

SPECIAL SECTION
TEN UNPUBLISHED SPEECHES
BY
JUSTICE
CARLOS R. MORENO

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EDITOR'S NOTE

During Justice Carlos Moreno's tenure on the California Supreme Court (2001–2011), he was frequently invited to speak to civic and legal organizations. The collection of papers donated by Justice Moreno to the Department of Special Collections at the Stanford University Libraries lists more than two hundred such speaking events. From these, ten speeches are published here for the first time, selected to represent the principal topics that he discussed.¹

Most recently, on April 10, 2019, Justice Moreno was honored by the Friends of the Los Angeles County Law Library with a Beacon of Justice Award at their annual Award Gala. He was introduced by Los Angeles attorney Jesse M. Jauregui, whose words of tribute also serve as a fitting introduction to these speeches by Justice Moreno.

— SELMA MOIDEL SMITH

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CARLOS R. MORENO
ASSOCIATE JUSTICE, CALIFORNIA SUPREME COURT
2001-2011

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*Introduction of***JUSTICE CARLOS M. MORENO**

JESSE M. JAUREGUI*

Thank you, ladies and gentlemen, and good evening. I came to the library about a month ago to meet members of the board and to hear about the programs that have been developed and are offered. As I left, there was a line of people waiting patiently for help with their applications for asylum. Among the many was a young woman with a toddler in her arms. In her face, I saw apprehension if not fear, but I also saw the face of hope.

That moment reminded me of a story Justice Moreno had told me, the story of a young Mexican immigrant woman, a widow, crossing the border. Little did anyone know that she would later bear a son who would go on to become a justice of the California Supreme Court and this country's ambassador to Belize.

Carlos Moreno has been an inspiration and a role model to many of us. From his days at Yale, to the bench, to service as a diplomat, and now as a mediator, every stage has become one more episode to add to the narrative arc of the American Dream. But Carlos is a true "Beacon of Justice" because he has always mentored and embraced those who came after him.

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There are several lawyers in this room besides myself who have benefited from his mentoring, who because of his encouragement were willing to travel the road less traveled and take the path he left for us to follow. In that sense Carlos is both Robert Frost and Yogi Berra.

Justice Moreno's brilliant legal skills are surpassed only by the humility of his person and the integrity of his character. But if there is any virtue you should know him by, it is his compassion. The Rawlsian concept of justice as fairness and the need to include every member of society as a party to the social contract, no matter what their background, is evident in his approach to the matters that came before him.

His words in *Strauss v. Horton*, his now notable dissent in the Prop 8 decision, resonate with the understanding that “even a narrow and limited exception to the promise of full equality strikes at the core of, and thus fundamentally alters, the guarantee of equal treatment Promising equal treatment to some is fundamentally different from promising equal treatment to all.”²

At the entrance to this library — a library Carlos visited as a young lawyer — is the following inscription: “This library is dedicated to serve those who labor in the faith that ours is a government of laws and not men.” Justice Moreno has kept that faith and has demonstrated his commitment to a government of laws and not men.

Ladies and gentlemen, it is with great pride and honor that I present to you the Honorable Justice Ambassador Carlos Moreno.

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² 46 Cal. 4th 364, 855 (2009).

I. ADDRESS TO THE SUPREME COURT OF MEXICO ON THE AMERICAN JUDICIAL SYSTEM

Mexico City, April 23, 2002

Thank you for that gracious introduction.

It is my pleasure to be invited to speak at this important and worthwhile conference. It is also my distinct honor to be in the presence of so many distinguished jurists from all over Mexico and Latin America.

My purpose this evening is to speak briefly about the doctrine of judicial review in the United States and in the state of California, where I now sit on the Supreme Court of California.

Before making my substantive comments, however, I wanted to say a few brief words about my background.

I was born in Los Angeles to Mexican parents. My parents left Mexico during the historic Mexican Revolution and settled in the city of Los Angeles area where I was born. Although I learned to speak Spanish fairly early in my life, I have not had the benefit of having to use Spanish in my daily work, so you will forgive me when I make my substantive comments in English and have those comments translated into Spanish.

As a lawyer for approximately eleven years, I practiced in the fields of criminal prosecution as a city prosecutor and later litigated civil business disputes in private practice.

I subsequently served as a judge at the state trial court level for twelve years and handled a variety of civil and criminal cases and jury trials.

In 1998 I was appointed by President Clinton to serve as a federal District Court judge at the trial level in Los Angeles, where I handled both civil and criminal cases arising under our federal law.

And for the last six months, I have served as a justice of the California Supreme Court which handles appeals from the trial and intermediate appellate state courts. The California Supreme Court is the highest court in California and is the court of last resort for all disputes arising under state law.

As an aside, I should also mention that the state of California comprises approximately 13 percent of the entire population of the United States. As an economic engine it represents the fifth largest economy in the world. It is an extremely diverse state in terms of its industry and population. Therefore, the appeals heard by the California Supreme Court comprise a wide and interesting selection of legal issues.

My service in both the state judicial system and federal judicial system gives me a unique firsthand experience in addressing how the two similar but distinct judicial systems interact.

ORIGINS OF JUDICIAL REVIEW

“It is emphatically the province and duty of the judicial department to say what the law is.” This statement, made in 1803 by Chief Justice John Marshall in the case of *Marbury v. Madison*,³ established the power of the courts to exercise judicial review.

The doctrine of judicial review is what gives federal courts their power. It is through this doctrine that federal courts can strike down laws that violate the U.S. Constitution. In addition, federal courts, especially the U.S. Supreme Court, can review the rulings of state courts to determine whether they meet requirements of the federal constitution. In this way, the judiciary serves as a check against the two other branches of government, the executive and the legislative branches.

Today, the power of courts to review the laws is unquestioned. But unlike the powers of the president and the Congress, the power of judicial review is not found in the Constitution. Article I of the Constitution creates the United States Congress and endows it with its enumerated powers, through which it can create legislation. Article II creates the United States president and endows him with certain powers, including the power to make certain appointments.

Article III of the Constitution creates the judicial branch of the federal government. It gives federal courts broad, though limited, jurisdiction to decide certain “cases and controversies.” Article III specifies a federal judge’s term in office; they are appointed by the president, subject to

³ 5 U.S. (1 Cranch) 137 (1803).

confirmation by the United States Senate, and they serve until they decide to retire, they die, or they are removed from office through Congress's Article I impeachment and removal process.

However, nowhere in Article III, or anywhere else in the Constitution, are federal courts expressly granted the power of judicial review. Instead, this most significant power of the judiciary exists because the United States Supreme Court itself has decided that the federal judiciary possesses this power.

In establishing the power of judicial review, *Marbury v. Madison* made the judiciary a co-equal branch of the federal government. In this case, Chief Justice Marshall reasoned that our federal government is one of limited or enumerated powers set out in a written constitution. Marshall stated that the Constitution is a supreme, paramount law. If this is true, then a legislative act contrary to the Constitution is not law. Because it is "the duty of the judicial department to say what the law is," Marshall concluded that it is up to the federal courts to adjudicate conflicts between federal statutes and the United States Constitution and to reject statutes that conflict with the Constitution.

Once the principle of judicial review was established, there were still unsettled questions. Over which governmental actions did federal courts possess the power of judicial review? At the center of this question is the division between the federal and the state governments. The founders of the American Republic wanted to ensure that the new national government would be powerful enough to deal with the nation's problems, but they did not want it to be so powerful that it would threaten the rights of the people. The system they created was one of dual sovereignty between the governments of the nation and the states. A national government was created with a federal constitution and a Congress to make federal laws. Each state, however, retained its own government, constitution, and laws. Article IV of the Constitution, known as the Supremacy Clause, established that the Constitution, laws, and treaties of the United States are the supreme law of the land. However, the Tenth Amendment to the Constitution provided that all powers not delegated to the federal government by the Constitution are reserved to the states.

One central question in the development of judicial review is how conflicts between the laws of the federal government and the states would be

resolved. In later decisions after *Marbury v. Madison*, the Supreme Court established that it had the power to review decisions by state legislatures and by state courts. In 1810, in *Fletcher v. Peck*,⁴ the Court struck down a state statute, thus establishing the Supreme Court's power to hold unconstitutional laws made by the state legislatures.

In *Martin v. Hunter's Lessee*,⁵ the U.S. Supreme Court established that it could review decisions made by state courts. In this case, the Supreme Court reversed a decision by a state appellate court in Virginia. The Virginia court had claimed that a decision of the U.S. Supreme Court could not bind the state courts. The U.S. Supreme Court reversed this decision, stating that the Supreme Court is the ultimate interpreter of the Constitution. In this way, the problem of conflicting decisions about the ultimate interpretation of the Constitution was resolved by giving the Supreme Court the power to review any decision issued by a lower court.

The power of federal judicial review is therefore very significant; courts have the power to decide what the Constitution means, and they have the power to declare unconstitutional all governmental actions that exceed constitutional limits. With such a great power, the checks on the federal judiciary are small. First, the president has the power to appoint judges, and the Senate has the power to confirm the judges. Second, the Congress has the power to remove a federal judge for "treason, bribery, or other high Crimes and Misdemeanors." These two limitations are the only checks on the power of the unelected federal judges who serve with lifetime tenure.

JURISDICTION

While the power of federal judges to exercise judicial review is great, this power is checked by the limited nature of federal jurisdiction. State courts have unlimited jurisdiction; they can hear any case before them. Federal courts, however, can only hear certain types of cases. Under Article III, federal courts have jurisdiction over nine categories of cases and controversies. The three most important categories in everyday practice are: (1) the power to decide controversies between citizens of different states; (2) the power to decide controversies in which the United States itself is a

⁴ 10 U.S. (6 Cranch) 87 (1810).

⁵ 14 U.S. (1 Wheat.) 304 (1816).

party; and (3) the power to decide cases arising under the Constitution, the laws of the United States, and United States treaties.

What this limited jurisdiction means is that the large majority of cases in the U.S. judicial system are decided by state courts. State courts handle ordinary criminal cases such as for burglary or murder, as well as civil cases involving a contract dispute, or a car accident, for example. Most of these cases could not be heard by federal courts, because they do not involve a federal law or citizens of different states. Only cases fitting into the limited requirements for federal jurisdiction can be heard by federal courts. For example, a federal case can involve a claim arising under a federal law, such as a copyright claim under the U.S. Copyright Act; or a civil rights claim arising under the Fourteenth Amendment to the U.S. Constitution. These types of cases would be subject to federal jurisdiction. All cases not meeting the strict requirements of federal jurisdiction can only be heard by the state courts.

THE APPELLATE PROCESS

Cases heard in federal court are subject to the federal process of judicial review. Every party is entitled to one level of judicial review. A party can appeal the trial court's decision for review by a federal appeals court. The party who loses at the federal appellate court level has a right to appeal to the U.S. Supreme Court. However, the U.S. Supreme Court generally has discretion over whether to hear a case. This discretionary jurisdiction is invoked by filing a petition for a writ of certiorari. The votes of four of the nine justices are needed to grant certiorari. The Supreme Court receives thousands of petitions every year, but it decides less than 100 cases. Generally, then, the decision of a federal appeals court is the last level of judicial review in a federal case.

State court decisions go through a parallel process of judicial review. A state trial court's decision is reviewed by a state appellate court. The state appellate court's decision can be appealed to the state supreme court. However, like the U.S. Supreme Court, the state supreme court can usually decide whether it wishes to hear a case or not. In California, our state supreme court gets over 6,000 petitions for review each year. Typically, we decide over 100 cases (which is more than the U.S. Supreme Court, I might add).

Except for appeals from cases in which the defendant was sentenced to death, the California Supreme Court can decide whether or not a case is important enough to review. In deciding whether to exercise our power of review, we look to see whether the case presents an issue of statewide importance, or whether it presents an area where the law is unclear, or whether it presents a case where the lower appellate courts are misinterpreting the law. In choosing which cases to decide, we select cases where an opinion from the California Supreme Court will help clarify the law of California and give guidance to the lower state appellate courts.

FEDERAL REVIEW OF STATE COURT DECISIONS

The federal and the state court systems are not completely separate. As I discussed earlier, the decision of *Martin v. Hunter's Lessee* established the ability of the Supreme Court to review state court decisions. This power of the Supreme Court has evolved over time. During the nineteenth century, the Supreme Court did not have discretion in selecting the state court decisions it would review. Instead, the Court was compelled to hear all cases within the jurisdictional statutes. Beginning in the early twentieth century, Congress granted the Court the discretion to decide whether to review certain state court judgments deciding federal issues.

There are limits on the Supreme Court's ability to review state court decisions. The Court has long held that it lacks power to review state court decisions that rest on "adequate and independent state grounds." Efforts to obtain review of such decisions are dismissed for lack of jurisdiction. Thus, when a state court decision rests on state law grounds, it is not reviewable by the Supreme Court. The Supreme Court's review of a state court judgment is restricted to cases where the state court's decision is based on an interpretation of a *federal* law or the *federal* constitution. Since the Supreme Court is the ultimate interpreter of the Constitution and federal law, the Supreme Court has jurisdiction to review such a case.

Another means of federal review of state court decisions is through a writ of habeas corpus. Habeas corpus is a Latin phrase literally meaning "you have the body." Habeas corpus is a civil remedy under which a prisoner can challenge his or her imprisonment in federal court. In order to

petition in federal court for habeas relief, a state criminal defendant must have exhausted all of his remedies in state courts. A writ of habeas corpus challenges a conviction based on circumstances outside the record of the defendant's case, challenging the constitutionality of a law, for example. Through federal habeas relief, federal courts are able to review whether a state defendant is unconstitutionally imprisoned.

CONCLUSION

Judicial review, then, provides a means of checks and balances throughout the judicial system. Through judicial review, federal courts can ensure that state courts are following the Constitution and federal laws. Also, it allows appellate courts at both the state and federal levels to provide for uniform and consistent application of the laws.

The concept of judicial review is constantly evolving. And the level of judicial review differs depending on the law that a court is evaluating. With respect to equal protection under the Fourteenth Amendment of the U.S. Constitution, for example, courts use three levels of review to determine whether a particular law violates the Constitution's equal protection provision. Generally, the standard for judicial review is deferential; the government must have a rational basis for classifying groups in a particular way, and it must not act arbitrarily or capriciously. However, the judicial review standard is stricter when courts examine governmental classifications based on race, ethnicity, or gender. In these cases, in order to prevent discrimination by the majority against the minority, the government must demonstrate that there was a particularly compelling reason for the government's classification. If the government cannot provide a compelling reason, a court will strike down the law.

While judicial review changes and develops along with the development of the United States, one thing has held constant since *Marbury v. Madison*: the unquestioned power of the courts to say what the law is.

II. ACCESS TO JUSTICE

SOUTHWESTERN LAW SCHOOL COMMENCEMENT

Los Angeles, May 19, 2002

I am honored to be invited to speak at today's commencement exercises. I congratulate today's graduates and their families for all of their hard work and accomplishments.

Today, I want to share with you some thoughts about how important it is that we in the legal profession — and those who are about to enter the profession — take significant steps to ensure that access to justice is foremost in our minds.

