CELEBRATING THE CALIFORNIA SUPREME COURT AND ITS HISTORY

EDITOR'S NOTE:

In 2016, twenty years of work by Professor Harry Scheiber and a team of distinguished authors made possible the publication of an authoritative history of the California Supreme Court, sponsored by the California Supreme Court Historical Society.[1] To celebrate the completion of this work, the Society organized a public symposium to discuss the past and present of the court, featuring Chief Justice Tani Cantil-Sakauye, former Chief Justice Ronald M. George, Professor Scheiber, and leaders of the Society. It took place in the Milton Marks Auditorium of the Ronald M. George State Office Complex adjacent to the Supreme Court in San Francisco on November 15, 2016. The following is a complete transcript of that event, lightly edited for publication, including the addition of footnotes.

—SELMA MOIDEL SMITH

[1] Harry N. Scheiber, ed., *Constitutional Governance and Judicial Power: The History of the California Supreme Court* (Berkeley: Berkeley Public Policy Press, Institute of Governmental Studies, University of California, Berkeley, 2016).

California Supreme Court Historical Society President George Abele opens the evening. Looking on (from left): Bob Egelko, legal affairs reporter for the San Francisco Chronicle, Charles J. McClain, vice chair of the Jurisprudence and Social Policy Program at Berkeley Law, Harry N. Scheiber, Society board member and professor at Berkeley Law, former Chief Justice Ronald M. George, Chief Justice Tani Cantil-Sakauye, and Society board members Daniel Grunfeld and Molly Selvin.

Photo: William Porter

GEORGE ABELE, SOCIETY PRESIDENT: Good evening, everybody, and thank you for coming. Welcome to what is going to be an extraordinary event. We are here to celebrate what is truly a tremendous accomplishment. For the past twenty years, we have been working on creating this tremendous scholarly work, and we're here tonight to celebrate all of the folks who helped put this book into publication and create it, both the authors and the editor, and all those involved. We're also here to have a conversation with our current chief and former chief, and we very much appreciate their coming and joining us. And we're going to learn a little bit of law and a little bit about history, and what it took to put this book together. This book will serve not only as an interesting historical read, but also a tremendous scholarly reference book for lawyer and non-lawyer

alike. It really gives a story of the history of the countless groundbreaking issues that our court and that our state have faced.

I'd like to start by remembering the passing of one of our former chief justices, Chief Justice Malcolm Lucas, who played such a critical role in our court's and our state's history. To do that, I'd like to invite former president of the California Supreme Court Historical Society Jennifer King to make a few remarks.

JENNIFER KING: Chief Justice Malcolm Lucas passed away at the end of October at the age of eighty-nine, and we pay tribute to his distinguished service on the California Supreme Court. Our tribute tonight is particularly poignant because Chief Justice Lucas had actually agreed to be part of the discussion this evening before he passed away, and so his presence is missed all the more. Governor George Deukmejian appointed him to the court in 1984, and he served on the court for twelve years, the last nine as chief justice.

The governor elevated him to chief justice at a critical historical moment after the voters had denied retention to three justices. In a statement at the time, Chief Justice Lucas said the removal of his colleagues "placed considerable pressure on our court as an institution." He said that "in the coming months" he "would attempt to take steps to heal some of our wounds and restore public faith in our judicial system." He remained confident "in the ability of the court to be one of the most respected courts in our nation."[2] By all accounts, he was successful in his efforts. According to Gerald Uelmen, Chief Justice Lucas's greatest legacy was "the giant strides he achieved to restore public confidence in the legal system at a time of historic peril."[3]

Chapter six of our history book is devoted to the Lucas Court. As chief justice, Justice Lucas wrote 152 majority opinions, more than anyone else on the court, and he had a less than 5 percent dissent rate. While that rate to an extent reflects the general conservativism of the Lucas Court, it also suggests that Justice Lucas had the ability to forge and maintain a majority in the cases that divided the court. His opinions were known for

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[2] Quoted in Jeremy B. White and Christopher Cadelago, "Former California Chief Justice Malcolm Lucas dies at 89," *The Sacramento Bee*, September 28, 2016.

[3] Quoted in John H. Culver, "The Transformation of the California Supreme Court: 1977–1997," *Albany Law Review* 61, no. 5 (Midsummer 1998): 1461–90.

respect for precedent and thoughtful analysis. Particularly in many of his civil cases, he would canvass the law in other jurisdictions, consider the views of commentators, and examine the consequences of his decisions. He authored what remain today as some of the most frequently cited civil cases. A 2007 study found that Chief Justice Lucas's decisions have had considerable influence on sister state courts, even more so than those from some of his well-known liberal predecessors.[4]

Beyond his judicial decision-making, he was also a skilled administrator. He reorganized the Judicial Council in 1992, and those changes were widely credited with elevating the council's role in court planning and policy making. As chair of the Judicial Council, he commissioned studies that resulted in ethical reforms. He was also focused on efficiency, working to reduce backlogs at the court, as well as the lower courts. Justice Lucas was born in Berkeley and grew up in Long Beach. He attended USC for both college and law school. He practiced law in Long Beach for several years before being appointed first to the Superior Court and later to the United States District Court. His wife, Fiorenza Cartwright Lucas, his two children, California State Librarian Greg Lucas and Lisa Lucas Mooney, and six stepchildren survive him. He will be remembered for bringing steady and principled leadership to the court. As our current chief justice recently said, "Chief Justice Malcolm Lucas was a man of great dignity and grace. He came to the court during a time of upheaval in the judicial branch and he brought stability, peace, and leadership to the court."[5] Please join me in a brief moment of silence to honor Chief Justice Malcolm Lucas. Thank you very much.

