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CALIFORNIA LEGAL HISTORY



JOURNAL OF THE
CALIFORNIA SUPREME COURT
HISTORICAL SOCIETY

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Cover Photo: Speakers at the October 7, 2006 Annual State Bar Conference Monterey Symposium, "California — Laboratory of Legal Innovation." L–R: (seated) Selma Moidel Smith, Justice Elwood Lui; (standing) Justice Joseph R. Grodin, Professor Robert F. Williams, Justice Kathryn M. Werdegar, Jake Dear, Professor Gerald F. Uelmen, Society Past President James Shekoyan, and Chief Justice Ronald M. George. Photo: Howard Watkins.

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SYMPOSIUM

CALIFORNIA — LABORATORY
OF LEGAL INNOVATION

SYMPOSIUM: CALIFORNIA — LABORATORY OF LEGAL INNOVATION

EDITOR'S NOTE

A group of distinguished jurists and law professors was invited by the California Supreme Court Historical Society to discuss the leading role of California in legal innovation. The occasion was the panel program sponsored by the Society at the California State Bar Conference in Monterey on October 7, 2006. Brief excerpts of the speakers' remarks were published at that time,¹ but the full content of their presentations has remained unpublished until now. On the following pages, the speakers' oral remarks have been joined with the written materials they prepared for the event to provide a complete record of their presentations. Collectively, it remains the leading source of scholarship on this aspect of California legal history.

— SELMA MOIDEL SMITH

¹ *CSCHS Newsletter* (Fall/Winter 2006), four-page color Supplement, <https://www.cschs.org/wp-content/uploads/2014/08/2006-Newsletter-Fall-Monterey-Supplement-updated.pdf>.

SELMA MOIDEL SMITH: Welcome to the panel program of the California Supreme Court Historical Society, “California — Laboratory of Legal Innovation.” We appreciate the honor conferred by the presence here today of Chief Justice Ronald George, and I especially want to acknowledge Society President Ray McDevitt.

We will start [turning to the speakers seated at the table] with Justice Elwood Lui, who, by the way, is entitled to a nice vote of confidence and congratulations by reason of receiving the Bernard Witkin Award yesterday from the State Bar of California. Next is Kathryn Werdegar, associate justice of the Supreme Court of California. Following is Justice Joseph Grodin. Following is Professor Gerald Uelman, and last, at the end, is Professor Robert Williams who comes to us from Rutgers University, Camden, New Jersey, to participate with us.

After their presentations, our speakers will be in discussion with each other, and then we will open it to questions from the floor. At the end of the program, you will notice that in your handouts you have evaluation forms, and I just want to make clear at this point that the degree of your



L-R: (SEATED) SELMA MOIDEL SMITH, JUSTICE ELWOOD LUI; (STANDING) JUSTICE JOSEPH R. GRODIN, PROFESSOR ROBERT F. WILLIAMS, JUSTICE KATHRYN M. WERDEGAR, JAKE DEAR, PROFESSOR GERALD F. UELMEN, SOCIETY PAST PRESIDENT JAMES SHEKOYAN, AND CHIEF JUSTICE RONALD M. GEORGE.

Photo: Howard Watkins

enthusiasm will govern entirely the amount of food you will receive at the reception. [laughter]

You will note from your handouts that you were expecting to hear Professor Harry Scheiber from Berkeley. It so happens he had oral surgery yesterday and, needless to say, was not in condition to participate. As a result, we have a very kind and generous man by the name of Professor Gerald Uelmen from Santa Clara University School of Law. He is filling that spot as substitute speaker with great graciousness and generosity. We have not required a paper from him in that interval, but he will be speaking on his own specialty of criminal law in the context of our program. You are having passed out here the long bio for Professor Uelmen that you can add to your handout pages. With all of that in hand, and my thanks again to Professor Uelmen and to all of the participants in this panel, I would now like to have Kathryn Werdegar, associate justice, begin the program.