It is my hope from these brief comments that you will have a greater sense of responsibility, obligation and commitment that comes with being a member of our legal profession.

Ours is a justice system that through the hundreds of years of its existence has given us a great measure of security and stability, while preserving and fostering the fundamental rights that are so essential to a freedom-loving democracy such as ours. It is a system founded on the bedrock of a marvelous Constitution and Bill of Rights and statutes that cover the scope and breadth of our complex society — laws that are well-intentioned and seek to provide fairness and justice to all in our form of democracy. But we know that ours is not a perfect system. We know that while our Constitution and statutes may exist on paper and provide significant rights for all Americans, unless those rights are enforced and exercised and given meaning in actual practice, for all intents and purposes they may as well cease to exist for many people in our society.

To illustrate this point, I want to tell you a story. It is a story about how difficult it can be to exercise one's rights in the context of obtaining a proper education and appropriate medical care in our society.

Our country, of course, has the greatest resources to deliver the best in health care services.

- The best training and education.
- The best equipment and facilities.
- The most advanced research and technology.
- And perhaps the most well-intentioned service providers.

But the existence of all of these wonderful resources means nothing unless one has *access* to these services. Access is the key to obtaining one's rights. You can have the best health care system in the world, as we do, but without access to these services, they may as well not exist.

Almost two years ago my wife and I took custody of her then-five-year-old niece, Heather. Heather had been diagnosed as autistic and severely developmentally delayed. This condition appeared to be the result of severe social neglect and deprivation as well as perhaps an organic malfunction of her brain. We took in Heather because the only other option was that the State of New Jersey institutionalize her perhaps for the rest of her life. We offered our help and our home to see if a new environment would allow Heather to thrive. Although Heather was then five years old, she could not speak a word, she had no language; instead she communicated by loud screams. She was rail thin (35 pounds) and had a severe eating disorder since she had never been weaned from consuming baby formula directly from a bottle, and thus all her food intake was by means of a nipple and baby bottle (that is to say, she didn't know how to chew). Her motor skills were so lacking that ordinary physical activities such as riding a tricycle or knowing how to play on swings or other playground equipment was simply beyond her limited capability. And at five years old, she was not potty trained. She was subject to temper tantrums which included pounding her head on the floor and walls, and emitting screams that sent shivers through your spine.

My wife and I appeared at a court hearing in New Jersey, offered our assistance and with only two days' notice, Heather was on a plane with us back to Los Angeles accompanied by a social worker and two nurses since no one knew what to expect on the flight back.

Neither my wife nor I had any prior experience, of any significant note, with the health care system, much less any experience in dealing with autistic children. We found that there was an immediate need for child care, medical care, major dental care, neurological exams, plastic surgery, genetic testing, hearing tests under sedation, in addition to finding a school for her and obtaining the right services for her.

More significantly, for many of you here today, we had to confront a virtual maze of state and federal regulations and statutes dealing with the rights of the disabled to both proper and appropriate medical and

educational care — and no single agency to help coordinate these services. Just as we have the greatest health care system in the world, we also have some of the most advanced laws that protect the rights of people with disabilities and require access to appropriate services . . . the Americans with Disabilities Act, Individuals with Disabilities Education Act, etc.

In attacking these issues, I recalled my experience as a business litigator and essentially assumed a litigation mode. I created individual files for every agency that I would have to deal with from the local school district, the local regional center, DPSS, social security, Medi-Cal and many others.

In retrospect, our overall experience with the numerous agencies was somewhat mixed, although at the time it seemed I was more often frustrated than satisfied with my contacts. Some agencies were, of course, more receptive and informative than others. By and large most were committed to providing mandated services. However, many who wanted to help were simply overwhelmed and one simply had to be placated by being placed on a waiting list or deal with the ubiquitous problem of voicemail. I learned to follow up phone calls with memos in writing to ensure accountability. I researched the applicable laws, and pointed them out when agencies were not following them. Of course, the fact that I was a federal judge at the time may have persuaded some to respond more quickly. But the thought occurred to me many times during the process of obtaining services for Heather that I probably was having a “relatively” easy time in obtaining these services, but not always.

But I also thought that if someone like me, who is obviously educated and has been appointed by then-three and now four executive authorities to high positions in the judicial system, if I was having difficulty in getting the system to work, what did people do who couldn't speak the language, who were not even familiar or aware of their rights, people who couldn't take time off from work, who didn't have access to word processing or fax machines, and indeed, people who simply did not seek any of these services because they were either mentally ill or were otherwise reluctant to deal with any public agency. How did they get access to these services? Because, believe me, it isn't easy.

I concluded from my short but intense, but also ongoing experience with the health care and educational systems, that we as a nation, and particularly lawyers, must make a concerted effort to effectuate a philosophical

sea change to make access to medical and legal services uppermost in our minds. That we should make these services more accessible and easier to obtain rather than more restrictive and more difficult to obtain. That our service industries, not only our medical service industry, but our legal service profession as well, should accommodate the user rather than the provider. I did not seek and do not seek now to be an advocate for any particular issue in the health care field, but I do think that I can and should be an advocate for improved or increased access to justice in our legal system.

Now I have no question that all of you here today are dedicated to the justice system and, I hope, will strive to make it more accessible and meaningful to those you intend to serve and to be rewarded for your efforts. Otherwise, I doubt that you would have chosen to go to law school and incur the tremendous expense of time and effort and money that law school entails. Because, fundamentally, ours is a helping profession; we seek to facilitate transactions, resolve disputes, create order and stability, rather than uncertainty.

But I want you to consider and reflect upon the fact that for many people in our community the fact that we have a marvelous Constitution and laws that purport to provide rights to all does not ensure that the majority of people, and especially those who need the services and protections afforded by these rights, will in fact benefit from these rights. For just as simply as having the best health care system does not ensure access, having the best legal system does not ensure justice. Because unless these rights are exercised and enforced, those rights may and will cease to exist.

Many of you here, like me, have been able to share in the many rights and privileges afforded by this great country. By virtue of your education, stamina, determination and sense of righteousness, you have come a long way. But I urge you to reflect upon the work that must still be done if we are to fully integrate all segments of our society into our justice system.

I want to challenge all of you to become advocates for greater access to justice, whether it be at your work, in your community, through bar association activities, serving on boards, or in the political forum. I also want to challenge you personally to do what you can to ensure access to justice for those who lack access. Something as simple as making sure that people are not excluded from participation in the justice system because of a barrier such as language, resources or technology can make a big difference.

I ask you to remember the words of the American author, Edward Everett Hale, who wrote:

I am only one,
But still I *am one*,
I cannot do everything,
But still I can do something,
And because I cannot do everything,
I will not refuse to do the something that I can do.

In conclusion, you can make a difference. You can make a *big* difference even though you are only one. You can make it easier for people to achieve justice because you now have the tools that so many out there are lacking.

Together, we may not always be successful, but we must keep trying to make sure the system works as it was intended to work. So that the wonderful opportunities and benefits offered by our great country to everyone are fulfilled.

As an update on my niece, Heather now is able to eat solid foods on her own (she likes pizza, pasta and cheese omelets) and weighs forty-nine pounds; she is able to communicate with a combination of voice and sign language, she is able to ride a scooter and swing on a swing, and she is potty trained. Her tantrums are almost gone, and it has been told to us, and we agree, that most of the time her behavior is better than your average six-year-old, in other words, better than most trial attorneys. Although no one can ever give you a prognosis as to one who has an autistic disorder, one can only remain optimistic. And just as I am optimistic about Heather's future, I, too, am optimistic about the future of today's graduates. I am confident that you will use your hard-earned skills and talents to serve the cause of justice — and promote access to justice — as you enter our great profession.

Thank you for giving me this opportunity to make these brief comments.

III. LAW ENFORCEMENT AND THE COURTS

ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS

January 31, 2003

Thank you for inviting me to be your keynote speaker this evening when we honor the many members of law enforcement who have given so much of themselves, their courage and bravery, so that we may all continue to live in freedom.

Tonight, I simply want to share with you a few of my thoughts about how we who serve in the judicial system are acutely aware of the many considerations of public safety that impact the lives of so many of our citizens, particularly the members of this audience who seek to enforce the laws of our state on a daily basis.

I have been on the Supreme Court for a little over a year and have found the work to be intellectually stimulating and an altogether enjoyable experience. I hope, also, that I have contributed in some small measure to the development of the law in California. I have had the privilege of participating in a number of significant cases, which I will tell you a little about in a few moments.

You know, as a trial court judge for fifteen years in both the state and federal judicial systems, I was able to participate in thousands of cases. One of my favorite moments came in a case which I heard when I was sitting as a judge in the Compton Municipal Court and a certain deputy, Tom Layton, from the Carson station was testifying in a motion to suppress, a section 1538.5 hearing. As the prosecutor was attempting to refresh Deputy Layton's recollection about the specific facts of the case, something the prosecutor had to do repeatedly, since the deputy's memory was not being refreshed by examining the police report, I had to intervene and pointedly asked Deputy Layton if he had any recollection whatsoever about this particular arrest, which involved a miniscule amount of rock cocaine. Much to his credit, and much to my astonishment, Deputy Layton indicated that he had no independent recollection of this case whatsoever, whereupon I asked the young deputy district attorney if he had any further questions.

The D.A. meekly replied that he had no further questions. Fortunately, however, the defendant did have a probation violation hanging over his head and a deal was quickly worked out. As far as I know, Tom has never let that one ruling affect his perception of my judicial skills.

I also recall another case out of Compton where the Compton Police Department got a tip of an impending commercial burglary. As they staked out the location, a man and woman, using a brick, broke the glass to the business, gained entry and were caught, property in hand. At the preliminary hearing, the female defendant testified over her attorney's strenuous objection. Those of you who appear in court know that defendants never testify at the preliminary hearing. Well, she thought she had a good defense. She explained to me that she broke the glass not to "rob the store," but because she wanted to recycle the glass. While that was a tough decision, she was held to answer.

I have certainly come a long way since those days in Compton. And from my years in the Criminal Courts Building downtown.

This past year, for example, our Court ruled on a number of significant issues and I want to talk briefly about a couple of those decisions because they impact directly on the kind of work that you all do on a daily basis.

The Court is concerned in almost every criminal case it decides with the question of public safety and the delicate balance that comes into play when weighing concerns about individual freedoms protected and guaranteed by our Constitution.

In a pair of cases we delineated the proper scope of searches of persons and vehicles when drivers could not produce any evidence of personal identification or registration. Our California Constitution tells us to follow federal law in this regard, but federal law does not always squarely address specific fact patterns or delineate the exact parameters of a proper search. We held in *Arturo D.*⁶ that it was reasonable for an officer to search underneath a driver's seat for evidence of personal identification and registration since documents could reasonably be expected to be found there. That is, the officers were not strictly limited to the glove compartment, a location which had been considered a traditional repository for such documents to be located. We held instead that the government interest in ascertaining

⁶ In re Arturo D., 27 Cal. 4th 60 (2002).

the identity of an individual and the identity of a registered owner of a motor vehicle justified a limited intrusion into other areas where such documents could reasonably be found.

In a time when we are constantly required to produce evidence of identification, the justification for a limited search here was sufficient since it would make no sense for a police officer to issue a citation to a phantom defendant, that is, someone without some form of identification. In other words, there was no need to accept the suspect's word as to his name, address, and date of birth when documents confirming his true identity could be ascertained by a minimally intrusive search.

While I do not have specific data concerning the dangerousness of traffic stops, it is common knowledge that even the most "routine" of stops present substantial and unknowable dangers to the police officers making those stops. At a minimum, taking the additional step of ascertaining the identity of a person appears to be a most reasonable and minimal intrusion into that individual's right to be free from unreasonable searches and seizures.

In another case decided this past term, our Court ruled on another type of security implicating the rights of police officers. Besides the dangers inherent in doing one's job as a police officer, there is the ever-present issue of complaints made by citizens against police officers and the collateral consequences that these complaints have on a police officer's career. In response to this issue, the Legislature enacted a statute making it a crime to make a knowingly false statement against a police officer, Penal Code section 148.6. Notwithstanding certain First Amendment considerations about the constitutionality of a statute which makes it unlawful to make a false statement against a public official, and officers are public officials, the Court upheld the constitutionality of Penal Code section 148.6.⁷ Although I did not fully agree with the reasoning of the majority in that case because the law is quite particular in protecting our rights to criticize all government officials, I found the law to be constitutional on the grounds that the state had a valid interest in criminalizing such knowingly false statements because of the negative impact that such statements trigger a mandatory

⁷ *People v. Stanistreet*, 29 Cal. 4th 497 (2002), *overruled by Chaker v. Crogan*, 428 F.3d 1215 (9th Cir. 2005).

investigation and record retention requirement which does not happen when false statements are made against other public officials. Considerable public resources are required to investigate these complaints, and the complaints may adversely, and uniquely, affect an accused police officer's career at least until the investigation is complete.

These cases illustrate the keen appreciation that those of us in the judicial system must have for the dedicated work of police officers.

Tonight, we honor many individuals who have demonstrated their uncommon valor by performing courageously and selflessly under the most dangerous of conditions and our tributes tonight are inadequate in expressing our true gratitude for their services.

But we must go beyond simply honoring these individuals, because there is a further point that cannot be denied: there are many, many others who serve in law enforcement who should be similarly honored and are honored — those of you who simply respond to any and every call you receive, those of you who have, luckily, never had to draw or fire a weapon while on duty, and those of you who have been able to calm a potentially dangerous situation through the use of common sense and good humor.

This was dramatically pointed out to me many years ago when I went on a series of ride-alongs with local law enforcement as part of my training as a deputy city attorney in Los Angeles. Of course, I opted for a graveyard shift with Rampart Division, a division that served the area in which I was raised. The call was a possible arson complaint at an old apartment building in the mid-Wilshire area. I realized quickly how dangerous a job the officers were doing when the two officers I was with proceeded up to the second floor of the apartment building and before us was a long, dark and narrow hallway at the end of which the suspect was reported to be living. The officers did not have to tell me more than once to stay where I was. At that moment I said that there wasn't any amount of money or psychic reward one could give me to walk down that hallway, knock on a door behind which who-knows-what lurked and to calmly and dispassionately deal with someone who ultimately turned out to be obviously intoxicated if not mentally disturbed as well. That vivid image and the emotions I felt that night remain with me still, notwithstanding the passage of twenty-seven years. While this was no doubt a "routine" call, it demonstrated to me that nothing in law enforcement is ever routine.

Sometimes those of us in the judicial system are accused of being abstract in our thinking and unconnected to the real world. In some instances that may be a valid criticism, but bear in mind that our job is to protect the Constitution and to protect those precious liberties that are the very foundation of our country. Protecting our freedom and our security, however, must be more than an abstraction. It is important to realize that our decisions have real world implications for thousands and millions of people in our society, and in particular, for those who serve in law enforcement. We as judges must never forget that.

All of you who respond to 911 calls or who are dispatched to the scene of a suspected crime or those of you who make traffic stops should be honored tonight. Not only should you be honored and proud of the work you do, you should be honored by the people you serve, and you should be honored by those of us in the judicial system who interpret the law and sometimes judge your actions with the benefit of hindsight. No more need be said.