GEORGE ABELE: Before we start our conversation with our chief justices, I'd like to recognize and thank the authors and the editor who were responsible for putting this tremendous book together. Sitting to my right, Professor Charles McClain, in the center, is responsible for two chapters in the book. A professor at UC Berkeley School of Law since 1997, Professor McClain has authored and edited several books in the legal history arena and is a recipient of numerous awards and fellowships. To his right is Bob

[4] Jake Dear and Edward W. Jessen, " 'Followed Rates' and Leading State Cases, 1940–2005," *UC Davis Law Review* 41 (2007): 702 (Graph 4).

[5] Quoted in Maura Dolan, "Former Chief Justice Malcolm Lucas, who steered state's top court to the right, dies at 89," *Los Angeles Times*, September 29, 2016.

Egelko, a legal affairs reporter for the *San Francisco Chronicle* for over sixteen years. Prior to that, Bob spent thirty years with the Associated Press. He currently reports on various state courts and federal courts on legal issues for the *Chronicle*.

To my left, one of our interviewers is Professor Molly Selvin who serves as vice president of our Society and a member of its executive committee. Molly is also a legal historian and a professor who has taught at the Pardee RAND Graduate School, Stanford, and Southwestern Law School. Prior to that, Molly spent eighteen years as a staff writer for the *Los Angeles Times*.

Finally, Professor Harry Scheiber. Professor Scheiber served as both an author and an editor for many publications. He is the Stefan A. Reisenfeld Professor of Law and History at Berkeley, also the faculty director of the Institute for Legal Research, the author of fourteen books, also is a fellow of the American Academy of Arts and Sciences and twice has held Guggenheim Fellowships. Harry served as an author for one chapter as well as the overall editor.

We also want to thank and recognize two of our authors who are not here: Professor Lucy Salyer is a professor of history at the University of New Hampshire. She is currently leading a study-abroad program in Budapest for the university. And finally, the late Gordon Morris Bakken, who authored the chapter that covers the late nineteenth and early twentieth centuries, passed away prior to the publication of this book.

With a book like this, you can imagine there are many, many people to thank. Thank you to the authors, to Professor Scheiber as the editor. There are also others, people and organizations who have contributed to the book. The Berkeley School of Law, for one, has donated countless hours and resources to the book. The Berkeley Public Policy Press and Institute of Governmental Studies published the book, and Ethan Rarick is its associate director who's unable to be here tonight but spent many hours working on the book. David Carrillo is the executive director of the California Constitutional Center at Berkeley, and he also spent much time helping us put this book together. There are also many law firms who contributed to the event tonight to help us defray the expenses, so we thank them as well.

And with that, I would like to turn the program over to Molly and to Dan. Molly — you've heard about her tremendous accomplishments already; Dan Grunfeld is also a former president of the California Supreme

Court Historical Society. He currently heads the Western Litigation Practice for Morgan Lewis, and they're going to lead us tonight in our conversation with our chief justices.

DAN GRUNFELD: So, as Jennifer so eloquently stated, we are gathered today in the shadow of the passing of Chief Lucas. Why don't we start with you, what is it you most admired about Chief Justice Lucas?

TANI CANTIL-SAKAUYE: Thank you, Dan. Let me say that my stories of Chief Justice Lucas come from his many admirers in the court who would tell me stories about what he did and how he did it. But when I think of Chief Justice Lucas, what first comes to mind is, unlike many of us, he was a chief who walked into the office knowing exactly what issues lay ahead for him. And he first had to deal with a court that needed healing. He had to come in and bring a different side of his many talents to that role, and you don't often think that a chief justice would have to come in and work immediately with the people he works with to heal. But knowing now what I know about the court and what a family it truly is, and how we share our family, our personal stories, our trust, he walked into a situation that I can only imagine was challenging and hard, and he had to think about and feel how he was going to approach that, and he did with great poise and grace and thoughtfulness.

When people talk about you in the past, they could tell many stories because they have the gift of hindsight, but everything I've heard about how Chief Justice Lucas handled that was tremendously calming and kind and truly familial. And so my limited contact with him has really been in that same sense. I called him approximately a month and a half ago about this event and his voice — he was hearty and strong and joking and inquisitive and excited to be here. And he had his family support. Greg Lucas, our state librarian, was happy and ready to assist and facilitate in any way. And I looked forward to hearing *his* recollections, as well as Chief George's recollections. And I'm sorry that we're not able to, but I admire the man for his heart and for his leadership along with his many skills that are well known as a jurist.

DAN GRUNFELD: Chief George, do you have a favorite memory of Chief Justice Lucas?

RONALD M. GEORGE: Well, I do. There are many, and since the chief and Jennifer have touched upon substantive highlights of the chief justice's tenure, I hope I'll be forgiven if I relate a couple of amusing anecdotes that illustrate for me the keen sense of humor and fine hand that Chief Lucas had in dealing with counsel during oral argument and with his colleagues.

There was one case that preceded my tenure on the court that was famous by the time I had joined the court and that was the *City of Azusa* case, where Chief Justice Lucas and his colleagues were confronted with a challenge to a municipal ordinance that forbade fortunetelling, that made it into a crime. And when the counsel for the fortuneteller was about ready to rest his case, Chief Lucas leaned forward and said, "You know, there is one thing that's very troubling to me about this case, and that is that one side has a decided advantage over the other. . . ." [audience laughter] I think you know where this is going. When the defense counsel indicated that he was not aware of what that might be, Chief Lucas responded that it was obvious that she, his client, would know the court's thinking and would know how the case was going to be decided.