KATHRYN WERDEGAR: Thank you so much, Selma, and indeed, thank you for all of your work in bringing this program to pass. I would like to say to those of you in the audience, good afternoon and welcome to the California Supreme Court Historical Society's program, "California as a Laboratory of Legal Innovation." As you've just heard, I'm Kathryn Werdegar. It's now my great pleasure to introduce our moderator today, Justice Elwood Lui. It's a cliché, but Justice Elwood Lui truly needs no introduction, but I'm going to do it anyway, because I want to. Justice Lui is with the law firm of Jones Day. He's a partner in charge of the San Francisco office, and he's part of the firm's Management Committee. He handles appeals in complex litigation in state and federal courts. He has been named as one of the 100 most influential attorneys in the state of California. Justice Lui served as a justice of the Court of Appeal for the Second District and a judge of the Los Angeles Superior and Municipal Courts. He was appointed to serve as a justice pro-tem of the California Supreme Court for several cases. Justice Lui retired from the state judiciary in 1987, but he has never retired from public service. He served as a Supreme Court special master of the State Bar disciplinary system. He has taught as an adjunct professor at two university law schools in Southern California. As Selma just mentioned to you, just yesterday at the State Bar Lunch, Justice Lui was justly awarded the Bernard E. Witkin Award, and I actually had been hoping he would wear his medallion, but I guess his modesty has prevented that. So here is Justice Lui.

ELWOOD LUI: Thank you very much, Justice Werdegär. I'd like to acknowledge the presence of Justice Carlos Moreno from the Supreme Court as well as Justice Kathryn Todd of the Court of Appeal in the Second District and Beth Jay, the chief of staff who makes the Supreme Court operations work for the chief justice.

KATHRYN WERDEGAR: And Justice Jim Marchiano —

ELWOOD LUI: I'm sorry. And Justice Marchiano [presiding justice, First District Court of Appeal, Division One].

Our first presenter today is Justice Kathryn Werdegär. Justice Werdegär was appointed to the Supreme Court in 1994. She previously served on the First District Court of Appeal in San Francisco. After graduating with honors from the University of California, Berkeley, Justice Werdegär attended law school at Berkeley's Boalt Hall, where she stood first in her class and was the first woman elected to be the editor-in-chief of the law review. She completed her studies at George Washington University, also graduating first in her class. Before assuming the bench, Justice Werdegär worked in the U.S. Department of Justice in Washington, D.C., as director of the Criminal Law Division of the California Continuing Education of the Bar, as a senior staff attorney for the California Supreme Court, and as a professor and associate dean at the University of San Francisco School of Law. It's my pleasure to turn the microphone over to Justice Werdegär.

KATHRYN WERDEGAR: Thank you. In discussing with Court staff the concept of "California as a laboratory of legal innovation," the question arose whether there were some objective way that we could measure the influence of the California Supreme Court on other state courts, since we thought that influence might at least in part serve as a proxy for innovation. We asked LexisNexis if they could do a *Shepard's Citation* analysis to determine



the extent to which the California Supreme Court's cases have been followed in other jurisdictions. LexisNexis did the analysis for the California Supreme Court and for every other state supreme court in the country, and they did it for the period of 1940 to 2005. We then took the raw data and distilled it into graphs. The data covers the sixty-six-year period that embraces the Courts of Gibson, Traynor, Wright, Bird, Lucas, and our own Chief Justice George. Although how often a case is coded by *Shepard's* as having been followed certainly does not tell the whole story of whether the decision was innovative, it does show that by this one measure at least, the California Supreme Court has been and continues to this day to be the most influential supreme court in the country. To present the graphs that were the result of this data, I would like now to invite Jake Dear to join us. Jake is head of the Chief Justice's Chambers, and he is chief supervising attorney at the Court. He is in his twenty-fourth year at the California Supreme Court, having served as staff attorney for the late Justice Mosk, the former Justice Grodin, the former Chief Justice Lucas, before joining our present chief's staff. Jake and our Court Reporter Ed Jessen, also with us today, have done an amazing job in conceiving and designing this project. So now we will see the charts that prove the fact. Thank you, Jake.