Thank you for giving me this opportunity to address you this evening.

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IV. MENDEZ *v.* WESTMINSTER AND SCHOOL DESEGREGATION

CHAPMAN UNIVERSITY

Orange, March 27, 2003

INTRODUCTION

In 2004, we will celebrate the fiftieth anniversary of the United States Supreme Court's historic ruling in *Brown v. Board of Education*,⁸ which ended segregation in public schools and severed the doctrine of "separate but equal" from its constitutional moorings. This important decision marked a turning point in the nation's struggle for equal rights for all people, regardless of color, in our society. This achievement resulted from the struggles engaged in by communities of color across the country to realize the ideals of justice and equality in their local school districts. The Mexican-American community in the small town of El Modena in Orange County, California was only one of those who sought to challenge institutional racism by pursuing desegregation through the courts.

Traditionally, the legal discussion of desegregation has focused on the battles fought by African Americans through litigation to dismantle Jim Crow segregation that permeated every level of southern society. Little attention has been paid to the efforts of Mexican-American parents who sought to achieve dignity and equality for their children by launching grassroots community efforts to overturn similar *de jure* segregation that existed in their largely farm-based communities. In fact, when the daughter of one of the named plaintiffs in *Mendez v. Westminster*⁹ asked her father why they had never been told about the case, he replied, "Because nobody asked." It is the function of this conference to create a consciousness of the past that assists the children growing up in our communities today to continue the movement toward a society that is free of discrimination for all.

⁸ 347 U.S. 483 (1954).

⁹ 161 F.2d 774 (9th Cir. 1947).

Mendez v. Westminster, a decision that determined discrimination based on national origin violated the Equal Protection Clause of the Fourteenth Amendment, is more than just a legal opinion; it presaged the dismantling of *de jure* segregation in public schools across the country. The court ruled on the plaintiffs' claims in the case seven years prior to *Brown v. Board of Education*. Interestingly, Justice Thurgood Marshall filed an amicus brief in support of the plaintiffs' position arguing that the facts of *Plessy v. Ferguson*¹⁰ involving desegregation in transportation did not apply to public schools. Although, the Ninth Circuit did not agree with this position, it marked a turning point in the movement to end segregation.

HISTORY OF SEGREGATION IN ORANGE COUNTY

Crucial to a thorough understanding of the issues that *Mendez v. Westminster* sought to address is an examination of the historical backdrop of pervasive segregation between Mexicans and Whites that existed in Orange County in all facets of everyday life during the time period. A commentator (Christopher Arriola) has dubbed the society of Southern California and its cheap Mexican labor the "citrus society."¹¹ This term signifies the dependence of the local farm economies on oranges as commodities and thus, on Mexicans who labored in the orchards. Given these economic necessities, Southern California politicians and agribusiness leaders lobbied Congress furiously to maintain the steady flow of cheap labor from Mexico into Orange County.¹² As a result, "the California Mexican population tripled between 1920 and 1930, from a conservative estimate of 121,000 to 368,000."¹³ In El Modena, by the mid-twenties, Mexicans comprised a majority of the population at 1,000 citizens.¹⁴

Whether intentional or not, virtually all aspects of everyday life in the town functioned in a vigorously segregated context. Movie theaters,

¹⁰ 63 U.S. 537 (1896).

¹¹ Christopher Arriola, *Knocking on the Schoolhouse Door: Mendez v. Westminster, Equal Protection, Public Education and Mexican Americans in the 1940's*, 8 LA RAZA L.J. 166, 167 (1995).

¹² *Id.* at 170.

¹³ *Id.*

¹⁴ *Id.*

swimming pools, organizations, businesses, housing, churches, and homeowner associations were all segregated.¹⁵ Many were segregated pursuant to official policies.¹⁶ As a result, the town developed a doughnut shaped segregated residential pattern — all Whites lived on the ring and all Mexicans lived in the center.¹⁷

In essence, the segregationist attitudes of the town's white residents became mirrored in all institutions of the small town. Nevertheless, in day-to-day life, Mexicans and Whites interacted frequently, albeit in the neutral zone of the commercial establishments of the downtown area where each community owned half the businesses.¹⁸ The schools reflected this neutral zone in a strip of land that separated the white from the Mexican school by 100 yards and functioned as a jointly shared playground where the children, divided by race, played at different times during the school day.¹⁹

SEGREGATION REFLECTED IN ORANGE COUNTY SCHOOLS

In other words, “The schools in El Modena were both a reflection of the citrus society and its silent segregation.”²⁰ Responding to the influx of Mexican children into the schools and what educational theorists were now referring to as the “Mexican problem,” the town built Roosevelt High School in 1923.²¹ The school district cited overcrowding as the ostensible reason for construction of the new school.²² However, later, when the school district changed Lincoln's calendar to match the agricultural cycle and placed all of the Mexican children in the older school, the true purpose of segregation became quite apparent.²³

¹⁵ *Id.* at 171–72.

¹⁶ *Id.* at 171.

¹⁷ *Id.* at 172.

¹⁸ *Id.* at 173.

¹⁹ *Id.*

²⁰ *Id.* at 172.

²¹ *Id.*

²² *Id.* at 173.

²³ *Id.*

Segregationist education ideologies were bolstered by theories that presumed Mexican cultural inferiority. White educators responded to this premise by adopting an assimilationist curriculum that tracked Mexican children into vocational, remedial, and domestic programs.²⁴ They also pointed to the results of culturally biased IQ testing and emphasized lack of English proficiency as indicators of the supposed intellectual inferiority of Mexican children.²⁵ Incidentally, these systems of tracking served the white landowners well as many Mexican children dropped out early and continued their parents' work in the fields.²⁶

The Roosevelt school's faculty, academic programs, and facilities were vastly superior to those of the Lincoln school.²⁷ Discipline of all students was administered from the Roosevelt school.²⁸ And most significantly, administrators did not determine who went to which school based on academic proficiency.²⁹ Instead, race determined placement.³⁰ In fact, it did not matter that, in 1945, the seventh-grade students in Lincoln scored higher on standardized tests than those in Roosevelt.³¹

Light-skinned Mexican children descended from Californios (the first Mexican families in California) and Japanese children were also allowed to attend the Roosevelt school.³² Their families primarily shared the status of wealthy growers with their white counterparts.³³ This may have meant that segregation not only thrived on racism but also found its genesis in the maintenance of a feudal system premised on the continual flow of labor from the Mexican community.³⁴ Put another way, one white rancher asked rhetorically, "Hey if we [integrate] who's going to pick our crops?" That question was implicitly answered by the dual existence of the Roosevelt and Lincoln schools.

²⁴ *Id.* at 173–74.

²⁵ *Id.* at 174.

²⁶ *Id.*

²⁷ *Id.* at 176.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 177.

³³ *Id.*

³⁴ *Id.*

This dual educational system resulted in high dropout rates for Mexican children.³⁵ In 1923, out of 635 enrolled students at Orange High School, only 8 were Mexican (1.25 percent).³⁶ By 1940, this rate had increased very little to (4.12 percent) or 165 Mexican students out of 4,000 total.³⁷ The school district ultimately solidified its segregationist structure in an official policy that mandated separate education systems for Whites and Spanish-speaking children of Mexican descent.³⁸ Curiously, no mention of the school board policy can be found in the minutes from 1943 to 1953.³⁹ And between 1945 and 1946, the years of the *Mendez v. Westminster* litigation, the minutes are missing altogether.⁴⁰

THE RESPONSE

Before and after World War II, several Latino political organizations formed to combat inequalities through social and labor activism.⁴¹ These included the League of United Latin American Citizens (LULAC), the GI Forum, and the Latin American Organization (LAO).⁴² The LAO formed specifically to combat school segregation.⁴³ Soon thereafter, several Mexican parents, including the Ramirez family in El Modena, requested transfers of their children to Anglo schools.⁴⁴ All requests were denied and the parents followed up by writing letters and complaining to administrators.⁴⁵ Leaders began to organize the community around these seminal actions taken by several brave families.⁴⁶

³⁵ *Id.* at 179.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 180.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 182.

⁴² *Id.* at 182–83.

⁴³ *Id.* at 183.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

MENDEZ v. WESTMINSTER — PART 1

On March 2, 1945, several of the Mexican parents whose transfer requests had been denied sued several Orange County school districts alleging unlawful discrimination for the exclusion of their children from Anglo schools.⁴⁷ Both sides stipulated that the case did not involve race discrimination and that Mexicans were considered to be “of the white race.”⁴⁸ Instead, the parents sought relief under the Equal Protection Clause of the Fourteenth Amendment arguing that their rights, as a class, had been violated because their children had been forced to attend segregated schools because of their national origin.⁴⁹

At the outset, the schools admitted that Spanish-speaking students had to attend schools separate from non-Spanish speakers.⁵⁰ The parents contended that this policy provided a pretext to discriminate against Mexican children based on their national origin.⁵¹ In opposition, the schools challenged the jurisdiction of the court, arguing that this state law entirely controlled the issue in this case.⁵² However, the trial court rejected this argument, finding that actions of public school authorities in California are to be considered to be actions of the state within the meaning of the Fourteenth Amendment.⁵³ This meant that the policies of the Orange County schools were subject to the Equal Protection Clause.⁵⁴

The court then concluded that state law in conjunction with the Fourteenth Amendment’s Equal Protection Clause prohibited the segregation of Mexican children from others based on their national origin.⁵⁵ Key to this decision was the court’s determination that “[a] paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage.”⁵⁶

⁴⁷ *Id.* at 185.

⁴⁸ *Id.*

⁴⁹ *Mendez v. Westminster*, 64 F. Supp. 544, 545 (1946 S.D. Cal.).

⁵⁰ *Id.* at 546.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 547.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 549

The court continued by stating, “It is also established by the record that the methods of segregation prevalent in the defendant school districts foster antagonisms in the children and suggest inferiority among them where none exists.”⁵⁷ The court then noted how evidence of discrimination confirmed this conclusion.⁵⁸ Finally, the court rejected the idea that students had been placed based on their language proficiency because the tests were a pretext for national origin discrimination.⁵⁹

First, the tests used by the school districts were found to be “generally hasty, superficial and not reliable.” Second, “In some instances separate classification was determined largely by the Latinized or Mexican name of the child.”⁶⁰ Third, “Such methods of evaluating language knowledge are illusory and are not conducive to the inculcation and enjoyment of civil rights which are of primary importance in the public school system of education in the United States.”⁶¹ Key to this portion of the court’s decision was its conclusion that language tests that had been offered were a sham and that any segregation among students had to be based wholly on language proficiency measured by credible tests.⁶²

The court then held, “The natural operation and effect of the Board’s official action manifests a clear purpose to arbitrarily discriminate against the pupils of Mexican ancestry and to deny them the equal protection of the laws.” The court then entered an injunction against the school district ordering it to cease practicing discrimination against Mexican children in its placement decisions.⁶³

Without the support of the community and its effort to raise funds for litigation costs, this decision would have probably been impossible.⁶⁴ One of the plaintiff-parents (Gonzalo Mendez) took the whole year off from work to organize people and gather evidence.⁶⁵ And he even paid

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 550.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Arriola at 186.

⁶⁵ *Id.*

men to take the day off from work to go to court.⁶⁶ Clearly, many community members sacrificed much to further the ends of justice and equal protection of the laws.

ORANGE COUNTY'S RESPONSE

A few days after the parents had succeeded in obtaining an order mandating desegregation of Orange County schools, the school districts reported in the local newspaper that they would be appealing the case to the Ninth Circuit Court of Appeals in San Francisco.⁶⁷ Furthermore, the school board refused to change its policies for placement the following year.⁶⁸ Parents organized an organization known as "The Unity League of El Modena" and went before the board to contest its decision not to change its policies.⁶⁹ In response, the school superintendent quipped, "tests were not given because they were not necessary to tell that the children could not speak English."⁷⁰ A school board member added, "If the parents had English as the language spoken in the home the children would have no trouble when they go to school and would do much better."⁷¹ Essentially, the school board and the superintendent blamed the Mexican parents for their segregationist policies and then proceeded to defy the court's order. On September 13, 1946, the school district confirmed their decision not to change their policies and to continue the agricultural cycle calendar for the Lincoln school.⁷²

The parents then responded by going to court to have the school district held in contempt for violating the court order.⁷³ "The court forced the school board to implement the plan to divide the school by grades," thus ending discrimination.⁷⁴ However, the school district obstinately continued its battle in the Ninth Circuit Court of Appeals.

⁶⁶ *Id.*

⁶⁷ *Id.* at 187.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

MENDEZ v. WESTMINSTER — PART 2

On appeal, the school districts reargued their contention that the federal courts had no jurisdiction over this state law matter.⁷⁵ They then added that even if the federal courts did have jurisdiction, there is no violation of the Equal Protection Clause if facilities provided to students are equal and that school districts could segregate as they pleased, in that instance.⁷⁶

One of the most interesting aspects of the case on appeal were the amicus briefs filed in support of the parents' efforts to outlaw desegregation.⁷⁷ For example, David C. Marcus argued for the parents and cited the U.S.'s involvement in World War II and its advocacy for democracy for all as a basis for upholding the lower court's ruling against segregation.⁷⁸ He also argued that the school district's policies discriminated against Mexicans on the basis of national origin and violated California law.⁷⁹

THE AMICUS BRIEFS

Almost every major civil rights organization active during the era wrote an amicus brief in support of the Orange County parents.⁸⁰ Future Justice Thurgood Marshall, on behalf of the NAACP, made three points in support of the parents' position: (1) racial classifications are invalid under "Fundamental Law," (2) Due Process and Equal Protection cannot be achieved under a system of segregation, (3) *Plessy v. Ferguson* does not disallow a ruling that school segregation is invalid since it only deals with public transportation.⁸¹ He also emphasized the post-World War II themes of freedom the U.S. cited as its justification for war, pointing out the hypocrisy of segregating white students from Mexican students while simultaneously claiming moral superiority over racist empires around the world.⁸²

⁷⁵ *Id.* at 193.

⁷⁶ *Id.*

⁷⁷ *Id.* at 193.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 194.