The other case was the *Nahrstedt* case, which I was witness to in oral argument.[6] The case involved the appropriateness of certain CC&R's that restricted pet ownership, and Mrs. Nahrstedt who owned three cats was trying to overcome the restriction that forbade that. One of the justices asked whether counsel was aware of a particular statute that had not been cited in briefs, so counsel acted puzzled and was pressed, and then the justice recited the statute which revealed that it dealt with seeing-eye dogs, and as that went on, and counsel's time was going off and was being spent on this, the chief justice leaned forward and asked counsel, "Is there anything whatsoever in the record that might suggest that any one of Mrs. Nahrstedt's three cats was a seeing-eye cat?" [audience laughter] Well, that put an end to that line of questioning.

And finally, one other anecdote, and that is on the rather grim night of the execution of Robert Alton Harris, Chief Lucas insisted that all of us be present in his chambers per the court's custom on an execution should there be any stay application or other proceedings that might emanate. So we gathered rather solemnly a few minutes before midnight. Some justices

6 Nahrstedt v. Lakeside Village Condominium Assn., 8 Cal. 4th 361 (1994).

had asked before, could they be excused, and Chief Lucas was quite firm, "No, I want you all here in case we have to vote." And time went on and on, and that was the night of various interventions by federal courts, and finally around three o'clock, Justice Mosk, who was just about turning eighty at the time, started looking at his watch, and Chief Lucas in a very kindly manner expressed concern, "You know, Stanley, it is getting very late; you must be quite tired, and if you really want to go home, that's all right; you can be on a telephone call." And Justice Mosk said, "Hell, no." He said, "I've got a tennis game at the Cal Club [California Tennis Club] at 6:00 AM, and it's gotten too late to cancel." So with that, Chief Lucas and the rest of us went home about 6:00 AM, and Justice Mosk went off to the Cal Club.

MOLLY SELVIN: Of course, we're also here to celebrate the publication of this court history book, so I'd like to ask you each, what sticks out in your mind as something you learned from this book, something that you had previously not known of, or perhaps not been as fully informed of? Chief Justice Cantil-Sakauye, would you start?

TANI CANTIL-SAKAUYE: Yes, it's a pleasure. Well, I have cherry-picked through the book — I will save the rest of it for later — and I did enjoy reading chapter three by Professor Salyer regarding the reforms from 1910 to 1940 in California, and that in 1910–11, there were twenty-three amendments to the California Constitution, including the gift that keeps on giving, the initiative [audience laughter], the recall of judges, the referendum, workers' comp, the PUC [Public Utilities Commission] — across the board, a number of changes — and the Progressive Movement that was replaced very briefly with the Conservative Movement. I found that all to be really quite interesting but so reflective of now and how the Supreme Court does in fact go in and litigate these thorny issues that are otherwise so emotional, that are put in motion by our legislature, and I continue to read and be surprised by truly how fascinating are the reforms that have reached all of our court.

RONALD M. GEORGE: I was interested in something I'd heard only bits about beforehand but had never really looked into much, and that was that at one point in the court's history, from the late nineteenth century into the 1920s, the court was actually organized into two departments. The chief justice could sit on either department. There were many opinions rendered

by the court, not en banc as they all are now but by department. This interested me because there always are proposals to try to increase the efficiency of the court system, particularly the California Supreme Court with its enormous caseload, and I looked at this and at the same time was being exposed, as president of the Conference of Chief Justices, to two states that had organized their high courts, not into departments but into separate courts of criminal appeals and civil appeals. Those two states are Texas and Oklahoma. In fact, I think Justice Mosk was intrigued by that precedent in those two states and was urging that our court get behind those moves, and I think, reflecting upon the experience of our court and the experience of those two other states, that it's not a good idea. But it was very illuminating.

TANI CANTIL-SAKAUYE: Thank you. [audience laughter]

MOLLY SELVIN: Sticking with the book and with history for another minute, which California Supreme Court justice would you have like to have served with, that you did not have an opportunity to serve with, and why, Chief?

TANI CANTIL-SAKAUYE: Well, I pick Chief Justice William Waste, and partly because I served on the Court of Appeal in Sacramento for six years, and the lore at the Court of Appeal — and former Justice [Dan] Kolkey can probably confirm this — was the story of how the court came to be built. So the story was that Chief Justice Waste came to Sacramento in 1927, in the summertime where it's very warm, and he came into the courtroom and he went to look at the construction of the new courthouse, the new California Supreme Court, and he went up to the fifth floor, top floor of that court, which is warm in anyone's imagination, and he asked, "Why is the courtroom in the attic?" That's all he needed to say, and all action ceased, and they rebuilt the exact same courtroom on the first floor. And you can still see that today. And so I've always been intrigued by a man who with one question could change construction and do it with such ease. But also because I admire Chief Justice Waste in that he was an assemblymember first, but he was also the chief justice at the time the Judicial Council was created, as well as the State Bar Act. And so, I would like to have served with him to find out, in his role as a decision-maker in the Capitol, and to be at the beginning of the creation of these two great entities, what were

the expectations of both, and what did he see as the purpose, and could he imagine it today? So I think that would have been a very interesting time to serve with Chief Justice Waste.

RONALD M. GEORGE: I would look back to the era of Chief Justice Phil Gibson because I think that he was truly the forefather of the modern court system and somebody who saw the inherent responsibilities of the chief justice as being truly chief justice of California and trying to organize a functioning judiciary. I know that he once wrote an article that impressed me when we were contemplating not just state trial court funding but the unification of what we had as three levels of trial courts — Superior Court, Municipal Court, and Justice of the Peace Court — the speech of Justice Gibson which was delivered and reprinted in the *State Bar Journal* amazed me.[7] He noted that at that time there were eight levels of court *below* the Superior Court, and he mentioned two — there was Township A, Township B, two types of Justice Courts; different Police Courts and so forth — and he said, "I challenged even the most experienced attorney to be able to specify what those eight courts are and their respective jurisdictions." But he saw the need to move ahead and a lot of the steps that he took, or that he at least contemplated taking and advocating, are things that came to fruition many years later.

