

CALIFORNIA — LABORATORY OF LEGAL INNOVATION

HARRY N. SCHEIBER*

EDITOR'S NOTE

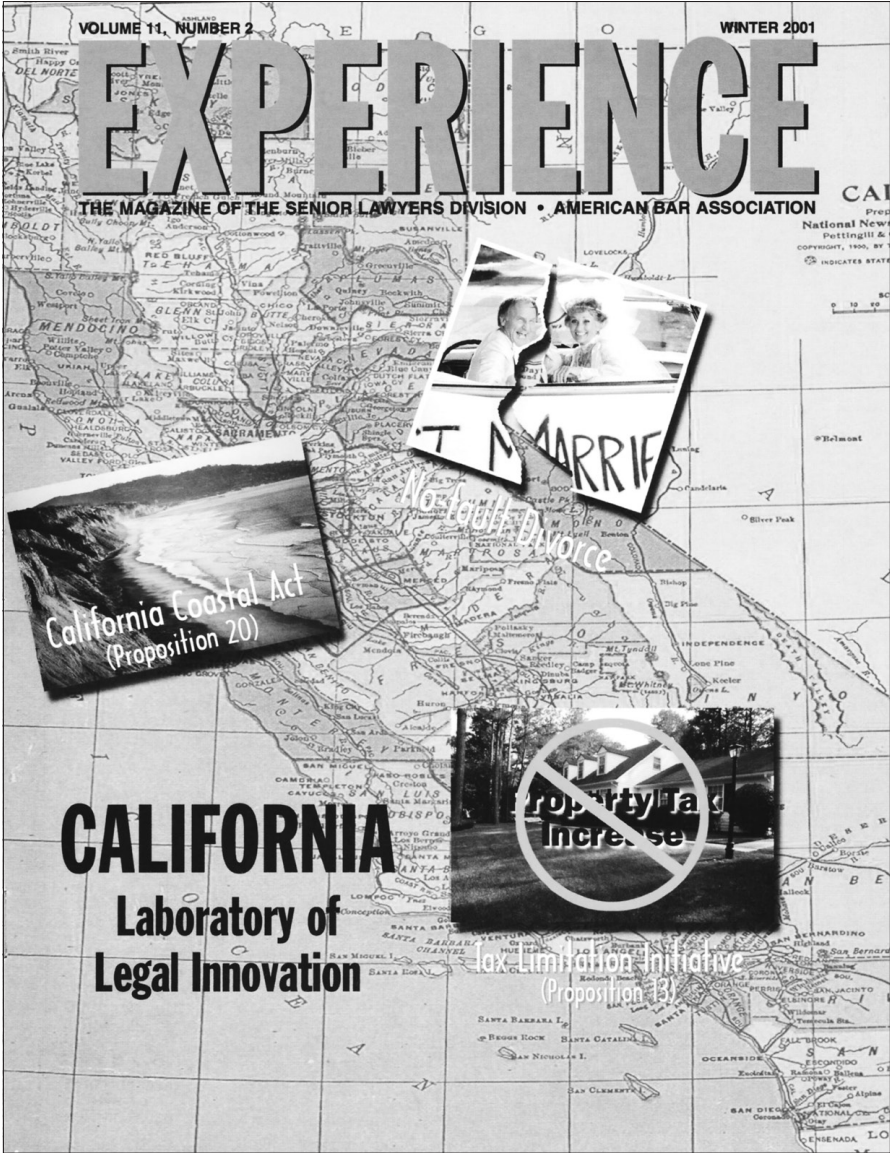
The following article first appeared in the ABA magazine *Experience* in 2001.¹ As chair of the *Experience* Editorial Board at the time, I had invited Harry Scheiber to prepare an article on the theme of California as a leading legal innovator. Later that year, he obtained permission from the ABA to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

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

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¹ 11 EXPERIENCE 4 (2001).

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



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

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

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 Although such a work might be updated over time to include later developments, it must ultimately become a historical document that speaks from the perspective of a given moment.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

— SELMA MOIDEL SMITH

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

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

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

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

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