⁸¹ *Id.*

⁸² *Id.*

The ACLU focused on this theme and stated in its brief: “If we learned nothing from the horrors of Nazism, it is that no minority group, and in fact, no person is safe, once the State, through its instrumentalities, can arbitrarily discriminate against any person or group.”⁸³ The California attorney general wrote a short brief pointing out that no state statute allowed the segregation of Latino students.⁸⁴ It also noted other statutes that mandated the segregation of Asian and American Indian students from white students.⁸⁵ After the decision in this case was affirmed, the California Legislature eliminated these provisions.⁸⁶

Finally, the American Jewish Congress argued that: (1) When a dominant group segregates an inferior group it can never be equal, (2) any racial distinction is immediately suspect by the courts, and (3) segregation by the state of immigrants or children of immigrants is contrary to “Americanization” policies of the federal Immigration and Naturalization Service and therefore preempted.⁸⁷

The Ninth Circuit refused to overrule *Plessy v. Ferguson*, sidestepping the question of whether the doctrine of “separate but equal” violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution.⁸⁸ Instead, the court emphasized the absence of California law allowing the segregation of Mexican school children as a basis for finding an equal protection violation.⁸⁹ Moreover, the court also refused to rule on whether the school district had discriminated against the children on the basis of their race.⁹⁰ The civil rights groups awaited the appeal of the case to the U.S. Supreme Court by the school district.⁹¹ This never materialized and the school districts acquiesced to the court’s desegregation order.⁹²

As one commentator has opined: “*Mendez* was part of a process which stripped away the formal structure of legalized segregation and exposed

⁸³ *Id.* at 196.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 198.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 199.

the underlying conditions of racism and reaction that divide the American people and plague their consciences.”⁹³ One direct effect of the decision in *Mendez* was the abrogation of all California segregation laws that targeted Asians and American Indians.⁹⁴ The decision also motivated the Mexican community in Texas to pursue litigation and achieve an injunction in federal court barring discrimination on equal protection grounds.⁹⁵ Also, *de jure* segregation in California was significantly weakened, given that prospectively, segregation would be permissible only if specific state legislation authorized it.⁹⁶ In other words, local school boards could not create their own segregationist policies without approval from their state governments.⁹⁷ This was especially significant in California, given that on the heels of the *Mendez* decision, the state legislature eliminated all laws mandating school segregation.

However, probably the most significant effect of the *Mendez* decision was its value as an initial step in eliminating *de jure* segregation in California.⁹⁸

POST-MENDEZ AND THE MODERN PERIOD

Subsequent to the Ninth Circuit’s decision, the El Modena School Board voted to drop the appeal and integrated Roosevelt and Lincoln.⁹⁹ Historically, this was the first time in the town’s history that Anglo and Mexican students attended the same school in large numbers.¹⁰⁰ *De jure* desegregation in El Modena had been ended.¹⁰¹

In subsequent years, the Mexican community gained seats on the school board.¹⁰² However, these gains were largely in vain as the number of

⁹³ Arriola at 199 (quoting Wollenberg at 35).

⁹⁴ *Id.* at 199.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 200.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 201.

Anglos vastly outnumbered those of Mexican descent on the board.¹⁰³ In a show of continuing Anglo economic and political dominance, the school board transferred the largely white portion of El Modena School District to the all-white Tustin school district.¹⁰⁴ With the completion of this transfer went valuable tax revenue and a substantial loss of enrollment.¹⁰⁵ Later, when Mexican members of the school board tried to stem the transfer mania, the District Board of Supervisors stepped in on behalf of white parents and overruled the school board, forcing the transfers.¹⁰⁶ As white flight and *de facto* segregation replaced *de jure* segregation, the district's resources declined and school facilities deteriorated.¹⁰⁷

Other forms of *de facto* segregation took similar forms. New schools were built that took advantage of natural boundaries like ravines to divide white from Mexican communities.¹⁰⁸ Attendance zones were adjusted to divide white from Mexican communities, while providing the former with superior resources and facilities.¹⁰⁹ The curriculum saw a return to tracking Mexican students into bilingual and remedial education.¹¹⁰ All of these measures served to reestablish the boundaries between the white and Mexican communities that existed during the former period of *de jure* segregation. Moreover, the silence of the opposition to the resurgence of this new form of discrimination was just as pervasive as it was when the *Mendez*'s first began their struggle to see equality in their day for their children.

CONCLUSION

In closing, the story of desegregation in Orange County was one of hope, victory, and defeat. Once the Mexican community had defeated the proponents of *de jure* segregation, the white community altered their strategies to pursue systematic exclusion of Mexican students that functioned in a more devious manner than ever. This *de facto* resegregation became almost

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 202.

¹⁰⁸ *Id.* at 204.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 205.

impossible to combat because those who supported it weren't openly drawing distinctions between races to decide how to organize the curriculum, place students, or allocate resources. Instead, they were redrawing attendance boundaries, reorganizing school districts, reallocating revenue, planning housing subdivisions, and engaging in voluntary transfers. Ostensibly, none of these strategies had anything do with race. Or did they?

Voluntarism, individual choice, economic efficiency and free will, in this context, have all become euphemisms for strategies that have functioned to resegregate our schools in the present day. Thus, the question is: "What should this generation do about it?" Only time and the courage of our communities will tell. Let us hope that we can match the bravery of our predecessors here in Orange County who fought to give their children a future free of the insidiousness of racial division.

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V. STANDING THE TEST OF TIME: USING DIVERSITY AS THE FOUNDATION FOR JUDICIAL DECISION-MAKING

BERNARD E. WITKIN JUDICIAL COLLEGE OF
CALIFORNIA

San Francisco, June 24, 2003

I want to congratulate each of you for your appointment or election to the bench. And I should congratulate your dean, Michael Garcia, for his appointment to the Judicial Council. And it is certainly a pleasure to see a number of you who either tried cases before me or appeared in my court when I served on the state and federal trial courts.

By this time, I know many of you are exhausted with the rigors of judges' college, but the end is in sight. I'll have you know that I had to attend judges' college twice, having flunked the first time — and look at me now. No, the truth is I attended judges' college in 1987 for the Municipal Court and in 1994 for the Superior Court. In fact, I still have the judges' college T-shirts that were issued to us as proof. I was informed that you were not issued T-shirts because it would not serve an educational purpose. But if you note from the logo on my 1994 T-shirt there is a Latin reference to “To or for the judge, the punishment is sufficient” — that's educational enough for me.

Thank you for inviting me this evening to deliver the twenty-seventh annual Roger J. Traynor Forum Lecture. When I received the invitation to speak tonight, Judge Michael Garcia reminded me that the Traynor Forum is an opportunity to challenge new judges on a controversial and thought-provoking subject. This is an appropriate forum to honor Justice Traynor's legacy. As a champion of civil and personal rights in his thirty years on the California Supreme Court, Justice Traynor led California to the forefront of the protection of free speech and authored the opinion overturning a California anti-miscegenation law sixteen years before the United States Supreme Court addressed the issue in *Loving v. Virginia*.¹¹¹ This California

¹¹¹ 388 U.S. 1 (1967).

precedent was much like Justice Mosk's opinion in *People v. Wheeler*¹¹² which foreshadowed the *Batson* decision.¹¹³ I am honored and humbled to have been appointed to the same judicial seat occupied by both Justice Traynor and Justice Mosk.

Tonight, I'd like to discuss the decision-making process of judges, and consider whether that process ensures that our rulings and opinions achieve justice today and will stand the test of time to achieve justice tomorrow. Diversity is an important element in this process, and the experience that comes from increased diversity on the bench, I believe, will help ensure that our opinions do stand the test of time. Our challenge today is to realize that law is not a mere abstraction, and our challenge is to use legal principles and doctrines that we will not regret in the future. In doing so, we can take advantage of the great force of history and experience that we all carry within us.

I. INTRODUCTION

The case reports of this country are filled with decisions that we now feel were poorly decided. Yet, when most of these cases were decided, they were met generally with widespread judicial approval and were readily incorporated into existing legal doctrines. How is it possible that cases that were once so right are now so wrong? These cases did not deal with obsolete technology or novel legal principles or facts; they were issues that were as pertinent then as they are now.

One explanation for our shifting legal perspective is a gradual change in social dynamics and the resulting increase of diversity in the legal system. Most of the decisions that are held in disdain were issued by courts that lacked a diversity of background, experience, or ideals. Many cases that have stood the test of time included diverse adjudicators or advocates, or acknowledged the virtues of diversity in the pursuit of justice. Diversity does not merely provide the appearance of justice (although it certainly does that); I argue that it aids substantially to obtain actual justice.

Nonetheless, it remains to be seen whether the cases we decide today will withstand the test of time. Though we have moved toward racial and gender diversity on the bench, our job is far from done. We must continue

¹¹² 22 Cal. 3d 258 (1978).

¹¹³ *Batson v. Kentucky*, 476 U.S. 79 (1986).

our pursuit of a judiciary that represents a cross-section of the society we live in. Whether our judiciary should represent more than just racial and gender diversity remains to be seen. Should the breakdown of sexual preferences of the judges mirror those of the community? Should their religious beliefs mirror those of the community? Should their social and/or economic status mirror that of the community? All of these issues will come into play when the decisions put forth by the judges today are scrutinized for fairness and bias in the years to come.

II. JUDICIAL RECOGNITION OF THE VALUE OF DIVERSITY

A. *STRAUDER v. WEST VIRGINIA*

The idea of diversity as an essential ingredient to justice is not novel. Blackstone said, “The right of trial by jury is . . . that trial by the peers of every Englishman” and prejudice in a community was historically grounds for change of venue. The Supreme Court itself recognized, very soon after the Civil War, the value of diversity to justice. The Court said that justice could not be served when the law precludes diversity. In *Strauder v. West Virginia*,¹¹⁴ the U.S. Supreme Court overturned the conviction of a black man because a West Virginia statute prevented Blacks from serving on a jury. The Court noted that exclusion of a particular race from the jury pool would lead to injustice, particularly where the defendant is a member of the excluded race. The Court likened the West Virginia law excluding Blacks from juries to a hypothetical law in a nonwhite-majority state that excluded Whites from juries.

Strauder states, “The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.” Though juries — like judges — are expected to be impartial, the Court recognized that inherent racial prejudices continued to exist and that the exclusion of all members of the defendant’s race amounted to legal acknowledgement and enforcement of that prejudice. This early Court recognized the value of diversity in striving to procure unbiased judgment.

¹¹⁴ 100 U.S. 303 (1880).

B. SEX DIVERSITY ON THE JURY

Though this early Court lauded the merits of diversity, their praise was reserved. The *Strauder* Court specifically limited its decision to African Americans, saying that nothing in their decision should be interpreted to mean that women (!) can serve on a jury. This stemmed from the belief that women, unlike African Americans, were not discriminated against (or, at least, that was the prevailing view at the time).

Women's feelings toward their own treatment and their inability to participate in society were neither acknowledged nor solicited. It was not until women began to participate in the legal system that social and legal attitudes toward women began to be addressed. (And, as we know, that was slow in coming.)

The year 1946 marked a turning point in judicial attitudes toward female participation in the justice system. The Court decided *Ballard v. U.S.*,¹¹⁵ which involved a prosecution against a woman and her son for engaging in a fraudulent religious scheme. The Court, while noting that women do not act as a class, said that a jury from which one sex is excluded can be highly prejudicial. "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference" (Justice Ginsburg or Justice O'Connor has said that presented with the same case a "wise old man" and a "wise old woman" would likely reach the same result). The *Ballard* court continued: "Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

C. CALIFORNIA CASES ITERATING IMPORTANCE OF DIVERSITY ON THE JURY

In 1954, the California Supreme Court expanded the notion of diversity to include class. In *People v. White*,¹¹⁶ the California Court held that a jury selected from membership lists of exclusive clubs was inherently unfair,

¹¹⁵ 329 U.S. 187.

¹¹⁶ 43 Cal. 2d 740 (1954).

because it tended to include a disproportionate number of members from particular classes and was therefore not representative of the community. In recognizing the importance of community representation on the jury, the Court reinvigorated and reinforced the historical foundations of a jury as judgment by one's peers. I remember one day when I served on the Compton Municipal Court when, late in the day, we ran out of jurors and the bailiffs went out and rounded up a group of citizens, who it turned out were mostly D.A.'s. Not to be outdone, another judge ordered his bailiff to get some jurors from the Public Defender's office. A truce was declared and the next day new jurors were selected from the regular jury pool.

D. DIVERSITY IS IMPORTANT FOR EVERYONE, NOT JUST MINORITIES OR THE DISADVANTAGED

Though courts in the latter half of the twentieth century had recognized that diversity of the jury was essential to justice for minorities and the oppressed, they also became increasingly convinced that diversity benefited all groups, not just certain select minorities. In a pair of cases, the U.S. Supreme Court recognized that excluding members of a group from jury service can cause injustice for a defendant who is not a member of the excluded group. The *Peters* case¹¹⁷ held that a white defendant was denied a fair jury trial because Blacks were systematically excluded from jury service.¹¹⁸ The *Taylor* case held that a man had standing to challenge a law that excluded women from jury service. Even jurors themselves have an independent right not to be discriminated against for an invidious purpose. A diverse jury ensures that the fate of a defendant is decided by a group of people who represent a cross-section of the community, thereby combining perspectives from different backgrounds and experiences.

III. EXAMPLES OF NON-LASTING DECISIONS

Though the Court recognized the importance of diversity on the jury as early as 1879, it did not yet perceive the need for diversity within its own ranks. I submit that the effects of this lack of diversity were profound and devastating.

¹¹⁷ *Taylor v. Kiff*, 407 U.S. 493 (1972).

¹¹⁸ *Taylor v. Louisiana*, 419 U.S. 522 (1975).

A. *DRED SCOTT*

Perhaps the most infamous Supreme Court case is *Dred Scott v. Sandford*.¹¹⁹ Justice Taney, delivering the opinion of the Court, held that Blacks were not citizens of the United States. Justice Taney listed laws of several states calling for special treatment for Blacks — including harsher penalties for offenders, and prohibitions against intermarriage — to support his holding. Justice Taney’s opinion held that neither the words “all men” in the Declaration of Independence, nor any reference to “citizens” in the Constitution, was meant to include African Americans.

It appears that Justice Taney had only researched sources that supported his preconceived conclusion. His argument, that Blacks could not be citizens because they were treated differently under state and federal law, is shortsighted and fails when applied to other groups. Women and those who did not own land were also treated differently under the law, but during that period enjoyed some of the benefits of citizenship. Justice Taney also ignored clear precedent by distinguishing a prior U.S. Supreme Court decision,¹²⁰ which recognized the citizenship of a black man who had inherited property.

Dred Scott was far from a well-reasoned legal decision, and in fact, was even repudiated by President Abraham Lincoln. Rather, it appears to be a decision based on the justices’ personal beliefs. One wonders: had a black justice occupied a seat on the United States Supreme Court at that time, a different perspective might have been provided regarding the meaning of citizenship and its origins in our country. Such a person (a Frederick Douglass, perhaps), subject to the horrors of slavery, would have been able to relate his experience to other members of the Court on the burdens and injustices he suffered as a result of his dual status as a non-citizen and piece of property. Although he or she, too, would certainly not be unbiased, she would present a balance to the one-sided approach undertaken by the Court at that time. Had there been a diverse Court, these racist themes might not have pervaded the decision as deeply as they did. In this case, however, even this perspective might not have changed the outcome in the case given the pending conflict between North and South in the Civil War.

¹¹⁹ 60 U.S. 393 (1856).

¹²⁰ *Legrand v. Darnall*, 2 Peters 664 (1829).

B. *PLESSY v. FERGUSON*

Seventeen years after the Court recognized the importance of diversity on the jury in the Strauder case, it handed down *Plessy v. Ferguson*,¹²¹ which established the infamous “separate but equal” doctrine.

