California Supreme Court Historical Society

October 7, 2006 – Monterey
California State Bar Annual Meeting

"CALIFORNIA – LABORATORY OF LEGAL INNOVATION"

President Ray E. McDevitt urged guests attending the reception to join the work of the Society.

He later stated, "The large and attentive audience and the guests happily enjoying the refreshments on the sunny roof garden marked this as a most successful event."

(Photo: Howard Watkins)

The Society's 2006 MCLE panel program featured present and former justices as well as leading academics discussing the innovative role of the California Supreme Court as the "most cited and followed" state supreme court since 1940.

Professor Harry Scheiber of U.C. Berkeley Boalt Hall School of Law regrettably was prevented from participating in the program by emergency oral surgery on the day before the event.

Professor Gerald F. Uelmen of Santa Clara University School of Law graciously agreed to serve as a substitute speaker.

Opening announcements were made by Selma Moidel Smith, board member of the Society and Program Coordinator, who expressed the Society's appreciation for the honor conferred by the presence of Chief Justice Ronald George. She then introduced the Society's president, Ray McDevitt. The program was moderated by the Hon. Elwood Lui, who introduced each of the speakers, commencing with Associate Justice Kathryn Werdegar. Justice Werdegar requested that Jake Dear, Chief Supervising Attorney of the California Supreme Court, present the research that he and Ed Jessen, Reporter of the Court, had developed on the relative standing of the California Supreme Court. She then continued her presentation, and was followed by each of the other speakers.

Justice Lui later moderated a panel discussion by posing questions to each presenter. At the end of the program, the Society held its annual reception on the terrace adjoining the meeting room, where audience members had the opportunity to greet the Chief Justice, the speakers, and members of the Society.

Jake Dear

"Working with LexisNexis, the current provider of Shepard's Citation Service, we identified all opinions since 1940, for each of the 50 state high courts, that Shepard's has designated as having been followed by a state court outside the originating jurisdiction, and the number of times each such case has been followed.

"Our research reveals that the California Supreme Court has been, and continues to be, the most 'followed' state high court in the nation.

"And I'm happy to report to the Chief, who's in the back of the room, that we seem to be on a par with historic trends."

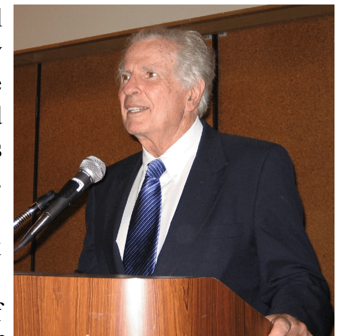
Attendees' comments included: "All of the speakers were outstanding, and the interaction was at the highest levels of scholarship, thought and civility – great job!" "Well prepared materials." "Very stimulating discussion." "Great panel." "Brilliant!" "Wonderful, informative discussion. Thanks for bringing in an out-of-state person, from New Jersey – gave good contrast to the issues." "All the panelists were excellent." "Provocative." "Very stimulating view of the development of the law." "Excellent!"

Hon. Kathryn M. Werdegar

"In Tort Law, an area that especially lends itself to judicial innovation, is the 1963 decision in *Greenman v. Yuba Power Products*. The so-called Greenman doctrine of strict product liability has been adopted by 37 states, and has been described as the single most dramatic change in tort law ever.

"Now I want to point out some of the issues before us today. The most obvious example of a high profile issue sure to come our way is in the gay marriage decision that was just handed down two days ago (by the District Court of Appeal). Issues already before us include whether an arbitration provision that prohibits employee class actions for violation of wage and hour laws is enforceable. Another is whether a physician, on first amendment religious grounds, can refuse to provide reproductive services to a lesbian. Another novel issue which is pending before us right now is whether California can ban the importation and trade of wildlife (kangaroos), when the wildlife in question has been de-listed under the federal endangered species act. We have certain guiding principles as to what cases we're going to grant review. We're guided by common sense. If there are conflicting Court of Appeal opinions, that means the courts and the litigants and the citizens need our guidance. If it's an initiative, then the State needs our guidance and can't wait for appeals to percolate. But we can't reach out – we can only work with what's brought to us. We get about 7,000 to 10,000 petitions a year and we grant about three or four percent of those, and we decide about 115 cases a year."