DAN GRUNFELD: Chief, the court is often described as the second most important court in the land. Why is that, do you think, and are you concerned about developments or trends that may impact its future?

TANI CANTIL-SAKAUYE: Thank you, Dan. Well, I think for many reasons that the California Supreme Court *is* the second most important court in the land, and in part because of, first of all, its judicial excellence which really derives from its bar membership, the talented lawyers, but also a combination of items including the fact that California has always been a leader — we're the eighth largest economy — our state is diverse in terms of geography — our urban areas, our rural areas — our nature, our demographics, our nature of employment, our technology; our legislature is diverse and representative, and so we California courts have, as is evidenced by the book, truly an opportunity to address some groundbreaking issues

[7] Phil S. Gibson, "Reorganization of Our Inferior Courts," *Journal of the State Bar of California* 24 (1949): 384.

that other states in the nation have had no opportunity yet to achieve or to approach. And we bring talented members of the bar, and a talented Superior Court and Court of Appeal to the Supreme Court, so we have a refining process, a winnowing process as well, which I think tees up the important issues for the California Supreme Court to in fact resolve. So, to me, it is a number of dynamic factors that have to do frankly with the diversity-rich nature of California.

DAN GRUNFELD: Chief George?

RONALD M. GEORGE: Yes, I concur [general laughter] and would add a couple of other items. I think we are blessed with a constitutional provision that requires that decisions of our high court be in writing "with reasons stated therefor." And that may seem like something that we would take for granted, that's somewhat obvious, but in fact there are many state courts and federal appellate courts that issue what are basically per curiam or even memorandum opinions, so when you have a decision of the California Supreme Court, it is thought out, it borrows without apology from wherever wisdom can be found in other jurisdictions, and it is therefore more persuasive. And it's not just because we're the biggest state.

There's a very interesting study which has been alluded to in the 41 volume of the *UC Davis Law Review*,[8] coauthored by our own Jake Dear, who is present, and by Ed Jessen, the former reporter of decisions, and it actually documents statistically the citation of California Supreme Court opinions, and not just in string citations, no, but where the reasoning of the California Supreme Court opinion was persuasive in another jurisdiction adopting that. So I think for all of those reasons — and I would add another thing, too: I think the fact that we do have a central staff system here, where our central staffs cull out the issues that occur with great frequency, demonstrating their statewide importance, and therefore are able to present to the justices issues that really not only merit but demand resolution — all of that, I think, causes the court to end up with a work product that's quite exceptional compared to other jurisdictions. And I'll add one other thing: if it were just size, the article points out, why is New York, why is Illinois, not way up there, why is Washington State, and Colorado and Kansas, why are they way up there, following California in the decisions

[8] Dear & Jessen, *supra* note 4.

that are followed by other courts? It's because of their methodology, their attributes, and it isn't just a question of, we're bigger than the other states.

DAN GRUNFELD: So, here's a somewhat related question. Nationally, there are concerns about judicial independence eroding. And we've thought about this for a long time now. Do you agree, and if so, how concerned are you about the California court system, and what can be done to combat the causes of such erosion?

TANI CANTIL-SAKAUYE: I think the threat to judicial independence is real, and I think it's growing, and I took a page out of the playbook of Chief George when he created the Commission on Impartial Courts to ensure that California was aware and studied the best possible ways to ensure our independence from political money or outside money or the politicization of the courts and judges. Nevertheless, we see nationally this threat in the most recent elections, and now that I serve as well on the Conference of Chief Justices, I speak to my colleagues about the very real threat, and it's interesting that the threat comes from its own legislature, its own governor, as well as its public. And so, yes it is, and it continues to be so, and so my concern continues to be that we have to be aware because my view is that those outside forces are simply sharpening their teeth by the time they get to California. I do not believe that California is insulated by our retention elections because we've seen nationally, retention elections have not protected other jurists in other jurisdictions.

So, to me, the best approach can only be continued education, continued raising awareness, continued partnerships, with the best advocates we have, which are our lawyers, and which requires judges, I think, to do outreach, to speak to groups, to talk about the importance of an independent and impartial judiciary. It also means going into the Legislature and having to have that conversation every legislative year, as well as building on civics and reaching out and creating bridges and relationships with entities that are interested not only in democracy but the rule of law and how valuable that is. It is a never-ending fight, and I think that we continue to have to be aware, and we continue to have to be vigilant, and we need to work with our partners in ensuring that California's judiciary remains independent.

DAN GRUNFELD: Chief George?

RONALD M. GEORGE: I certainly agree that we're in a period in history — it's perhaps cyclical, where courts are more under attack and their independence is more in jeopardy than perhaps ever before — and yet, I would say that California's system is far superior, if that's any comfort, to that involved in many other states. I know in Texas, one year there were competing candidates for the Texas Supreme Court, backed by competing rival oil companies. In Ohio, it's traditional to have a candidate for the supreme court of the state backed by the labor unions and another candidate backed by the business community. There are many states where they run on political tickets and so forth.

That's not the case here. But Justice [Joseph] Grodin and I had a little chat before the program began here, and I think both of us are in agreement that something can be done and should be done to attempt to improve the system that we have here in California, even though it is a retention system. There's room for a lot of dialog on what that might be, but it is vital when you look at the fact that there were three justices, I believe, of the Kansas Supreme Court in recent years who were defeated at one election because of their vote on an abortion issue, and also a justice on the crime issue in Tennessee. I know that Justice [Ming] Chin and I faced a contested confirmation election in 1996 because of our position on the Planned Parenthood *American Academy of Pediatrics versus Lundgren* decision, which came out in '97 but had come out before rehearing was granted in 1996.[9] It was a major issue at our confirmation hearing; we were threatened with a contested retention election and it came to pass.