In *Plessy*, the Court rejected the argument that the separation of the races somehow stamps Blacks with a badge of inferiority. Instead, the Court noted, if this is so, it is because Blacks, as a race, believe it to be. The Court then distinguished between civil and political rights on the one hand, and social rights on the other, finding that legislation could not force Blacks and Whites to mingle socially. Instead: “If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits and a voluntary consent of individuals.” President Eisenhower echoed the same sentiments when I was growing up in Los Angeles.

Again, one wonders if an African-American justice had occupied a seat on the United States Supreme Court at that time, would the decision have been the same or different given the social context of the era.

Only Justice Harlan dissented, stating, “In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by the tribunal in the *Dred Scott* case.” “The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.”

The very history of the United States up to that point had demonstrated that racial discrimination could not be ended without positive governmental action. Indeed, that is why the country had, very recently, fought a civil war, amended its constitution, and passed several civil rights statutes in an effort to end black slavery. An African-American justice would have been able to speak from personal experience when addressing the issue of whether, as the Court framed it, legislation could lead to social equality. In fact, that’s exactly how many African-American citizens had achieved their equality through legislation and amendments to the Constitution.

¹²¹ 163 U.S. 537 (1896).

It took an extremely gifted African-American lawyer to persuade the minds of the Court that the policies condoned by the Court flew in the face of the Thirteenth and Fourteenth amendments. Thurgood Marshall, who later became a Supreme Court justice, convinced the court in *Brown v. Board of Education* that Separate but Equal was inherently unequal.¹²² Although the facilities and education provided for Blacks and Whites could be identical, the stigma associated with being forcibly separated from the other race, and the missed opportunity of schoolchildren of one race to interact with those of the other race, bred hatred and inequality that extended throughout the students' lives.

Those of you from Orange County are no doubt aware of the 1947 case of *Mendez v. Westminster School District*,¹²³ which found unlawful the intentional segregation of Mexicans and Anglos in the local schools.

One wonders if the conclusion in *Brown* that government sanctioned segregation of schools amounted to a blatant violation of the Fourteenth Amendment would have been reached much earlier had the Court been more diverse and able to share directly their personal experiences under the Separate but Equal doctrine.

C. *PEOPLE v. HALL*

California also has had its share of shameful cases. In 1854, the California Supreme Court, my Court, was asked whether a Chinese witness could testify against a white citizen charged with murder, since California statutes prohibited Blacks and Indians from offering such testimony, but said nothing about the admissibility of testimony from a Chinese witness.¹²⁴ The California Supreme Court decided to extend the prohibition to Chinese by means of perverse and pseudo-scientific reasoning that the word "Indian" included Chinese (Indians crossed the Bering Strait from Asia, after all), effectively construing the statute to exclude all nonwhite testimony. The Court said with a straight face that construing the statutes narrowly would allow many undesirables, including recent African immigrants and other clearly inferior people, to testify against those who were considered full

¹²² 347 U.S. 483 (1954).

¹²³ 161 F.2d 774 (9th Cir. 1947).

¹²⁴ *People v. Hall*, 4 Cal. 399 (1854).

citizens. Additionally, the Court feared, “The same rule that would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.” To prevent this “actual and present danger,” the Court needed to construe the statutes broadly. This decision, like many others, was borne of plain and simple ignorance and outright prejudice. A diverse colleague on the court, or even counsel in the case, could have chipped away at the notion of inherent racial difference that infested the Court’s logic. Had a justice of Chinese descent been present on the Court at this time, arguably this opinion would have come out the other way, given that one justice out of three dissented. How could a Chinese justice have voted to prevent those of his own race from testifying against Caucasians in court? More likely, a hypothetical Chinese justice would have joined Justice Wells’ dissenting opinion to form a new majority holding the testimony admissible.

D. *KOREMATSU*

Korematsu v. United States is perhaps the most painful of recent cases, and also perhaps the most historically relevant in today’s climate of fear and terrorism.¹²⁵ It also reveals the ease with which we can justify curtailing the human rights of our own citizens on account of their race. In *Korematsu*, the Court held that the military could evacuate and imprison people, including U.S. citizens, solely because of their Japanese heritage. The Court justified its decision by saying that the country was at war, and the military was justified in taking any measure to ensure the safety of the country.

The Court held, “We are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.” The court refused to recognize that Mr. Korematsu had been singled out on the basis of his race: “He was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded

¹²⁵ 323 U.S. 214 (1944).

that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this.”

Had a justice of Japanese descent occupied a seat on the U.S. Supreme Court at the time it decided these cases, it is likely that their outcomes would have been very different. First, a Japanese-American justice would have been evidence, contrary to the Court’s reasoning, that those who are of Japanese descent are extremely loyal to the United States and are not a greater source of danger than those who are not of Japanese descent. Second, it is likely that a Japanese-American justice would have been able to enlighten the other members of the Court as to the conditions existing in local Japanese communities at the time, as well as the patriotism exhibited by many Japanese Americans who volunteered to serve in the war.

Instead, the Court relied on population statistics, the dual citizenship of some Japanese residents, and an overview of discriminatory laws to conclude that those of Japanese ancestry posed a greater threat to national security than others in the general population.

Of course, we must put this ruling in the proper context — a context not all that different from the one facing some Arab Americans today. The country was at war, had been attacked by Japan, and was clearly frightened. This fright manifested itself as xenophobia. Although justice is expected to be colorblind, the judiciary is composed of people who are influenced by many of the same factors as the rest of the population. Had the Court consisted of a diverse sampling of the community, would these embedded racist feelings be counterbalanced? Certainly, it is more difficult to maintain that generalization when a fellow Japanese judge, who has dedicated his life and sworn his allegiance to the country, flies in the face of that stereotype. Similar concerns should be remembered as the United States Justice Department continues its registration process and detentions for certain nationalities in the wake of the September 11 attacks.

E. *VIRGINIA v. BLACK*

The contributions of diverse members of the judiciary cannot be overemphasized. Even Justice Clarence Thomas, who is widely regarded as one of the more conservative justices on the Supreme Court, has made an

important impact on the Court. In early April of this year, Justice Thomas issued a dissent in *Virginia v. Black*,¹²⁶ which concerned the constitutionality of a Virginia statute outlawing cross burning. While the majority opinion focuses on the direct issue of whether the prima facie language of the statute violates the First Amendment, Thomas gives a historical and pragmatic perspective.

Thomas' dissent highlights how the burning cross is inextricably linked with terror and conduct, and, in the overwhelmingly vast majority of circumstances, conveys no message other than intimidation. Consequently, the speech aspect of the burning cross cannot be independently protected without condoning and protecting the intimidation and terror that accompany it.

During oral argument, Justice Thomas recounted the history of how the burning cross served as the symbol of the reign of terror perpetrated on African Americans in the deep South. Justice Thomas noted that groups such as the Knights of Camellia and the Ku Klux Klan used this symbol to promote almost one hundred years of lynching. Justice Thomas seemed to imply that its use in this manner might be significantly greater than intimidation or a threat. He then continued by opining that counsel had understated the case when he compared a burning cross to a mere religious symbol. Rather, Justice Thomas found that the use of the cross in this manner had a virulent effect. In other words, the only purpose of the cross was to cause fear and terrorize populations.

I have read that this insight added a perspective to the oral argument and opinion that otherwise may have been lost on the Court. It allowed counsel and the other justices on the Court to confront the effects of racism as seen firsthand by an African-American fellow justice.

IV. PERCEPTIONS OF JUSTICE VERSUS ACTUAL JUSTICE

As you can see, I believe that diversity has a direct impact on attaining actual justice in the law. However, another significant byproduct of diversity is a shift in the perception of justice. A public perception of justice has a

¹²⁶ 538 U.S. 343 (2003).

profound effect on attitudes toward our justice system and the ability of the system to serve all communities.

Even where a case is properly decided, a perception of injustice may exist where a participant's race is not represented on the bench, jury, or by counsel. This perception of injustice is dangerous, because it leads to a lack of confidence, however unmerited, in the legal system. Our legal system persists, and is on the whole respected, because of the trust that society has that it will be treated fairly. A diverse judiciary and legal system strives to ensure that whatever the outcome in a case, a party will not perceive that it has been prejudged. The perception of justice not only serves to increase faith in the legal system but also encourages society to obey the law and to respect the justice system.

V. IMPACT OF RECENT SUPREME COURT AFFIRMATIVE ACTION CASES: AFFIRMATIVE ACTION IS CONSTITUTIONAL

In closing, I also want to comment briefly on the Supreme Court's decision yesterday in the University of Michigan affirmative action case. The Supreme Court's holding in *Grutter v Bollinger*¹²⁷ reaffirms the Court's recognition of the role that diversity plays in achieving justice and equality. Justice O'Connor's majority opinion recognizes the importance of "the skills . . . developed through exposure to widely diverse people, cultures, ideas, and viewpoints," and acknowledges the added legitimacy that is bestowed on leaders when the "path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity." The same diversity on the bench that has served to overturn many of the Court's less admirable decisions also has shown the Court the importance of maintaining a judiciary composed of a cross-section of society. Affirmative action and diversity in our nation's schools and universities helps feed that diversity on the bar and the bench.

¹²⁷ 539 U.S. 306 (2003).

VI. CONCLUSION

The cases I have discussed demonstrate that diversity on the Court can provide a unique and particularly relevant perspective to the issues that the Court addresses. At the very least, we should consider the role that diversity plays in educating fellow judges. Justice Sandra Day O'Connor recently spoke of the great impact of Justice Thurgood Marshall's stories of his upbringing and background as a lawyer in the South. Justice O'Connor found persuasive not only Justice Marshall's legal arguments, but also the power of his moral truth.

Under some circumstances, this unique moral perspective can be outcome determinative. However, the most important function of diversity on the court is to bring an experience that is outside the mainstream to bear on the court's decisions. This function is essential in a state and country that are becoming increasingly pluralistic, both socially and politically. Indeed, our democracy has successfully balanced a wide variety of social and political interests over time. Our Court should be no different, and should strive to achieve the maxim of Oliver Wendell Holmes that the life of the law has not been logic; it has been experience. I challenge you to find the same perspective, inner wisdom, and moral truth so that your work also will stand the test of time. Thank you.

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VI. LANGUAGE ACCESS IN COURT

STATEWIDE CONFERENCE ON LANGUAGE ACCESS TO THE COURTS

San Diego, May 11, 2006

Muy buenos días, o mejor dicho, buenas tardes. Soy Carlos Moreno, magistrado de la Corte Suprema de California. Estoy muy feliz de estar aquí con todos ustedes esta mañana, para aprender y discutir este aspecto tan importante como lo es el acceso al lenguaje en las cortes.

La necesidad de intérpretes en las cortes es, sin duda, esencial para mantener un alto nivel de calidad de justicia en nuestras cortes; y es con conferencias como ésta, y con la dedicación de personas como ustedes, que juntos podemos cambiar y mejorar esta situación tan importante.

Translation: And a very good morning to you all, or better said, good afternoon. I am Carlos Moreno, an associate justice on the California Supreme Court. I am very happy to be here with you all today, as we learn about and discuss the very important issue of language access to the courts. The need for court interpreters is, without a doubt, essential to a sustained level of high quality of justice in our courts; and with conferences like this one, and with the dedication of people like you, together we can effect change and improve this very important problem.

It is very fortunate for those of you here today who do not speak Spanish that I am also fluent in English (at least on a good day). If we did not share the common language of English, there would be a very significant language barrier between us, and you would not be able to communicate with me, or understand me, or me, you.

Yet we know that this situation is one that happens in our courtrooms every day throughout our state. Court users have to conduct business in our courts, but many of them, mostly immigrants from other countries, have very limited English language skills.

In fact, nearly seven million Californians cannot access the courts without significant language assistance:

- They cannot follow the signs or directions posted in courthouses.
- They cannot understand pleadings, forms or other legal documents.
- They cannot communicate with clerks or court staff.
- And they cannot participate meaningfully in court proceedings or effectively present their cases — without a qualified interpreter.

This situation creates a very troubling reality: to many Californians, justice is simply unavailable.

Language barriers are a serious threat to the quality of justice in California. Our state is one of the most ethnically and racially diverse populations in the world: of the state's 34 million people, about 26 percent (1 in 4) are foreign born, and in some of our metropolitan areas, the percentage is much, much higher. More than 220 languages are spoken in California, and 40 percent of the state's population speaks a language other than English in the home.

However, our courts are not meeting the demand brought about by this vast diversity. In their September 2005 report, the California Commission on Access to Justice noted a disturbing trend: while the number of immigrants in California who do not speak English "very well" is increasing, the pool of qualified interpreters is decreasing (35 percent in recent years). Where the need for interpreters is greatest, for Spanish-speakers, the number has declined most significantly. And the Judicial Council has reported to the Legislature that approximately 10,000 cases a year are continued or postponed due to the unavailability of a qualified interpreter. What does all this mean? More and more, justice is becoming even less and less available to more and more Californians who use the courts.

The right to have a state-funded interpreter in criminal and juvenile proceedings has long been recognized by the courts; however, in most civil proceedings, this same right does not apply. The consequences? In routine civil proceedings (such as evictions, family law matters, creditor/debtor cases), people cannot effectively defend themselves or assert their legal rights, possibly ultimately losing their legal rights, property, livelihood, shelter and perhaps even their children.

So we must recognize that the stakes are just as high in some civil proceedings as they are in criminal proceedings.

For example, being able to successfully apply for a restraining order is very important — some would say, life-saving. And, as no one can deny,

one's right to personal safety has just as much importance as one's right to freedom from incarceration, or from being wrongly convicted.

A notable aspect of the Access Commission's report is the discussion of the major impact language barriers have on the public's trust and confidence in our courts. The inability to accommodate the language needs of litigants — litigants from some of our state's most vulnerable and most exploited populations — impairs trust and confidence in the judicial system and undermines efforts to secure justice for all. Our legal system persists, and is on the whole respected across the globe, because of the trust that people have that they will be treated fairly. So we must affirmatively protect the integrity of the judicial system. We must not passively accept the undeniable reality that for many Californians, justice is unavailable and inaccessible.

Many significant steps have indeed been taken toward addressing this very important issue, but as long as justice is unavailable for a significant segment of the population, the job is far from done.

As part of these efforts, we must continue to support and applaud those educational institutions, such as UC Berkeley, UCLA and Cal State Long Beach, which have instituted training programs for spoken language interpreters. Very notably, CSULB is the first school in the United States to start a four-year degree program for court interpretation and translation. These efforts toward recruitment, training, retention, and ultimately increasing the pool of qualified interpreters are key elements to improving this grave situation.

So is the adoption of a comprehensive language access policy for courts, as recommended by the Access Commission. The policy includes:

- Specific plans designed to achieve the goal of *guaranteeing* language access.
- Obtaining adequate funding.
- Providing translated standard court documents in *at least* those languages spoken by a significant number of the population using the courts (e.g. self-help centers, facilitators).
- And providing training and resources to courts for identifying and addressing language issues.

And just as important, I submit that maintaining comprehensive data collection on language issues, and the usage and need for interpreters in criminal, juvenile and civil cases, is crucial to properly and effectively address this issue, as well as to properly and adequately fund interpreter services.

Without this increased knowledge and attention to language issues in our courts, we may end up focusing our time and our efforts in the wrong places.

