is a better judge if he or she writes an opinion which marks a new path in the law? If we're talking about getting followed by other states, if that's a good thing, then I suppose the answer is yes. But I don't know that it should be an attribute of a good judge that he looks toward being followed in other states. And we do have high regard, do we not, for judges who are cautious about the development of the law — Justice Harlan, for example, on the United States Supreme Court — so, just to be pesky, I thought I would raise that question. [laughter]

ELWOOD LUI: Did you want to answer that question, Gerry, or?

GERALD UELMEN: No, I have another question.

ELWOOD LUI: Let me just answer it by giving two comments. If you are the appellant, and the decision is innovative, you think it's good because that's your chance of being successful on appeal. And the other part of being innovative — it would seem to me, it should be totally irrelevant to the justices. They'll do the right thing on the case and explain the reasons for which they reached their decision, and if it's innovative, it's for someone else to comment upon.

ROBERT F. WILLIAMS: The current terminology for innovative judging is “legislating from the bench,” right?

ELWOOD LUI: Yes. Actually, I think we have time for one more question.

EDWARD W. JESSEN: My interest was piqued by a couple lines in Caldeira's study, which was the last published study of the influence of state supreme courts. He said, “The California Supreme Court has over time begun to rely less and less on the decisions of sister courts. As this court has grown in reputation, it has become more insular. Of the forty-nine other state supreme courts, California referred to New York most often.” That struck me as counterintuitive. My sense is that I've seen *more* citations to sister courts in recent decisions of the California Supreme Court, and I wanted to ask Justice Werdegar, which other state court decisions do you find most influential?

KATHRYN WERDEGAR: Well, I personally would not be naming a particular state. We *would* look through research across the board. We wouldn't say, well, let's see what New Jersey did, or let's see what New York did. But once various answers come to the fore, if we had a need to go out of state, certainly — and this sort of brings full circle — the prestige of the court, the weight of its reasoning is what it's all about. If we're doing something brand-new, you will look to what others have done before you, just as others will look to us if you do something that's brand-new.

GERALD UELMEN: Were there any surprises for you in how other courts lined up?

KATHRYN WERDEGAR: No, actually, I have not myself before this paid attention to that. I think innovation has some value. I don't think any judge sets out to have a career being an innovator, but I think innovation,



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as Justice Lui so aptly said, it's not for us to say whether we're influential or innovative. We do the best we can with what we're given, but I think the concept of innovation has value because you're not ossified. You are responding to changing social-economic conditions, and you don't race to do it — that would be activist if you're reaching out trying to change the world — but you can't be blind and deaf to what's happening around or you'd be abdicating your responsibility. Every branch of government has to be responsive to what's happening out there.

JOSEPH GRODIN: That's an excellent answer to the question I posed.

ELWOOD LUI: Let me close by offering my thanks to Jake and Ed for these excellent statistics, and I would be remiss if I did not thank — and the panel echoes this as well — the work that Selma Smith did in conceiving and creating and managing this seminar has just been delightful. You've been excellent.