So, these are real threats, and I'll conclude by saying that I totally agree with the chief that the heart of this is really education. I think there are very serious problems in terms of our citizenry's understanding of the whole concept of separation of powers and that two of the branches are by necessity political branches, and the judicial branch is not supposed to be. And that's not something at all clearly understood, so we have a real job to make, and I'm very pleased that the chief is pursuing educational measures because that's at the heart of it, to get our school kids understanding, as they become adults, what their responsibilities are and how they can intelligently vote in elections involving the judiciary.

[9] 16 Cal. 4th 307 (1997).

DAN GRUNFELD: So one of the lesser-known powers of the California Supreme Court Historical Society is the power of do-over, and we have granted each of you a chance to go back in history, and you get to redo a decision of the Supreme Court at the time it was issued. What decision would you do over? [general laughter]

TANI CANTIL-SAKAUYE: I thought long and hard about this . . .

RONALD M. GEORGE: I hope it's not one of mine! [general laughter]

TANI CANTIL-SAKAUYE: Never, Chief. You know that, never. Well, I would bring up the story of poor Ethel Mackenzie (right? — *in the book*). Ethel Mackenzie was an accomplished San Franciscan, a woman of taste and a woman of means, and when she married a British national, she lost her American citizenship because there was a law at the time that said when a woman, *a woman*, marries a foreign national, she loses her American citizenship. The California Supreme Court upheld the law,[10] as did the United States Supreme Court several years later,[11] and it wasn't until about nineteen years later it was overturned. And so, if I had the do-over, and of course — right? Justice Werdegar, with a female majority on the California Supreme Court — not that that matters [laughing] — however, the do-over would be the meta-issue of women in the 1900s, not only labor issues, not only exclusion from unions, and exclusion from the Legislature and the above, but the entire concept of a woman's rights.

DAN GRUNFELD: Chief George, I'm pretty sure that was not one of your decisions! How would you answer that question?

TANI CANTIL-SAKAUYE: — 1913!

RONALD M. GEORGE: I don't go back quite that far. There are always decisions that justices of the court regret having been made by their predecessors, but I suppose the most embarrassing decision — if I could go around and rip it out of the casebooks — would be *People versus Hall* in 4 Cal., an 1854 decision.[12] In that case, the court was reviewing the murder conviction of a white defendant, and his claim of error was as follows: There was a statute that barred various races from being competent witnesses,

10 Mackenzie v. Hare, 165 Cal. 776 (1913).

11 Mackenzie v. Hare, 239 U.S. 299 (1915).

12 4 Cal. 339.

and it addressed specifically black citizens and mulattoes and some others. It happened, in this case, that the defendant was convicted in part upon the testimony of a *Chinese* witness, and that category of witness was not covered by the statute, so in addition to being racist and overturning the decision on that basis — because the court went on and enthusiastically embraced the exclusion of such witnesses, and commented in broad terms about the ethnicity of the witness and how proverbially persons of that ancestry could not be trusted as witnesses — the case was objectionable not only as a stark reference to racism but of judicial activism because the statute didn't even cover Chinese witnesses. But the court was quite activist and basically said, and I don't say this flippantly, that there were these other races that were just as bad as those that were specified in the statute, so . . . witnesses from *those* racial backgrounds should also be barred. If I had to take one decision of our forerunners out of the books, that would definitely be my first choice.

MOLLY SELVIN: Well, let's go in the other direction, staying with that theme of history here. Chief George, what do you think is the most important decision that the court has rendered, and why?

RONALD M. GEORGE: Well, I would go with a decision — and I admit having, you know, a somewhat personal stake in it, having endorsed it, but I think it was truly a landmark decision — and that is the decision in 1948 in *Perez v. Sharp*.[13] That case was the first decision to invalidate the anti-miscegenation statutes that existed very broadly through the United States, and it was several years before other states followed. Much ado, and it's well deserved, has been made of the *Loving* decision of the United States Supreme Court, but that took place in 1967,[14] coming to the same result, nineteen years after the California Supreme Court led the way. So that, to me, also illustrates what we were talking about previously of the California Supreme Court being truly a trailblazer, and the trailblazer in the most important areas, too.

I would add a second reason why I viewed that as a very significant decision and that is because, in authoring for the court, the *Marriage Equality*

[13] 32 Cal. 2d 711.

[14] Loving v. Virginia, 388 U.S. 1.

case,[15] I relied — as did those who joined the majority — on one decision above all, and that was our *Perez v. Sharp* decision because, if you go back and see the language in that opinion talking about the fundamental right of forming a union with an individual of one's choice — a person whom one loved and cherished — and forming a family unit, that language fit beautifully and perfectly into the decision that was before the court in the *Marriage Equality* case, and we therefore relied upon it very substantially in coming to the decision that *we* came to in the year 2008. So, for those reasons, I would pick out *Perez v. Sharp*.

DAN GRUNFELD: Has the more conservative U.S. Supreme Court of recent years resulted in a shift of power from the federal to the state court, or conversely, has the power shifted from the state to the federal court, in your view?