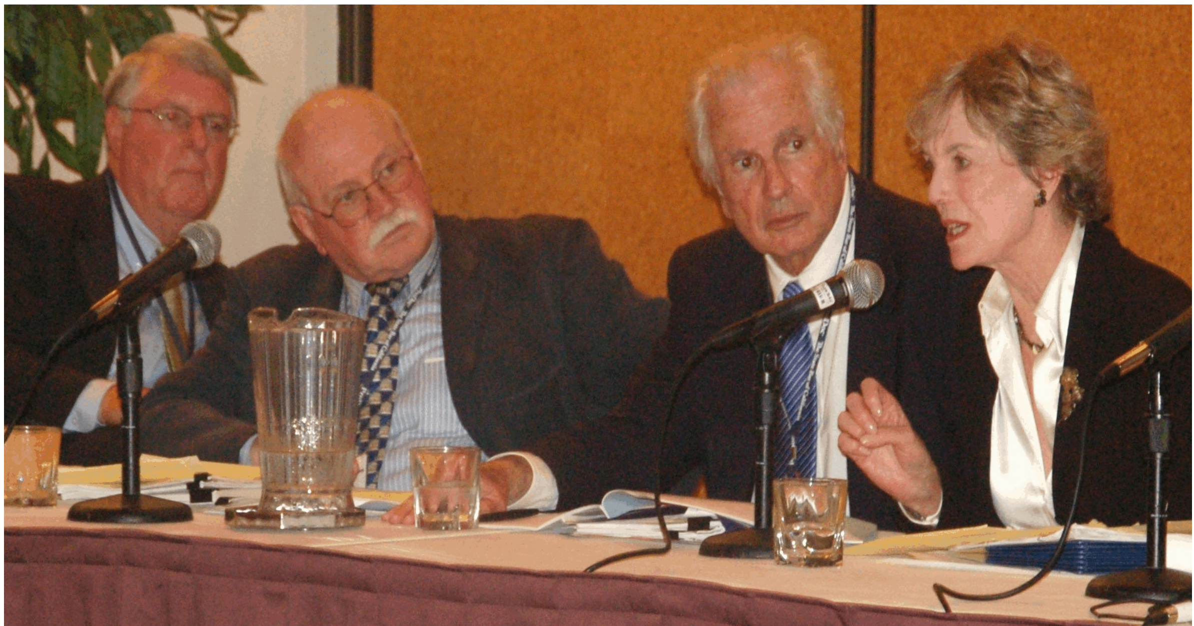
[Kathryn M. Werdegar is an Associate Justice of the California Supreme Court.]



Hon. Joseph R. Grodin

"The story of employment law in California starts with the Constitutional Convention of 1878 which declared that all persons have a right to pursue any business or occupation without regard to sex. This was an early version of the Equal Rights Amendment – the first of its kind in the country – and allowed Clara Shortridge Foltz to become a lawyer. The Progressive Movement was in dominance in the early part of the 20th century and in this state it was responsible for a number of innovations including our referendum process, and especially the Workers' Compensation Act of 1913 which was a landmark law, probably the most progressive in the country.

"On the judicial front, in 1940 Culbert Olson was elected governor of California, the first Democratic governor since 1900, and appointed as Chief



Professors Williams and Uelman, Justices Grodin and Werdegar. (Photo: Howard Watkins)

Seated: Selma Moidel Smith, Justice Elwood Lui. Standing: Justice Joseph R. Grodin, Prof. Robert F. Williams, Justice Kathryn M. Werdegar, Jake Dear, Prof. Gerald F. Uelmen, past president James Shekoyan, Chief Justice Ronald M. George. (Photo: Howard Watkins)

Justice a member of his cabinet, Phil Gibson, and an obscure Boalt law professor by the name of Roger Traynor, and I think it's fair to say, from that point the California Supreme Court began to take off. In 1944, the Court issued a unanimous decision in *James v. Marinship* holding that, while a labor union could have a closed shop, it couldn't also have a closed union that excluded black members...

"Finally, let me mention the California Fair Employment and Housing Act. Here we have a pattern of innovation which is a joint product of action and collaboration of the legislative and judicial branches. I tell my students that if they represent a plaintiff in an employment discrimination case, and they only talk about Title VII, without mentioning the FEHA, they're holding themselves open to a malpractice charge. It's broader in coverage, it provides more substantial remedies, it's broader in its definition of discrimination, it's substantive protections go well beyond the federal statute, and the California Supreme Court has applied the FEHA with sensitivity to the independent role it plays as a supplement to federally protected rights, and generally has not hesitated to depart from federal court interpretations of Title VII... The result of this continuing partnership between the courts and the legislature has been the development of an independent state jurisprudence of employment discrimination that it is fair to say is the most advanced in the nation."

