

CHIEF JUSTICE DAVID S. TERRY AND THE LANGUAGE OF FEDERALISM

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I. INTRODUCTION

David S. Terry was one of California's most colorful and controversial judges, serving on the California Supreme Court from 1855 to 1859, two of those years as chief justice. And because of the events that were part of his life, Terry is easy to caricature. After all, in 1856 Terry stabbed a person in the neck with his Bowie knife in his first year on the Supreme Court, for which he was almost hanged by the Vigilance Committee; three years later he shot a U.S. senator dead in a duel; he fought for the Confederacy with the Texas Rangers in the Civil War; he returned to San Francisco and represented, and later married, the mistress of another U.S. senator — one of the wealthiest individuals in the country — in her suit for “divorce”; he knocked a tooth out of a U.S. marshal in the federal circuit court when the “divorce” decision went against his client; and he was shot dead by a deputy U.S. marshal while he was punching a sitting U.S. Supreme Court justice in the face. However, lest we think of Terry as a cartoon character, he is

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also the same person who championed the rights of women at California's second constitutional convention, and who helped a single mother successfully sue a law school when it refused to admit her because she was a woman.

One way of viewing Terry in the context of his times is to look at his life through the lens of federalism — the relationship between the state governments and the federal government — particularly because Terry's life spanned the period from before the Civil War, when "states' rights" were given prominence, until a period after the Civil War, when a federal officer could be protected from state prosecution for murder so long as he was engaged in his federal duties. And while Terry never had occasion to address the concept of federalism as a jurist, federalism ran through many of the arguments he made, or those made against him, or those made about him, as exemplified in the letters, trial transcripts and court decisions discussed below. Although the primary focus of this article will be Terry's life, it will do so with an eye to federalism by looking at three separate events: (1) the attempt to free Terry from the Vigilance Committee in 1856; (2) Terry's attempt to claim state jurisdiction over federal jurisdiction in two trials in the 1880s concerning the legality of an alleged marriage contract between a U.S. senator and his mistress; and (3) the State of California's attempt in 1889 to prosecute the U.S. deputy marshal who shot and killed Terry when Terry was assaulting a U.S. Supreme Court justice. Terry was a formidable man, and the ripples he sent out into the world have had a lasting legal effect.

II. FEDERALISM AND THE ATTEMPT TO RELEASE TERRY FROM THE VIGILANCE COMMITTEE IN 1856

A. TERRY'S BACKGROUND AND HIS ELECTION TO THE CALIFORNIA SUPREME COURT

Terry was born on March 8, 1823, in what is now Christian County, Kentucky. Terry's mother left Terry's father when Terry was age 11, and his mother took him and his three brothers to live on his grandmother's plantation just outside of Houston. Terry claimed he fought in the Texas War of Independence from Mexico when he was 13, and that this was where he developed his skills with a Bowie knife. There is no documentation of Terry

actually being enrolled in any of the units that fought in that war. Whether true or not, the Bowie knife became Terry's weapon of choice, and he was known for always carrying it in his breast pocket.¹

Terry, who grew to be almost six-and-a-half feet tall, had no formal education after age 13. Instead, he was trained as a lawyer by his uncle, who had a law practice in Houston. Terry was a good apprentice, and he became a member of the Texas bar after two years. In 1846, at age 23, he served as a lieutenant of what later be-



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came known as the Texas Rangers in the war between the United States and Mexico. Terry settled in Galveston, Texas after the war. In 1847, he ran and lost the election for district attorney of Galveston. Shortly thereafter, he and his brother moved to California, with Terry settling in Stockton in 1849.²

After a brief stint as a miner, Terry opened a law office in Stockton with another lawyer from Houston in 1850. Although Terry established a good reputation as a lawyer, he also acquired a reputation for violence. In one case, Terry quarreled with a litigant, stabbing him with his Bowie knife.

¹ See A. Russell Buchanan, *David S. Terry of California: Dueling Judge* (San Marino: The Huntington Library, 1956) at 3–6; Milton S. Gould, *A Cast of Hawks, A Rowdy Tale of Greed, Violence, Scandal, and Corruption in the Early Days of San Francisco* (La Jolla: The Copley Press, 1985) at 15–19. See also A. E. Wagstaff, *Life of David S. Terry: Presenting an Authentic, Impartial and Vivid History of His Eventful Life and Tragic Death* (San Francisco: Continental Publishing Company, 1892) at 34–40.

² See Buchanan at 5–8; Gould at 16–18.

Because the judge found it was only a superficial wound, and because Terry paid to have the wound dressed, he was fined only \$50. In another incident, Terry and two friends quarreled with the editor of a Stockton newspaper about something written about Terry, and Terry struck the editor with the handle of his Bowie knife. That cost Terry a fine of \$300.³

With the collapse of the Whig Party in the 1850s, there was really only one party in California, which was the Democratic Party. The Democratic Party, however, was deeply divided on the issue of slavery. The pro-slavery “Chivalry Democrats” came primarily from the South, and they were led by Senator William Gwin. The anti-slavery Democrats came primarily from the North, and they were led in California by Senator David Broderick.⁴

During the 1850s, there was the rise of the “Know-Nothing” party in American politics, which was nativist and anti-Catholic, which also meant anti-Irish. The “Know Nothing” moniker came, not, as one might assume, from a general declaration of ignorance, but from the fact it was originally a secret society. In answer to any question about the organization, the response would be, “I know nothing.” In 1855, the Know-Nothing party dropped its cloak of secrecy, held a national convention, and presented slates of candidates. In California, many of the Chivalry Democrats defected to the pro-slavery Know-Nothing Party, including David Terry. In that same year, the Know-Nothing Party won several state offices. J. Neely Johnson, who was age 30, was elected governor. Chief Justice Hugh Campbell Murray, age 30, narrowly won re-election to the Supreme Court. (Justice Murray was first appointed to the Supreme Court when he was 26.) And David Terry, age 32, was elected to the Supreme Court as an associate justice.⁵

At the time of Terry’s election, the California Supreme Court consisted of three justices, each elected to six-year terms. California had no intermediate appellate courts. Serving with Terry and Chief Justice Murray was Solomon Heydenfeldt, who was by far the oldest justice at age 39 (having been 35 when he was appointed). Like Terry, neither Murray nor Heydenfeldt had a college education and neither had been formally educated in the

³ See Buchanan at 8–13; Gould at 19–20.

⁴ See Arthur Quinn, *The Rivals: William Gwin, David Broderick and the Birth of California* (New York: Library of the American West, Crown Publishers, Inc., 1994) at 163–74; Gould at 20–25.

⁵ See Quinn at 163–74; Gould at 20–25.