RONALD M. GEORGE: I'm not sure that there's been that much of a shift in the sense that it has always been, or least in recent times, the fundamental principle that we have independent state constitutional grounds. We've had four major figures in causing that to be recognized. We have Justice William Brennan. We have Justice Hans Linde of the Oregon Supreme Court, Justice Stanley Mosk — and our own Justice Joe Grodin [gesturing to him] who has written quite comprehensively on that subject. It is actually a conservative principle that we should act, as we do, first on statutory grounds without reaching the constitutional issue unless necessary, that we should look first to state constitutional grounds before we invoke federal constitutional grounds. And in the United States Supreme Court decision in *Pruneyard versus Robins*,[16] a conservative court, writing through Justice Renquist, noted that there was no principle of federalism that required a state constitutional provision to be interpreted in a manner consistent with its federal counterpart. Naturally, we all know that the federal constitution provides a *floor*, but the state constitution can provide a *ceiling* of additional rights. So, I think that's been a continuing principle, and interestingly enough it's a conservative principle that has often led to liberal results, as California, for example, has provided for women's reproductive choice that way antecedes *Roe v. Wade*, and if you go back to the

15 In re Marriage Cases 43 Cal. 4th 757 (2008).

16 Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

federal decisions that have interpreted the Fourteenth Amendment by a process of incorporation, most of the Bill of Rights, most of the first ten amendments, have been incorporated by reference to apply to the states. So it's really a two-way proposition, and I'm not convinced really that there's a definite trend, and of course as long as 95 percent of the decisions made in courts in the United States are made in state courts, the states will inevitably play a very major role in lawmaking in this country.

MOLLY SELVIN: One last question for each you — apart from individual decisions, Chief Justice Cantil-Sakauye, what keeps you up at night these days?

TANI CANTIL-SAKAUYE: Well, let's see. [general laughter] I will notice your emphasis on *these* days and say, frankly, it's that California is undergoing so much change, and that change is reflected in the need for the judicial branch to be prepared and to anticipate the change. And, of course, the judicial branch, unlike potentially the other two branches, we don't move as quickly, for all of the reasons stated here, to our decisions. So what keeps me up is trying to anticipate the change in the administration of justice because the courts, the filings, our court users, the nature of our court users, have all changed, and we are a service to the people. So what keeps me up at night, just generally speaking, is ensuring that we are anticipating the change, that we are able to respond to the change, that we're able to timely deliver justice. I mean, cases are always keeping me up, but I think it's the bigger question of, are we as a branch providing the forums for justice that the public expects and that we are endeavoring to provide? And it comes in many different forms of change, that has the ultimate effect of providing justice. Of course, it's always about funding, but it's always about the use of the funding, and it's always about "Is this the best use?" And it's always about "Can we find a more efficient use to balance with due process?" And then, of course, there's the oversight of, and reporting to the Legislature of, the change, and so in many ways it's trying to walk a tightrope of providing justice, providing access, reporting it, and doing it on an ever-shrinking budget, recognizing how dynamic our users have become.

MOLLY SELVIN: Chief George, what kept you up at night?

RONALD M. GEORGE: Well, I won't parse the question the way the chief did, and substitute "who" for "what," but I will just say that I am very much concerned about access to justice as impacted by the reductions

in funding. I can understand that the courts have to do their part, even though I think that special consideration should be given to the courts as a separate and coequal branch of government, but I'm very, very disturbed when cuts are made, when millions and millions are taken out or so-called "borrowed" from our funds, and then are not restored when times become prosperous again. There seems to be an attitude among many in the other two branches of government that perhaps courts are a luxury and maybe even worse, that when we ask for funds we're asking for something for courts, for judges. We're not. We're asking for access to justice on behalf of our citizens, who paid their taxes to have a fair and accessible system of justice. I'm very, very concerned about this, and on my wish-list one day would be to have some sort of constitutional amendment that guarantees the courts a certain level of funding that cannot be invaded improperly and that would authorize them to have incremental growth in the number of judgeships. I'm really disturbed when I hear stories of people having to drive a hundred or more miles in our larger counties, like San Bernardino and Riverside, to put forth or defend their claim and then just decide they can't afford to do so, and they have to forgo their day in court. I think that is a very fundamental flaw in government, in society, and that's something that seems to be a trend, so that is what really does keep me up at night. Even though I don't have the responsibility for it anymore, it keeps me up at night as a citizen.

DAN GRUNFELD: So I would like, on behalf of all of us, to wish both of you less sleepless nights. In fact, I'd like to hope all of us will have less sleepless nights as we move foreword. Thank you for such an illuminating interview session, but even more importantly, for your role, both as chiefs and with the colleagues you served for, enhancing and adding yet more glory and respect to this very, very special institution. Thank you. [audience applause]

GEORGE ABELE: Thank you all for a truly enlightening discussion and conversation. We truly appreciate your contributions and thoughts on this issue. We have refreshments outside that we're going to return to in a moment, but we wanted to close the program by asking Professor Scheiber to say a few words about the book and what it means to him. I mentioned at the outset that the idea for this book was twenty years in the making

and that the person that's been there all along is Professor Scheiber. In the course of putting this event together, I was fortunate enough to be able to correspond with many people who have worked with Professor Scheiber and have been involved in the creation of the book, and there's one in particular that I want to share with you, from Dean Melissa Murray at the UC Berkeley School of Law, who was unable to be here tonight, but she asked that I convey her remarks. And I think this truly shows the determination and the will of Professor Scheiber.

> It is with great regret that I cannot be with you today to celebrate Harry's latest achievement. This edited volume is one for the annals, a meticulously curated celebration of the California Supreme Court. While the volume uses the court as a point of entry, in truth it goes beyond the work of the judiciary to celebrate the social, cultural, political, and economic achievements of the Golden State. That one book could cover so much ground is a testament to its editor, the indomitable Harry, an amazing legal historian and a much-beloved colleague. Congratulations, Harry. [audience applause]

So, Harry, I hate to put you between us and the drinks, but if you would comment for a few moments on what the book meant to you, that would be much appreciated.

HARRY SCHEIBER: Thank you. My doctoral advisor gave me very good advice when I was a graduate student all these many years ago and, among other things, told me never be the last one on a program because everyone wants to get over to the party.