[Joseph R. Grodin is Distinguished Emeritus Professor, UC Hastings College of the Law and former Associate Justice, California Supreme Court.]

"I want to talk about the California Supreme Court in the context of what we've come to call the 'New Judicial Federalism.' By this we mean the realization by state supreme courts that they may look at the state constitutional declaration of rights, or Bill of Rights, and interpret it to provide more rights even than those provided under the U.S. Constitution by the U.S. Supreme Court. I don't mean that the New Judicial Federalism always involves state courts going beyond, or being more protective, but that state courts recognize the potential for such an outcome, and that lawyers in those states recognize the viability of such arguments. For example, a search and seizure case might be won under the state constitution when the same argument has already lost in the U.S.

Prof. Robert F. Williams

Supreme Court. You could never make that argument except in a federal country, like ours. This kind of argument is beginning to be made in the eight or ten other federal countries that have states which have their own constitutions. The 1976 California Supreme Court decision in *People v. Disbrow,* was the centerpiece in Justice Brennan's famous article in the Harvard Law Review, which may be the most important development in the New Judicial Federalism, and Justice Brennan said toward the end of his life that this phenomenon of the New Judicial Federalism was the most important jurisprudential development of our times. A country consisting of states within states is what leads to the notion of having these laboratories of federalism, these bubbling experiments, attempting different solutions to legal and societal problems."

[Robert F. Williams is Distinguished Professor of Law and Associate Director of the Center for State Constitutional Studies at Rutgers University School of Law, Camden, New Jersey.]

Prof. Gerald F. Uelmen

"I want to take this occasion to congratulate Jake Dear and Ed Jessen on a marvelous piece of research. This paper is fascinating, it breaks new ground, it will be widely cited. And as for law professors, everyone studies and salivates over every nuance of U.S. Supreme Court decisions, but scholars like Bob Williams are a rather rare breed in the academy. I was struck by how many of the followed decisions of the California Supreme Court are tort decisions and how few are decisions in my field, criminal law and procedure. Why is that? The reason is that by constitutional amendment we have removed the California Supreme Court from that enterprise. No independent state grounds are available for the exclusion of evidence to protect constitutional liberties because of Proposition 8 in California. With the enactment of Proposition 8, sixty California Supreme Court precedents bit the dust, and ever since we've had to march lock step with the U.S. Supreme Court, which has demonstrated its hostility to exclusionary rules. I think the other reason is the dominance of the death penalty docket as a proportion of the California Supreme Court's workload, and such cases are not an area of innovation to be followed by other courts.

"When we look for the explanations for this really profound demonstration of influence of our California Supreme Court, what explanations do we have other than the brilliance and productivity of the justices and the professionalism and competence of its staff, which we should celebrate. One factor that is frequently overlooked is the competence of the appellate bar of the State of California. One reason that our Supreme Court gets an incredible menu of cutting-edge issues to decide is because we have a deep pool of expertise and excellence among the lawyers who are raising those issues and presenting them to the Court."

[Gerald F. Uelmen is Professor of Law at Santa Clara University School of Law, where he served as Dean from 1986-1994. He is also the Executive Director of the California Commission on the Fair Administration of Justice.]

"I'd like to acknowledge the presence of Justice Carlos Moreno from the Supreme Court – your colleague, Justice Werdegar – as well as Justice Kathryn Todd of the Court of Appeal in the Second District, Justice James Marchiano of the Court of Appeal in the First District, and Beth Jay, the Chief of Staff who makes the Supreme Court work for the Chief Justice."

Hon. Elwood Lui

Later, Justice Lui began the panel discussion: "What is the effect of the California rule requiring reasoned opinions and how does it help in determining cases for review and in deciding opinions? Does diversity of the population influence state court decisions? As for being innovative, it would seem to me that it should be totally irrelevant to the justices, that they'll do the right thing on the case and explain the reasons for which they reached their decision, and if it's innovative, it's for someone else to comment on.

"Let me close by offering my thanks to Jake and to Ed for those excellent statistics, and also, I would be remiss if I did not thank, and the panel echoes this as well... The work that Selma Smith did in conceiving, creating and managing this seminar has just been delightful."

[Elwood Lui is Partner-in-Charge at Jones Day, San Francisco, and former Associate Justice, California Court of Appeal, Second District.]