So as I close, I would like to share a quote with all of you, a quote from Dr. Martin Luther King, Jr. which captures very appropriately the importance of conferences like this one, and the great importance of individuals like all of you — you who work in the courts, you who care about the courts, and you who strive daily to improve the future of our courts:

He said: “Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. This is the interrelated structure of reality.”

Language barriers to courts *are* an injustice and a threat to justice everywhere. Their continued existence can only negatively impact the lives of millions of Californians who use the courts, and those who could use the help of the courts. And by failing this population, these language barriers threaten the very integrity of our justice system as a whole, and thereby fail all of us as well.

So, with our continued efforts, positive efforts, we can work to ensure that justice is, in fact, available to all.

And so, I thank you for your continued hard work and your interest in addressing this important issue of language barriers to justice. Your work is very necessary and it is greatly appreciated. Without you, there would be no progress, and so I applaud you — and I thank you.

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VII. ON SELF-ESTEEM AND LIFE'S OPPORTUNITIES

LINCOLN HIGH SCHOOL COMMENCEMENT

Los Angeles, June 19, 2008

I first want to congratulate the graduates tonight for arriving at this first major step in their education. I also want to congratulate the parents and teachers who have also worked hard to get all of you to this point.

Why would I be asked to speak today? Although I don't have a sure answer for that, I can only guess that I was asked to speak because there is so much in my background and experience that I share with you. After all, not only did I graduate from Lincoln High School (although a long time ago) but I also grew up in this immediate area — I was in fact born just a mile or so from here at the County General Hospital. I rode on the same bus routes that many of you used to get to school (some of those same buses are still running!), ate at the same places, played on this field, and shared many of the same experiences you've all had as Tigers.

Also, like a great number of you, my first language was a language other than English. My parents spoke to me in Spanish and I responded in English and Spanish, and no one in my family had done much more than graduate from high school, if they even did that.

So, while I am guessing — because I don't know each and every one of you — we probably have more things in common than most other people.

I remember what a great time I had here. In the three years that I attended Lincoln I remember some wonderful and remarkable teachers, a great collection of tightknit friends who participated with me in a variety of activities, particularly in our junior and senior years — plays, dances, speech contests, athletic competitions between the classes, class sweaters, rings and picnics.

Of course, I realize that times were different then in so many ways, and that you have had a much more difficult time adjusting to a much more complex and dangerous world. But for me, in the mid-1960s, before the expansion of our nation's involvement in the Vietnam War (where Lincoln lost many of its sons), I had a great experience here.

When I graduated from high school my sense of self-esteem was that a whole new world was about to open up for me, that I had many, many choices to make, that those choices would take me far and wide, that those choices would be mine and mine alone.

And as remarkable as it may seem, and I remember this as if it were yesterday, I felt a great sense of empowerment that I could become anything or anyone I wanted to become in this world. I could become a surgeon, an airline pilot, a scientist, a lawyer or successful businessman. Curiously, I never envisioned that someday I would become a judge, and certainly never imagined in my wildest dreams that I would sit as one of seven justices on the highest court of this state with over 35 million people. That could not happen to someone who grew up next to Chavez Ravine. But with the strong support of my teachers and my family, I did feel then that I could achieve anything that I set out to do.

And that is the message that I would like to give to you tonight: that is, that you, too, regardless of your circumstances or background, can achieve virtually any goal that you set out to accomplish. It is not easy. It is not delivered to you on a silver platter. In fact, I have to tell you that it is much harder today than it was for me back then. You will encounter many obstacles to success — the real world out there is in many ways unforgiving, not forgiving like your parents and teachers. So you must be prepared.

It will require a great deal of work, determination and stamina for you to succeed. But the fact of the matter is that in this great country the opportunities are there for the taking.

Let me tell you a story. I have tried to imagine what it must have been like when my mother first came to this country following the Mexican Revolution. And I imagined an interview between my mother and an immigration official when she crossed the border. I imagined the official routinely asking her, “Where are you from?” as the official who processed her entry visa along with thousands of others coming from Mexico, must have asked her.

And my mother, accompanied by her mother and little sister said, “I am from Guaymas, Sonora, Mexico.”

And the official questioned her, “What do you do?”

“Nothing now; I am going to meet my older brother, José, in Los Angeles.”

Question: “What does he do?” “Nothing, he’s looking for work.”

Question: “What kind of work?”

Answer: Any kind.”

Question: “But what can he do?”

Answer: “Well, he has no skill, he has little education, but he is strong and he can use his hands and will work all day and he will help my mother and little sister.”

Question: “Well, does he have any friends?”

Answer: “Not really.”

Question: “Any money?”

Answer: “Not a lot. Not yet.”

Question: “How about you?”

Answer: “Well, we have very little and no friends, no money, just our family.”

Question: “Well, with no friends, no money, no skills, no education, what do you expect from this country?”

Answer: “Not a lot, not a lot. Work. A place to sleep. A chance to raise a family. And just one more thing, sir, before I die, I have a dream: I would like to see my son, if I have one, be a judge on the California Supreme Court.”

Imagine if you will, what kind of reception a dream like that might have received. And yet, it describes a story that has happened over and over in this country for those who dared and who worked for their dreams.

And just think of Barack Obama’s father, a student immigrant from Kenya, having the same type of conversation — “I want my son to be president of the United States.”

I knew before I graduated from Lincoln that if I was to succeed I would have to set goals. Now, as I mentioned, I never set as a goal then, or even many years later, that I would someday become a judge, deciding cases like the death penalty, or more recently, the right of same-sex couples to marry. But I did set high goals for myself. I made it a goal to attend college. I set as my goal early in high school to get good grades so I would be able to get into a good college. So I made the decision then, and I want you to make the same decision, to set big goals, never to sell yourself short.

I don’t mean by any of this that you should expect to achieve all your goals in one big leap, unless you’re a star player for the Lakers. That doesn’t

happen in real life. I urge you to set small goals, step-by-step. And you will find that with each small step, your goals may change (and that's a good thing), but as they change so will the options and opportunities available to you increase dramatically. Just be sure that with each small goal that you set and reach, you continue to move toward the big goal that you set for yourself, whatever it might be.

I am reminded about a statement by a famous judge:

He said, "The greatest thing in this world is not so much where we are, but in what direction we are moving."

Ask yourself, "What direction am I moving in?" Today, upon your graduation, I can say, you are moving in the right direction.

The choices you make, the small ones and the big ones should always keep you moving in the right direction. So, it doesn't matter whether you attend Los Angeles Trade Tech or East Los Angeles College or an Ivy League school. As long as when you look at yourself in the mirror you're moving in the right direction toward your main goals.

One final word:

There are many problems in our modern society: problems related to economic inequality, crime, about discrimination and social injustice. These problems existed when I was in high school, and they will continue to exist. But I want to issue a challenge to all of you to become advocates for eliminating these problems rather than contributing to them. I want to challenge each of you personally to do what you can to make this a better world for everyone. Something as simple as making sure that people you know are not excluded from participating in our society because of a barrier such as language, money, or technology can make a big difference.

And you will be all the happier for helping other people.

Ethel Percy Andrus, one of Lincoln's first principals, the first woman principal in this state, and the founder of the American Association of Retired Persons said:

"We learn the inner secret of happiness when we learn to direct our inner drives, our interests, and our attention to something besides ourselves."

And don't think for a moment that because you are just one person that you can't make a difference. By getting an education you can help solve many of our world's problems. I know you are probably concerned about fairness and equality, and equal opportunity for all. Believe me

when I say that as you move ahead in your education, you will be able to achieve these objectives, not just for yourself, but for your family, and for your community.

Congratulations to all of you on your outstanding achievement tonight.

[EDITOR'S NOTE: At a 2013 Lincoln High School reunion, Justice Moreno was presented the inaugural Dr. Ethel Percy Andrus Legacy Award for his achievements.]

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VIII. PROSECUTORIAL MISCONDUCT

UNIVERSITY OF LA VERNE COLLEGE OF LAW

October 24, 2008

Good morning. It's an honor and a pleasure to be here today. I want to thank Dean Easley and the University of La Verne College of Law for hosting this Symposium on Prosecutorial Misconduct.

As a former deputy city prosecutor for the City of Los Angeles and as a former criminal trial court judge, prosecutorial ethics is a topic that I have over the years become intimately familiar with. I have been in the trenches — along with Professor Ed Perez and defense attorney Sam Eaton, who is on the panel, as young deputy city attorneys prosecuting criminal cases — and I have presided over numerous criminal trials evaluating the practices of prosecuting attorneys. And now in my position as a justice of the Supreme Court, I am a part of a Court charged with resolving conflicts, and clarifying the law — including, on occasion, misconduct by the prosecutor — misconduct that at times erodes the bedrock, the very foundation on which not only the profession stands, but upon which our criminal justice system is based.

You know, our legal profession is vast, and the *role* of the attorney varies, whether it's a specialty in corporate tax or family law, working in a big or small firm, public interest, private practice, civil or criminal. All are bound by our Rules of Professional Conduct.

The one *role* that all attorneys share is the role of guardian — guardian of the public's trust and confidence in of the legal profession and the justice system.

As guardians of the public's trust, members of the bar have agreed to be bound by the most stringent ethical codes within any jurisdiction — and one which arguably sets the highest bar for the standards of ethics in any profession.

For example, we know by looking at precedent, that vital to the integrity of the legal profession is the need for attorneys to maintain this high standard of ethics, civility, and professionalism.¹²⁸

¹²⁸ *People v. Pigage*, 112 Cal. App. 4th 1359 (2003).

We know by looking at the Rules of Professional Conduct, that offending the professional code does not turn on whether a member of the state bar was acting as a lawyer when the violative conduct occurred.¹²⁹

And finally, we know by looking at the Business and Professions Code that the attorney's duty of honesty and fair dealing is not limited to only those occasions when he is working with his clients — in fact, it is much greater.¹³⁰

And never, never, is the importance of adherence to the code of ethics more heightened, than when the attorney is acting in the role of a prosecutor.

As my esteemed colleague, Justice Carol Corrigan, who was an Alameda County prosecutor for twenty-two years, has so eloquently articulated in her writings on prosecutorial ethics, "The prosecutor does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole."¹³¹ And in representing society as a whole, the duty of the prosecutor is heightened.

The duty is heightened by the responsibility of the prosecutor to the people — acting on behalf of the people of the state of California. Heightened by the prosecutor's obligation to only convict the guilty and never convict the innocent. And finally, heightened by the profound responsibility of the prosecutor to keep safe, in his care and custody, the public's faith and trust in the justice system.

In preserving that faith and trust, it is the responsibility of the leadership in each county, each jurisdiction, when training new prosecutors, to dispel the misconception that a prosecutor's single role is to obtain a conviction.

That should not require a paradigm shift in the thinking and acting of prosecutors. But if the prosecutor views his charge as only one — to obtain a conviction — the likelihood that a prosecutor will cross an ethical line, or deprive the criminal defendant of due process, increases exponentially. And crossing that line, or even testing the contours of the law or pushing the envelope, may not only compromise his case, it may also compromise his job — and crossing that line will certainly always erode the public's trust.

¹²⁹ Prof. Cond. Rule 5-102(B) interpreted by *William H. Raley Co. v. Superior Court*, 149 Cal. App. 3d 1042 (1983).

¹³⁰ Bus. & Prof. Code § 6106.

¹³¹ Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537 (1986).

In preserving the public's trust, there are well-settled principles and guidelines that a prosecutor must follow and that all prosecutors should be aware of. For example, every prosecutor should know unequivocally about his or her obligations under *Brady*, the need to disclose exculpatory evidence.¹³²

One pet peeve of mine is that a prosecutor should know it is not permissible to invoke the Bible and other religious authority during argument — because it implies there is a higher law that should be applied by the jury. Nor should he impugn the integrity of defense counsel, or vouch for the credibility of his own witnesses, or imply personal knowledge of the truth or veracity of certain facts.

A prosecutor should know what is permissible cross examination, and a prosecutor should know what are acceptable methods of impeachment.

Finally, a prosecutor should be open to discerning when recusal is warranted. When it comes to matters of recusal — a matter you will be considering today — the prosecutor should always have at the forefront of his mind, the special duty of impartiality that flows from his function as the representative of the people, whose interest in a criminal prosecution is not, again, that it shall win the case, but that justice shall be done.

The statute setting out the standard governing a motion to recuse the prosecutor is clear — but also, in reality, quite difficult to satisfy. The statute articulates a two-part test: first, a motion to recuse requires a showing that there is a conflict of interest; and, second, it requires that the conflict be so severe as to disqualify the prosecutor from acting.

A “conflict” exists, for purposes of the test, if there is a reasonable possibility that the prosecutor may not exercise his discretionary function in an evenhanded manner.

Once the trial court determines that a conflict exists, the court must further determine whether the conflict is so grave as to render it unlikely that the defendant will receive fair treatment during all portions of the criminal proceedings, in other words, a disabling conflict.

When our Court reviews a challenge for recusal, we review under the abuse of discretion standard. However, the abuse of discretion standard is not a unified standard; the deference it calls for varies according to the

¹³² *Brady v. Maryland*, 373 U.S. 83 (1963).

nature of a trial court's ruling under review. Moreover, reviewing under the abuse of discretion standard should not be interpreted as insulating trial court recusal orders from meaningful appellate review. After all, deference does not equal abdication, but it is a tough standard to meet.

We give strong deference to the trial court because the trial court is in the best position for factfinding and in assessing how great a conflict exists. It is genuinely in the best position to assess witness credibility, make findings of fact, determine which matters can be adequately addressed through jury voir dire, and evaluate the consequences of a potential conflict in light of the entirety of a case.

In reviewing a challenge to recuse the prosecutor, the Court asks whether the trial court's findings of fact are supported by substantial evidence, whether the trial court's rulings of law are correct, and whether the trial court's application of the law to the facts is or is not arbitrary and capricious.

Moreover, when our Court reviews a challenge to recuse — or any other conduct of the prosecutor for that matter — that review may lead to a more serious finding, such as a due process violation or a finding of outrageous conduct, which review may lead to a reversal of the conviction along with a bar to retrying the case because of double jeopardy. Not all error is harmless.

Now I can't address two of the cases you will be discussing today, *Hollywood*¹³³ and *Haraguchi*,¹³⁴ both decided on pretrial writs, since there is still a possibility those cases might come before our Court again in the future.

But in some other recent cases decided by our Court, the prosecutor unfortunately made himself vulnerable to recusal — testing the contours of the law — by not appropriately dealing with the appearance of conflict.

I should also note first that many conflicts suggesting or warranting recusal do not involve misconduct at all. The typical case is where D.A. employees are victims or witnesses to a crime. Usually the trial court can fashion a remedy short of full recusal of the entire D.A.'s office.

Although the cases I will mention were decided in favor of the prosecutor (over my dissent) — and the Court clarified the law — one cannot

¹³³ *Hollywood v. Super. Ct.*, 43 Cal. 4th 721 (2008).

¹³⁴ *Haraguchi v. Super. Ct.*, 43 Cal. 4th 706 (2008).

help but think that these cases were not resolved without some compromise of the public's trust.