I should begin by acknowledging some people other than those who George Abele so graciously acknowledged earlier. I could start with a little story about Chief Justice Lucas, actually, because he was chairman of the board of the Society at its founding. I was there a year after the founding. I think I attended the first actual board meeting, and he presided over it with Bob Warren, a very distinguished litigator with Gibson Dunn. He and Bob Warren together were really the great force in getting this thing moving, and he took a deep interest in it. He talked to me privately after one of the meetings when the board had approved the outline that I and others had agreed to present, and he very generously — a characteristic of

him; I have to say, to outsiders he was rather magisterial, but he was actually very approachable once you were in a common enterprise — and he said, "Harry, you can consult me on anything, of course. Don't hesitate if you have any questions or you need any help, except for one thing: don't ask me about water law!" [general laughter]

The project was endorsed and supported generously by the Society. A lot of individuals were involved in it, and they've been mentioned, but I really have to mention just a couple names. At various junctures, Justice Werdegar was particularly important to this project; she's been very dedicated to it and intervened at several times, and I want to thank her in this forum. And Selma Moidel Smith, who's sitting here, is now the editor of a journal for the Society [*California Legal History*]. It's just a fantastic accomplishment. It's become a treasure house of interpretative articles and edited documents and other materials and an inspiration in the field. Selma, we have to thank you for this, as for so many other things. On the academic side of what the Society does, she has been instrumental.

Part of the Society's major projects has been, and what I've been proud to be associated with as a member of the board — at one time, vice president, but since then just dealing with the academic side of things — is that oral history effort, and one of the great products of this, of course, was Chief George's book which came out a couple years ago and is such a rich source.[17] But the Society has been promoting the advancement of knowledge about the court across a broad front, including public programs, which I think are very important. We're very grateful for this effort, but in particular these oral histories, many of which are not open yet to researchers. They've been closed for a period of time, but they're going to be tremendously valuable, and it's another achievement of the Society that's important to mention.

Let me just turn to the book and say a few words about that. I had written — let me talk about it autobiographically for a moment — on various aspects of California law in relation to economic development. I was then a professor of history and chairing political science at the University of California, San Diego, which was in the '70s, and I happened to be the

[17] Ronald M. George and Laura McCreery, *Chief: The Quest for Justice in California* (Berkeley: Berkeley Public Policy Press, 2013).

chairman of the Advanced Placement board for American history, the national AP exams, for several years. In that capacity, I got to talk to a lot of high school teachers, and we had periodic meetings of these teachers to guide us in how the AP program should proceed. I asked them, almost accidentally, what do you do with the California Constitution, and I got complete blank looks, of course. So we conducted a survey, a formal survey, and the returns came in — very nice return, maybe 80 percent — and the percentage of teachers who actually mention the California Constitution was under 10 percent. So I became something of a fanatic about that, in terms of promoting it for high schools. Together with colleagues at the San Diego campus, we instituted what was called the Earl Warren Conferences, in which we brought literally hundreds of high school kids in to hear about the California court and other issues in constitutional law, but focusing particularly on California.

We got a lot of support for that, and that kind of effort carried over when I came to Berkeley in 1980. One of the first things that happened was that Justice Grodin invited me to be a speaker at a conference that, I think, a year or two late was celebrating the centenary of the 1879 Constitution. I think that it dates from the time of that conference at Hastings [College of the Law], that real impetus came to the study of the California Constitution in the law schools, where it had really atrophied to some degree — Bob [Egelko], you're nodding; I guess you agree with me — there was a remarkable lack of effort, with the exception of McGeorge and one or two other journals, I'm ashamed to say the *California Law Review*, which had been a great source of interpretation, had stopped doing its annual sessional analyses. That has turned around in a major way. I'm very happy about that, and major figures in the Society have had a great deal to do with that.

So I saw this book as a dual opportunity, first to do for California — and this sounds very boastful, when you think about it — do for the California court what's been done for the [U.S.] Supreme Court by the Oliver Wendell Holmes Devise, to have a really major, deeply researched, authoritative study of the history of the California court. Well, the Holmes Devise volumes are, I don't know, up to fifteen or something, and each one's about a thousand pages, so we weren't going to do that. After consulting with Chuck McClain, my colleague here, and others, and I think I did consult with you, Molly, with Charles McCurdy at Virginia, who's a

very distinguished legal historian in California, we worked out a plan that I presented to the board, and it was for a monographic effort, and one that would be readable, that would be a single volume, but not to be "history-light" but to be a serious, authoritative history. I think the board members, many of them, cringed when I would justify the length of time that we were taking by saying, "This is not going to be done again in our lifetime. We want something that's going to stand." It was very daunting for some of the people who we initially contacted. They looked at what was involved and backed off immediately. I was telling Dan this before; it looked like it was going to derail their careers for a couple years — and it did.

That brings me to the fact that the Society was really fortunate, I was really fortunate, that Molly and Bob Egelko, Charles McClain who did *two* chapters, Lucy Salyer who's been mentioned (a very "decorated" legal historian who was, by the way, Judge [Robert] Peckham's first non-J.D. clerk — he brought her as a Ph.D. in history to the court as a clerk), and the late Gordon Bakken, who had been writing in California legal history for a long time — it was a tremendous pleasure to be able to bring these very able people together and to have them make this kind of commitment. Bob Egelko, here, came in for the next-to-the-last phase of the project which was to do the Lucas Court, and then Molly came in to do the George Court, and so we have a huge span of California history.

Now I say our objective was to have an authoritative history. That meant a lot of deep digging in the sources. There are two different kinds of challenges here for historians. For the earlier period, really down to 1900 and to this momentous Progressive-Era flood of changes, interpretative sources — this really solid historical material was really lacking. There's very little, and the authors who undertook this really had a heroic job to do to find the sources and to work with them. For those of us who did the modern period — Chuck McClain on the Gibson Court, myself on what I call the "liberal court," 1964 through the Bird Court, and Molly and Bob — the problem was different. Here you just have a super-abundance of material to get through. It's almost overwhelming on any given subject. So we have that kind of challenge.