JAKE DEAR: Thank you, Justice Werdegarr, and it's a pleasure to be here this afternoon. Right before I flick on the light and show you the first of four graphs,² I'll just mention a couple other things very quickly: One, for the social scientists in the group, the methodology behind this is just as interesting as what I'm about to show you in terms of the results. Ed Jessen and I will be at the Reception afterwards and will be happy to talk with you about



² The graphs — and their accompanying written materials — are not included here. Instead, for the final published version of the Dear-Jessen study, see Jake Dear & Edward W. Jessen, “Followed Rates” and *Leading State Cases, 1940–2005*, 41 UC DAVIS L. REV. 683 (2007), https://lawreview.law.ucdavis.edu/issues/41/2/essay/DavisVol-41No2_Dear.pdf; and *Measuring the Comparative Influence of State Supreme Courts: Comments on Our “Followed Rates” Essay*, 41 UC DAVIS L. REV. 1665 (2008), https://lawreview.law.ucdavis.edu/issues/41/4/addendum/41-4_Dear-Jessen.pdf.

that and also share with you our full draft of our paper that we'll be submitting to publication sometime soon, so questions about that can come up afterwards. Secondly, I just want to mention something about the "follows." Many of you are aware that *Shepard's* codes cases, and has for over a hundred years, as "distinguished," "criticized," "limited," "harmonized," "followed." "Followed" is the designation that's used when *Shepard's* determines either that a prior case is treated as controlling authority or is found to be persuasive authority. What we've done in these graphs is look for the version of "followeds" that constitutes persuasive authority. We've eliminated from our data bank all of the cases, for example, that are followed by California Courts of Appeal, following the California Supreme Court; there's nothing very remarkable about that, is there? The California Court of Appeal, if it's not following the California Supreme Court, is acting outside of the law, and so we expect to see those kinds of follows. Therefore, we removed all follows from the court of the originating jurisdiction — California, Ohio, Texas, New York — from the data. We also removed all of the federal follows, the reason being that when a federal court entertains a diversity jurisdiction case, under *Erie v. Tompkins* principles and such,³ you can never really tell why a case is being followed. It might be followed because the court finds it persuasive; it might also be followed, however, because the state decision is controlling authority that the federal court thinks is terrible authority, but it's controlling authority and needs to be followed. We removed the federal cases from the study for that reason, so all we're going to be looking at are the cases that Lexis found from the years 1940 to 2005 for each one of the state supreme courts that issued an opinion that was in turn followed by an appellate decision of another state.

There are 24,300 such opinions that Lexis located, and we'll see them here in the graphs. Now, whenever I show this graph to somebody who is not originally from California, the first thing you do is you look for your home state. I showed this to my son, who happens to have been born in Louisville, Kentucky, and unfortunately he had to move all the way to the right-hand side of the graph to find Kentucky, but that's just the way it goes. So this represents the 24,300-plus cases decided since 1940 that *Shepard's* has designated as having been followed by at least one court outside of the

³ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

originating jurisdiction case. California leads pretty dramatically: 1,260 cases. The next state is Washington, which shows 942. The state in the third position is Colorado. After that comes Iowa, Minnesota, Kansas, Massachusetts, Wisconsin, Oregon, New York around number ten — a little bit surprising to some. Now, that a case is followed one time in its life is interesting but maybe not all that revealing, so a further probing consisted of looking at the same data over the same period and asking how many cases filed by the various fifty state courts have been followed multiple times over this same period, and that'll be Graph 2. This graph shows two things: First, the lighter-numbered bars are the cases that have been followed three or more times by these authoring jurisdictions over the sixty-six-year period of the study. You see California again leading the pack with 160 cases that were in turn followed three or more times. The next position state is Washington, followed by New Jersey, Kansas, Minnesota, Massachusetts, Arizona, Wisconsin, Oregon, Colorado, New York, and trailing on down to the end. The darker bars on the graph scrape a little bit further below the surface. How many decisions have been followed *five* or more times from these authoring jurisdictions during the same sixty-six-year period of the study? Again, looking at it that way, California has forty-five. The next-highest state is Washington with seventeen, followed by Arizona with sixteen, New Jersey fifteen, Oregon thirteen, Minnesota eleven, Wisconsin eleven, New York six. That's a sixty-six-year look at the data. The next question you might ask is "What have you done lately?"