For example, in *People v. Vasquez*,¹³⁵ charges were brought against an individual whose parents were both employed by the district attorney's office. The office considered recusing itself, but its tender to the Attorney General's Office was rebuffed. In an effort to give the victim's family the impression that the defendant would not get off lightly because of his ties to the office, the prosecutor, I believe, overcompensated, and, arguably, made no pretrial settlement offer it might have made in a routine case. The prosecutor departed from the obligation to be fair and impartial — and to act only in the interest of serving justice — and by doing so (in my mind) denied the defendant his right to due process under the law. A neutral and detached prosecution office might have dealt differently with the case. The majority found that the D.A.'s Office should have been recused, but the error was harmless in light of the strength of the case against the defendant. I dissented on due process grounds.

In *People v. Hambarian*,¹³⁶ the defendant was charged with crimes related to defrauding a city in connection with trash disposal contracts. During the investigation, the prosecutor relied on the findings of an audit conducted by a forensic accountant, whose services were paid for by the city. The city, also the victim in the case, provided the data and the expertise needed for the prosecution. Not surprisingly, the defendant moved for the prosecutor's recusal. Although it was a close case decided in favor of the prosecutor, the prosecutor might have avoided the issue of recusal by erring on the side of caution — by being the first to acknowledge the appearance of a conflict and by offering to recuse itself, or at least pay for the expert's services out of its own coffers, and not the victims'.

As a final word of caution, I note that it bears reminding that, although individual instances of unfairness or misconduct in a proceeding may not merit reversal, the accumulation of those instances may, depending on the severity of the violations and the strength of the prosecution's case, warrant reversal.

I want to close by commending those who are working as prosecutors — a truly honorable job, as prosecutors do truly serve the public's interest — and again remind prosecutors that you are the guardians of the public's trust.

¹³⁵ 25 Cal. 4th 1225 (2001).

¹³⁶ 31 Cal. App. 3d 643 (1973).

We are very fortunate to have in our country a justice system that strives to achieve justice without the corruption and undue influence we see in other systems of justice.

So, Convictions or search for Truth?

In the United State Supreme Court case, *United States v. Wade*, Justice White along with Justices Harlan and Stewart set out the guidelines for what I believe to be the suggested prosecutorial paradigm — a shift in focus from one of obtaining a conviction — to directing the focus toward ascertainment of the truth.

The three justices wrote in their concurring and dissenting opinion that a prosecutor “must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime”¹³⁷ — convicting the guilty but not the innocent.

Or as the court said in *People v. Kelley*: the prosecutor’s “interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”¹³⁸

To quote my esteemed colleague, Justice Corrigan, a final time: “The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor.”¹³⁹

Certainly, when I joined the Office of the City Attorney over thirty years ago, I was convinced that I could do more for the cause of justice for victims as well as the accused by being a just and fair prosecutor.

By seeking and bringing light to the truth — that the truth might be revealed — showing mercy and compassion when it was warranted, but balancing that with the requirements of the law. In that way, the people would be served — and, in that way, justice too would prevail.

Thank you.

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¹³⁷ 388 U.S. 218, 256 (1967).

¹³⁸ 75 Cal. App. 3d 672, 680 (1977).

¹³⁹ Corrigan, *supra* at 537.

IX. “JUSTICE FOR ALL SEASONS”

ST. THOMAS MORE SOCIETY

Stanford University, November 20, 2008

Good evening. Thank you for that very gracious introduction. I understand that the St. Thomas More Society was founded to promote the discourse of ethical, moral, and social issues relevant to the legal profession. So I will say a little bit about Saint Thomas More, because I think his story is quite relevant to the issues we all face as lawyers and as judges.

I first learned about Thomas More many years ago in high school through Robert Bolt’s excellent play, *A Man for All Seasons*. The play describes how Sir Thomas More, the lord chancellor of England, refuses to acknowledge King Henry VIII’s supremacy as the head of the Church of England, which the king has just broken off from the Roman Catholic church. More refuses to sign an oath recognizing the king’s marriage to his second wife (the second of six marriages) and refuses to succumb to the political pressures of the king and his political aides. He is tried for treason in a show trial and is beheaded, dying for his principles.

The play portrays More as a deeply principled man whose stand against the king persists even as he is about to be beheaded. We remember More for his challenge to royal tyranny, standing up on behalf of reason and principle, and, perhaps most of all, for his fidelity and loyalty to the rule of law.

So, he is the patron saint of lawyers and politicians (now there’s an interesting pairing!) and he represents the ideal for each of these — the true statesman and lawyer, whose commitment to his principles is so personal, and so complete, that he is willing to give up his life for them.

And Thomas More’s story is every bit as important to us these days when we take for granted our many freedoms, and the distribution of political power, among our three branches of government, rather than the vesting of that power in one, all-powerful, ruler. But, I submit, we still have to fight, and fight hard, to preserve this system, because it is the *system itself* that protects us. As a judge, I am obviously reminded every day of the singular importance of our impartial and independent judiciary.

Now, as judges we are sometimes called upon to make decisions which are unpopular with the majority. Still, we are required to apply the law impartially. We must make difficult choices in interpreting the Constitution on matters related to church and state, freedom of speech, due process, and frequently now, we are asked to consider ever-evolving standards of equality and decency here and abroad, whether they relate to our right to privacy, the right of same-sex partners to marry, life without parole sentences for juveniles, or the imposition of the most severe punishment, the death penalty.

And while we judges are subject to the same societal pressures that everyone is exposed to, most people expect, and the Constitution requires, that judges rise above any personal preferences in reaching their decisions under the law. Nothing new here.

But our deeper and deepest challenge lies in using legal principles and doctrines that we will not regret in the future — in making decisions that will stand the test of time, that will impose justice now and “Justice for All Seasons.”

Now, in America we have not always remained loyal to our best ideals in times of crisis — basic civil liberties, like freedom of speech, and habeas corpus, may seem to diminish in light of security threats from abroad; but, in fact — and in truth — these are the moments. These are the moments when our civil liberties are the most important — and when we must be super-vigilant in guarding these rights. I say this because it is easy to defend our ideals in times of peace and prosperity (in the good times), and hard, but absolutely essential, that we continue to defend our ideals in times of crisis.

*Korematsu v. United States*¹⁴⁰ is one of the most painful of historical cases — though certainly not the only one — which illustrates the great importance of carefully considering the historical context in which one is acting as a judge. The case is also particularly historically relevant in today’s climate of fear and terrorism, because it reveals the ease with which we (presidents and courts, alike) can justify curtailing the human rights of our own citizens on account of their race or ethnicity. The parallels to many of our government’s current practices seem obvious and painful. The Court justified its decision

¹⁴⁰ 323 U.S. 214 (1944).

then by saying that the country was at war, and the military was justified in taking any measure to ensure the safety of the country.

Ironically, it was, after all, U.S. Supreme Court Justice Louis D. Brandeis in dissent in the *Olmstead* case who earlier said: “Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.”¹⁴¹

Now, of course, with hindsight, we are able to place the *Korematsu* decision in its proper historical context, and to properly criticize it — but it is a context, different in degree perhaps, not all that different from the one facing some Arab Americans and other minorities today.

Could it happen again?

Has it already happened again?

Has our current Supreme Court adequately addressed and provided for essential procedural protections for Guantanamo detainees and others? And how will history judge our actions as a society and our legal system, as we reach decisions on other issues like indeterminate detention, the death penalty, or the right to marry?

Will the justice we render today be a “Justice for All Seasons”?

For about the past decade, or perhaps longer, our country has become increasingly polarized on a number of fronts — politically, economically, rhetorically. Whether generated by the war on terrorism or the war in Iraq, the contentiousness in Washington, or the incessant battles in the culture wars for the hearts and minds of America, it matters not. Increasingly, we are identified as either Democrats or Republicans, red states or blue states, pro-choice or right-to-life, intelligent design and creationism, gays vs. straights, fundamentalists and others. We have somehow come to see ourselves as a nation of opposites, contradictions, and vast disparities, rather than striving to be the apocryphal melting pot, in which view-points and backgrounds of all types are welcomed, or at least tolerated. No one seems to listen to the other side as facts are distorted and personal attacks and fearmongering seem to carry the day.

¹⁴¹ *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

In our rush to join one side or the other, I think we often forget that we shall be all working together on a common project that is supposed to allow us to have our strong beliefs, but to still live together peacefully. I sometimes think we would do well to remember the reason this country was started in the first place as a haven of religious tolerance and for reasoned and accountable government. That as our new president-elect has said: “We are not red states or blue states, but the United States of America.”

On that point, I should note that exactly two months from today, we will have a new president:

- A son of an immigrant African father.
- A biracial son of parents who could not marry each other legally in many of our states on account of their race.
- And a president who has already indicated significant changes in our country’s policies on Guantanamo, indeterminate detentions, torture, and any number of important legal issues.

I know that I and my colleagues on the bench understand how important it is that judges decide cases free from intimidation and the influence of public opinion, and to confine ourselves to deciding cases based on the rule of law and the facts before us. We are not, and should not be, accountable to any particular point of view or constituency. That when actions by the legislative and executive branches are called into question, ever since *Marbury v. Madison*, the responsibility of determining the constitutionality of these actions falls squarely on the judiciary, without regard to popular opinion, or to the whims of an all-powerful king.

There is a scene in *A Man for All Seasons*, that I think is particularly relevant to us these days. In the play, Thomas More’s son-in-law warns More to be careful around some of the king’s men, his political enemies, who he believes are trying to build a case against him. He urges More to use his considerable power to remove the legal protections and benefits his enemies enjoy, but More refuses, saying,

When the last law [is] down, and the Devil turned round on you — where would you hide . . . ? This country’s planted thick with laws from coast to coast . . . and if you cut them down . . . d’you really think you could stand upright in the winds that would blow then? Yes, I’d give the Devil benefit of law, for my own safety’s sake.

We have to apply the laws evenly everywhere in order to protect ourselves, he is saying. Our laws are like a thick forest that protects us from the harsh volatile winds that would otherwise turn our country into a wasteland.

Or as the political philosopher, Thomas Paine, put it: “He that would make his own liberty secure must guard his enemy from oppression: for if he violates this duty, he establishes a precedent that will reach to himself.”

Because without law we have chaos. It reminds me of something I heard Justice Anthony Kennedy say: “The law makes a promise — neutrality. If the promise gets broken, the law as we know it ceases to exist. All that’s left is the dictate of a tyrant, or perhaps a mob.”¹⁴²

So it is up to us — the legal community — to maintain the promise, the promise that protects even the Devil and the most heinous of criminals.

We judges, of course, must be committed to neutrality and impartiality. At the same time, we absolutely depend on lawyers who will provide representation for all views in society — not just for the wealthy, and for the politically popular views, but for the indigent, the disenfranchised — and yes, even for the most despicable members of our society who still need a lawyer just as much (and more) as the most innocent and upright citizen. And to give them the fullest protection of law that distinguishes our country.

In the end we remember Thomas More because of his dramatic and heroic act of personal sacrifice in standing up for his principles and fundamental principles of law. Thanks to him, and people like him, we now have a system in which people are free to act on their principles — to do so peacefully, and without fear of repercussion, and certainly, without fear of having your head chopped off. And a key part of that are the members of our legal profession, peacemakers, defenders of due process, defenders of equal protection, and other civil liberties — legal principles that I hope continue to prosper in good times and in bad, and in all seasons, and for all people.

Thank you.

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¹⁴² Anthony M. Kennedy, *Address to American Bar Association Symposium, Bulwarks of the Republic: Judicial Independence and Accountability in the American System of Justice*, Dec. 4–5, 1998, Philadelphia.

X. THE STATE OF THE INITIATIVE PROCESS AS SEEN THROUGH THE LENS OF CRIMINAL LAW

ANNUAL APPELLATE DEFENDERS DINNER

San Diego, April 9, 2010

Let me begin by extending my thanks to the Board of Appellate Defenders and Federal Defenders of San Diego for inviting me to speak tonight. I am honored to be in the company of so many talented and dedicated criminal defense attorneys. Representing those who are “presumed innocent” is, of course, no easy task. In a nation founded on establishing checks and balances against government oppression, many people often forget how important criminal rights are, especially the right to counsel.

A few months ago, an attorney for an accused 9/11 terrorist went on Fox News’s *The O’Reilly Factor*. Toward the end of the interview, Bill O’Reilly said to the attorney, “You know, people hate you.”¹⁴³ We also saw something to this effect recently when the Department of Justice recently hired a handful of Guantanamo defense lawyers. Well, of course, all this is totally absurd; because if you stop to consider the role of the advocate, whether it’s a prosecutor or defense attorney, each is asserting and defending the rights of all of us here tonight.

I want to talk tonight about the initiative process and how it has impacted the criminal justice system and the work of the courts.

Since the controversy surrounding Proposition 8, there has been a lot of discussion about flaws in California’s initiative process. Tonight, I will talk about a few of the major problems in the way initiatives are drafted, the way they are sold, and enacted, using as examples, criminal law ballot initiatives.

I think the origins of the initiative process is a good starting point. Direct democracy is not new. Forms of direct democracy date back to ancient

¹⁴³ Nicholas Graham, *O’Reilly Interviews Lawyer For 9/11 Defendant*, HUFFINGTON POST, (Nov. 24, 2009) http://www.huffingtonpost.com/2009/11/24/oreilly-interviews-lawyer_n_369338.html.

Athens and the Roman Republic, where citizens (I should qualify that by saying “men”) assembled in public meeting places to debate and to pass laws. And we see it today even in our country in the form of New England town halls.

The stirrings of the initiative process in California began in the late 1800s among farmers frustrated with the control wielded by railroad companies. With rail expansion, the railroads acquired whole industries necessary to farming, such as fertilizer and seed companies, as well as grain storage houses.¹⁴⁴ And, of course, the railroads controlled the means for transporting crops.¹⁴⁵ In California, Southern Pacific owned 85 percent of the railways.¹⁴⁶ At the same time, banks set mortgage rates that put farmers under water.¹⁴⁷ Farmers were selling crops at a loss, racked up massive debts, were denied credit, and lost their farms to banks.¹⁴⁸ Wait, this sounds too familiar!

These economic conditions gave birth to the Populist and Progressive movements, which advocated for the initiative and referendum as a check on corrupt state governments.¹⁴⁹ During the first decade of the 1900s, our state government was incredibly corrupt. Industry had a fixed scale for bribes based on a lawmaker’s position in the Legislature.¹⁵⁰ One legislator was a “\$2,500 man,” another was a “\$1,500 man,” and so on.¹⁵¹ Nowadays, of course, we call it “campaign finance.”

But the Progressive Era swept into California, and a little-known prosecutor by the name of Hiram Johnson rose to the Governor’s Office on a reform platform.¹⁵² During his first year in office, the Legislature approved legislative packages to be sent to the people, which included processes for the

¹⁴⁴ CENTER FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA’S FOURTH BRANCH OF GOVERNMENT* (2008) [hereafter “CGS”], 37.

¹⁴⁵ *Id.*

¹⁴⁶ CGS at 35–36.

¹⁴⁷ CGS at 37.

¹⁴⁸ THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* (1989), 43–44; DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000), 25–27.