The second kind of challenge that each author had to cope with was: we're not just looking at this case and that case and in the conventional way saying, "Well, here are my wise and perceptive remarks on this case

and then eight years later my wise and perceptive remarks on how that case may or may not have drawn on the earlier case." We all were dedicated to the proposal that, interestingly, Justice Lucas set out in his introduction to the first volume of what was then our journal which I edited, called the *Yearbook* at that time, in which he said, "We want a history of the work of this court in relation to California's socioeconomic, cultural, political change." It's a big order. For the historians, you had to get on top of the literature of all these other fields of history in order to construct that context. So it was a very formidable challenge, and these authors have taken it on so admirably and, I think, with great success.

Then there is the further mandate: we wanted it to be readable and accessible. You know, historians are just as concerned about accessibility for their years of labor as you are for the courts to be accessible to the citizenry. We wanted it to be accessible; we didn't want to write a book that eight people were going to read and say it was wonderful and learned, and no one else would ever look at. Our hope — going back to the whole question of education in the schools and the colleges and even the law schools — our hope was that we would produce a book that could be used and would be a source of reference for a long time, as an authoritative source of reference that would be used in classrooms and in student research and so on. I was really pleased that part of [UC Berkeley School of Law] Boalt Hall's support of this project was to support graduate research assistants, and I think seven of them ended up publishing under their own authorship on the work they had done with us.

We are hoping that this would become an inspiration to students in seminars, both undergraduate and graduate, as well as in law schools to find aspects of California history that interested them. You just heard about a couple of these amazing periods of California history and the extraordinary problems that the court confronted and tried to resolve over time. This book is full of those. It's just remarkable, and you do come away from it as an author, I have to tell you, with your own favorite moments where you feel as though you've gotten into the court's history and you really do understand the efforts to confront these huge changes and to anticipate changes to deal with them. There are so many of these, ranging from the death penalty issue to tort reform, immigration, privacy — issues that in 1879, let alone in 1849, weren't even on the radar screen, let alone the

agenda. So it's a process of discovery for the authors, and we hope that will inspire the process of discovery for the readers, particularly in the schools and in the profession.

Then you come down to the nitty-gritty of getting it all right. He hasn't been mentioned, but I'll mention Jake Dear, who's here — on the court staff — who helped us in the very last phase, very diligently. He gave himself, made time on his own, to help with the technical details, and it was a last review which really was fun for me in the end, although it was torture at the time, of discovering certain things that I had to research anew. I think we improved and — to just give you one vignette on this, for example, the famous doctrine of the United States Supreme Court that a corporation is a person, which we now know is a person who has freedom of speech, guaranteed.

Well, that crept into the national constitution in a very curious way. Howard J. Graham, a historian of an earlier day had researched and found this story. Justice Field [Stephen J. Field, former chief justice of California] had been a great proponent of railroad exemptions from control, and when he went on the [U.S.] Supreme Court, these issues came before him. The *Santa Clara Railroad* case came before him,[18] among others, in which that dictum came down. But ironically, it wasn't even a dictum in the opinion part of it; it was in the headnote to the decision as published in the reports. And Graham had found years ago that this headnote had been written by the clerk, and the editor had written to Chief Justice Waite who was then in the hospital and not well and said, "Shall I put that in? It was mentioned by some of the justices." "Sure, put it in the headnote." Well, it was never in the opinion, but it crept from this curious beginning into a full-blown doctrine of law — another contribution of California to the great body of constitutional law. Graham suspected that it was because Field had pushed that idea over to the clerks behind the scenes. This is one of, I'd say, two hundred such little stories that actually reflect *very big* stories. I mean, the whole question of how railroads would be controlled in their corporate powers and their operational powers and their rate-making, was huge in the history of the court and the history of California and, of course, in the history of the nation's developing economy.

[18] Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886).

I know that everyone wants to get off to the reception, and won't keep you further, but I do have to say again what a privilege it was to work with these folks whom I've mentioned, and George has mentioned, with Dan Grunfeld and Jennifer King, [former Society President] Ray McDevitt, and others who have served the Society so well. Just speaking for my own period of the Wright Court and the Bird Court, I have enormous admiration for the contributions that have been made by many, as scholars, as well as a judge in one case, by, among others, Joe Grodin, whom we're all indebted to — all of us who try to do the history of the court and understand jurisprudence. Every lawyer would like to have something in his or her career, an achievement where the law was advanced as a result of his or her work, and every historian would like to have an achievement in his or her career where the understanding of a period or a problem or an institution was advanced. That's what we've tried to do, and we hope as we launch this ship on the turbulent seas of American society that it will have that effect. I do want to say in the end that it was a privilege and a joy to work with Molly and Bob and Chuck and the other two who have not been here, and I have to say it was a great opportunity for me to share in this mammoth undertaking with such dedicated and accomplished historians (and in Bob's case, journalists). It's been a terrific voyage. Thank you. [general applause] And we did cover water law!

CHARLES MCCLAIN: I know why he said, "Don't ask me about water law," because that was a very big part of the early history of the court and extremely difficult to understand. On behalf of the authors, I just wanted to extend an enormous word of thanks to you, Harry, for seeing this project through to such a successful conclusion. This was not an easy job at all.

GEORGE ABELE: Thank you. Thank you all again for your insights on the book and your thoughts about the current and historical aspects of California society. The California Supreme Court Historical Society would like to invite all of you for cocktails and snacks outside, so please join us for continued conversation outside. Thank you very much.

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