¹⁴⁹ BRODER at 26–27.

¹⁵⁰ *Id.* at 39.

¹⁵¹ *Id.*

¹⁵² CGS at 40.

referendum, recall, and initiative.¹⁵³ They were approved by large margins.¹⁵⁴ The Progressives believed it was the beginning of a glorious new era.¹⁵⁵

Now, with that brief historical background, the first problem with the initiative process today actually involves the California Supreme Court and our lax enforcement of the so-called “single subject rule,” which originates — not surprisingly — from a 1948 ballot proposition.¹⁵⁶ That proposition said, “Every constitutional amendment or statute proposed by the initiative shall relate to but one subject.”¹⁵⁷ The language in the ballot pamphlet that year was clear: complex initiatives confused voters, and the single-subject rule would “entirely eliminate[] the possibility of such confusion.”¹⁵⁸ Despite this clear mandate for interpretation, our supreme court held that all legislation should be upheld that is “reasonably germane” to the title of a proposition.¹⁵⁹

So what does it take for a group of provisions to be “reasonably germane” to the proposition title? Not much, and this is especially well highlighted in criminal propositions. Take, for example, Prop 8 — not our most recent Prop 8. I am referring to the *other* Prop 8, passed in 1982, colloquially called the “Victim’s Bill of Rights.” Prop 8:

- Established restitution rights for crime victims.
- Amended the California Constitution to include the right to attend safe schools;
- Purported to abolish a program to treat mentally disordered sex offenders.
- Lowered criminal evidentiary standards, and increased prison terms.¹⁶⁰

If ever there were an initiative with disjointed and unrelated provisions, Prop 8 was it. As my predecessor, Justice Mosk, wrote in dissent,

¹⁵³ *Id.* at 40–41.

¹⁵⁴ *Id.* at 41.

¹⁵⁵ BRODER at 41.

¹⁵⁶ *Manduley v. Superior Court*, 27 Cal. 4th 537, 584 (2002) Moreno, J. concurring (*Moreno Concurrence*).

¹⁵⁷ BALLOT PAMP., APPEN., GEN. ELEC. (Nov. 2, 1948), 6.

¹⁵⁸ *Moreno Concurrence* at 584–85.

¹⁵⁹ *Perry v. Jordan*, 34 Cal. 2d 87, 92–93 (1949); *Moreno Concurrence* at 585.

¹⁶⁰ BALLOT PAMP., ANALYSIS BY THE LEGISLATIVE ANALYST, PRIMARY ELEC. (June 8, 1982), 32, 54.

“These provisions cannot be characterized as ‘so related and interdependent as to constitute a single scheme.’”¹⁶¹

But Prop 8 was hardly an exception. Justice Mosk later joked in 1990, “If you liked Prop 8, you will love Prop 115.”¹⁶² Prop. 115 expanded the number and reach of special circumstances for murder, added the crime of torture, created measures to ensure faster criminal trials, expedited preliminary hearings, altered discovery and evidentiary rules, and removed counsel’s right to examine potential jurors.¹⁶³ According to Justice Mosk, “the question whether Prop 115 satisfies the single-subject rule practically answers itself The measure is a veritable ‘grabbag of . . . enactments.’”¹⁶⁴

After an eminent career as the longest serving justice on the California Supreme Court, Justice Mosk passed away in 2001. Not long after I was confirmed to succeed him, a case called *Manduley v. Superior Court* came before the Court, challenging Prop 21, the “Gang Violence and Juvenile Crime Prevention Act.” In my concurring opinion, I picked up the single-subject torch from Justice Mosk and wrote: “the single-subject rule was . . . designed to prevent an unnatural combination of provisions dealing with more than one subject that have been joined together simply for improper tactical purposes (log rolling) Unfortunately, this court has generally not interpreted the single-subject requirement to accomplish these basic purposes.”¹⁶⁵

The second flaw in the initiative process is the “process” itself. Initiatives are often drafted quickly and in reaction to some interest group’s indignation about a hot potato social or economic issue. This haste leaves much to be desired from an enforcement perspective.

While legislatures across the country are routinely perceived as being sluggish and unresponsive to problems, it’s important to remember that may be exactly the point: the legislative process is supposed to be slow and deliberative so that our laws are written clearly enough to give notice to

¹⁶¹ *Brosnahan v. Eu*, 31 Cal. 3d 1, 11 (1982), dissent of Mosk, J.

¹⁶² JUSTICE MOSK, COMMENCEMENT ADDRESS AT UC DAVIS (May 19, 1990), 11 [on file with California Judicial Center Library, Special Collections].

¹⁶³ BALLOT PAMP. (June 5, 1990) at 32–33.

¹⁶⁴ *Raven v. Deukmejian*, *supra*, 52 Cal. 3d at 364, dissent of Mosk, J.

¹⁶⁵ *Moreno Concurrence* at 585, internal quotations and citations omitted.

the people of what they require or proscribe, and so they are easy for the courts to enforce.

In California's legislature, as a bill goes from one committee to another and from one legislative house to another, it has a *minimum* of seventeen procedural gates to pass before it becomes law, and along the way a lot of people analyze the proposed law.¹⁶⁶ Legislative counsel, staff members, legislators themselves, interested advocates, and ultimately the governor and his staff analyze bills passed through the legislative process.¹⁶⁷ However unpopular the process is, all the people along the way poke, prod, ask questions, and iron out problems.

Contrast this with the initiative process. For an initiative, a limited number of people or organizations propose what they alone believe is good public policy and give it to the voters on a take-it-or-leave-it basis.¹⁶⁸ The result is predictable: drafting errors and vagueness that leave the courts with the task of construing initiatives using only the limited information in the voter pamphlet as guidance.¹⁶⁹

Take, for example, Prop 36, which reduced criminal penalties for most nonviolent drug users.¹⁷⁰ The language of the proposition said its provisions would "become effective July 1, 2001 and . . . applied prospectively."¹⁷¹ Even language so seemingly straightforward can create problems without the watchful eyes behind the legislative process. In the case of *People v. Floyd*, the defendant was charged with a drug offense before Prop. 36 was enacted, but sentenced after.¹⁷² And unfortunately for the defendant, he already had two strikes under our Three Strikes law.¹⁷³ Two days before the defendant's sentence, voters passed Prop. 36, which would have made the defendant

¹⁶⁶ Sheila Kuehl, *Either Way You Get Sausages: One Legislator's View of the Initiative Process* (1998) 31 LOY. L.A. L. REV. 1327, 1327–29; California State Legislature, *Overview of the Legislative Process* <http://www.leginfo.ca.gov/bil2lawx.html>.

¹⁶⁷ *Id.*

¹⁶⁸ Kuehl at 1329.

¹⁶⁹ Kuehl at 1331, 1335; *Robert L. v. Superior Court*, 30 Cal. 4th 894, 901 (2003).

¹⁷⁰ BALLOT PAMP., ANALYSIS BY THE LEGISLATIVE ANALYST, GEN. ELEC. (Nov. 7, 2000), 23.

¹⁷¹ Prop. 36, § 8, as approved by voters, Gen. Elec. (Nov. 7, 2000).

¹⁷² *People v. Floyd*, 31 Cal. 4th 179, 182 (2003).

¹⁷³ *Id.*

eligible for rehabilitation and probation instead of a third strike sentence.¹⁷⁴ We therefore had to determine whether the “effective date” applied to defendants charged after that date only or to pending cases as well.¹⁷⁵ Based on the Court’s prior precedent, we determined that Prop 36 did not apply to the defendant. But had Prop 36 gone the legislative route, such an elementary problem may have been spotted and resolved early in the process.

The ambiguities of that particular proposition created additional problems. For example, in *People v. Canty*, we had to determine whether driving under the influence of drugs was “a misdemeanor not related to the use of drugs,” thereby disqualifying the defendant from parole and treatment.¹⁷⁶ In *People v. Guzman*, we had to determine whether Prop 36 required a probation sentence for a defendant already on probation for other crimes.¹⁷⁷ Prop 36 is not unique. Virtually every proposition passed generates more questions and problems than any law passed by the Legislature.

And propositions often compound these drafting problems with clauses that restrict the Legislature from amending the law without a two-thirds supermajority.¹⁷⁸ Thus, the Legislature can’t clarify poorly drafted initiatives and punts problems back to the voters.

The most recent example of this problem is the Compassionate Use Act, an initiative adopted by the voters in 1996. The Compassionate Use Act provides a defense to criminal charges for people who possess or cultivate marijuana for “personal medical purposes.”¹⁷⁹ The drafters of the initiative did not include any specific limit on the amount of marijuana a patient may possess or cultivate. While the Court of Appeal subsequently explained that the amount must be “reasonably related to the patient’s current medical needs,” plenty of uncertainty remained because no one knew how much marijuana a jury would ultimately determine was a reasonable amount.¹⁸⁰

Thus, people using marijuana for legitimate medical purposes weren’t sure how much marijuana they could safely possess without the possibility

¹⁷⁴ *Id.* at 183.

¹⁷⁵ *Id.* at 184.

¹⁷⁶ *People v. Canty*, 32 Cal. 4th 1266 (2004).

¹⁷⁷ *People v. Guzman*, 35 Cal. 4th 577 (2005).

¹⁷⁸ *See, e.g.*, BALLOT PAMP. PROP. 115 ANALYSIS BY THE LEGISLATIVE ANALYST, PRIMARY ELEC. (June 5, 1990), 69.

¹⁷⁹ § 11362.5, subd. (d).

¹⁸⁰ *People v. Trippet*, 56 Cal. App. 4th 1532, 1549 (1997).

of prosecution; and prosecutors prosecuting illegal possession weren't sure how to distinguish meritorious cases from those unlikely to succeed.

In response, the Legislature took a straightforward step to fix the problem: it passed a statute that created specific limits on the amount of marijuana patients could possess or cultivate. Under the statute, patients could avoid prosecution as long as the amount was below the ceiling and prosecutors could confidently move forward with charges if the amount was above the ceiling. To the benefit of patients, prosecutors, and the administration of justice generally, the outcome no longer depended upon the vagaries of a particular jury's conception of what was reasonable.

In *People v. Kelly*, decided earlier this year, we had to strike down this sensible scheme as an impermissible amendment of the Compassionate Use Act.¹⁸¹ Despite its helpful clarification of ambiguous language, the statute ran afoul of the constitutional prohibition against legislatively amending an initiative when the initiative itself does not authorize such amendment.

The third, and possibly most damning problem with the initiative process, is the sad irony that it has been co-opted and exploited by powerful special interests — the very problem Hiram Johnson and the Progressives sought to fix.

Special interests can qualify ballot initiatives with relatively small resources. To qualify a statutory initiative for the ballot, proponents need to collect signatures from registered voters totaling only 5 percent of the number of votes cast in the last gubernatorial election.¹⁸² Currently, that works out to about 434,000 signatures.¹⁸³ For constitutional amendments, the threshold is a mere 8 percent, which is about 694,000 signatures.¹⁸⁴ In recent years, special interest groups have begun utilizing services of the so-called “initiative industry,” which pays people to gather signatures.¹⁸⁵ For example, in 1994, Phillip Morris paid a then record \$2.00 per signature to qualify its smoking initiative for the ballot.¹⁸⁶ Signature gatherers sit in

¹⁸¹ *People v. Kelly*, 47 Cal. 4th 1008 (2010).

¹⁸² Cal. Sec. State, Initiative Guide, <http://www.sos.ca.gov/elections/ballot-measures/initiative-guide.htm>.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ CGS at 71.

¹⁸⁶ JIM SHULTZ, *THE INITIATIVE COOKBOOK: RECIPES AND STORIES FROM CALIFORNIA'S BALLOT WARS* (1996), 34.

front of retail stores asking patrons if they will support the “Victims Bill of Rights” initiative or the like¹⁸⁷ — and who could refuse?

When I’m approached, I have the perfect answer . . . “that issue may come before the court” (I don’t really say that).

The total amount required to collect the requisite signatures is a little over a million dollars.¹⁸⁸ Prop 36 cost only \$1.4 million to qualify for the ballot.¹⁸⁹ Similarly, Prop 69, which in 2004 required DNA collection for any adult arrested for or charged with any felony offense, cost only \$1.7 million to qualify.¹⁹⁰ Some special interest groups who cannot raise all the money they need for their issue literally sell provisions of their initiative to other groups in exchange for financial support.¹⁹¹ It’s no wonder we end up with ballot initiatives that look like “grab bags” of variously assorted policy proposals.

Another thing: All ballot initiatives today use some form of signature gathering services.¹⁹² Even the recent Prop. 8, the one repealing the right of same-sex couples to marry, as polarizing and emotive a subject it was, relied on hired signature gatherers.¹⁹³ This is hardly what the Progressives had in mind.

Add to this the question whether an initiative campaign has an interest in providing a fair and balanced picture of the proposed initiative.¹⁹⁴ Victory, *not* education, is the objective, so campaigns dispense slanted information that supports their respective cause, e.g., Save the Forests as a slogan for clear-cutting trees.¹⁹⁵ Not surprisingly, public discourse on initiative proposals is often rife with misinformation and appeals to voters’ emotions — especially fear (e.g., gay marriage will be taught to third graders).¹⁹⁶ The result is that we end up with laws that are poorly drafted, poorly understood, and richly serving special interests.

¹⁸⁷ See *Id.* at 33–34.

¹⁸⁸ CGS at 175.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 286.

¹⁹² *Id.* at 168–169.

¹⁹³ Cal. Sec. State, *Cal-Access*, <http://cal-access.ss.ca.gov>.

¹⁹⁴ CGS at 254.

¹⁹⁵ *Id.*

¹⁹⁶ SHULTZ at 44.

The money spent on initiative campaigns — expenditures on everything from signature gathering to political consultants to television advertisements — is also a perversion of the initiative process not contemplated by the Progressives. Between 2000 and 2006, proponents and opponents of ballot measures spent over \$1.3 billion on ballot initiative campaigns.¹⁹⁷ Today, this money mostly comes from corporations, wealthy individuals, labor unions, Indian tribes, and candidates for office.¹⁹⁸

In closing, I submit to you that this system of initiative governance is not what the Progressives intended. Initiatives contain mixes and matches of proposals that have little relation to each other. They are unclear to the people and to the courts who interpret them. And, in recent years, special interests have co-opted the process to enact legislation favorable to them by spending untold sums of money, spreading misinformation, and making manipulative emotional appeals to voters.

California is considered a great innovator: in government, industry, the arts, the law, technology, the environment, and so on.¹⁹⁹ We are a people ahead of the curve, ready to implement new, exciting ideas while other states proceed with caution. But even the most innovative people must step back from time to time and admit that an idea did not play out as intended, and it may be time to consider whether our liberal approach to ballot initiatives is one such failed experiment in need of retuning.

Thank you for being a most attentive audience.

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¹⁹⁷ CGS at 282.

¹⁹⁸ CGS at 291–95.

¹⁹⁹ Michael Grunwald, *Why California is Still America's Future*, TIME MAGAZINE (Oct. 23, 2009) <http://www.time.com/time/nation/article/0,8599,1931582,00.html>.