Graph 3, which I'll put on right now takes a look at the most recent twenty years of the data, and it shows again the California Supreme Court with sixty-one, Washington in second place at fifty. At this point I'm tempted to say that Washington is punching above its weight in terms of its population, number of cases that come up to the court and present appropriate matters that eventually can lead to a leading and followed case. It's really quite remarkable what this chart shows for Washington. Next is Massachusetts, Kansas — Kansas is a little surprise: they're growing more than corn; they're growing some follows — New Jersey, Arizona, Colorado, Minnesota, Wisconsin, Illinois, Iowa, Connecticut, New York. It's a little surprising to me how New York shows on all of these graphs. These three graphs are horizontal looks at what all fifty states have done during a defined period of time.

The fourth graph will show a California-only look at the data, and it's basically a vertical look at that data. It's going to compare the productivity, the production of cases that were followed three times, and five times, by the tenure of the six most recent California chief justices. The first thing that you notice here is that the Wright Court is basically in a tie with, or slightly under, the Lucas Court in terms of producing opinions that were followed at least three times by out-of-state courts. On average, every year of the Wright Court, as this graph explains, produced five opinions that were in turn followed three times or more by other state jurisdictions. Also, every year, the Lucas Court did the same, a slightly higher number actually for the Lucas Court. Let me add a caveat here. Just as it's somewhat problematic to compare baseball stats of Babe Ruth and Hank Aaron, because they played in different times under slightly different circumstances, it's also a bit problematic to make this comparison. There are a number of factors that go into the mix here, and we get into that in Ed's and my evolving paper, much more than what we see in the outline that we gave you. But basically, we think that these stats are fairly accurate.

What Graph 4 also shows you is that the Traynor Court and the Bird Court were basically tied in terms of opinions that were followed three times and five times. Each one produced on average annually around three opinions that were followed by other states three times, and so forth. What the graph also shows is that, of course, for the current Court, the data is in its infancy. There's a real substantial gestation period that we've noticed in looking across this data, and it will probably be ten years before we'll have an assessment in terms of the George Court, but it looks very much like — and I'm happy to report, Chief, who's in the back of the room there — we seem to be on a par with historic trends. Now, these figures show one thing. They show kind of objectively what a number of people have talked about over the years. There's always been the perception that the California Supreme Court has been a leader, and this tends to show that. We can quibble about some methodologies and such, but some of the real interesting things about this data are follow-up questions: Why does this happen? The little summary paper that we've given you gets into four reasons that Ed and I have come up with for the why. I suspect that the panelists will get into and approach some of those reasons as well. So, with that, I'll turn the matter back over to Justice Werdegar.

KATHRYN WERDEGAR: Thank you, Jake, and I know how much work went into those graphs, and they are beautiful. Well now, I would like to lend some color to what we've just seen with respect to the graphs, and, in doing so, I'd like to mention, out of what I think I can call the top forty-five cases — those would be the top cases in the years we're talking about that have been followed three or more times — I'd like to draw your attention to just five of them to illustrate the point. And the decisions I'm going to mention were innovative when handed down, and they've proven to be influential based on the data that Jake's been describing. The names are probably familiar to you. I'll start with tort law, an area that especially lends itself to judicial innovation, and the first one is *Greenman v. Yuba Power Products*, decided in 1963.⁴ *Greenman* was the first case ever to impose the principle of strict product liability on manufacturers. *Shepard's* codes *Greenman* as having been followed by the courts of eight states, and I'll point out that being followed is a very much more selective coding than just to be cited. *Greenman* has been cited 1,799 times as of a few weeks ago, and numbers are probably ongoing. But the *Shepard's* eight followeds don't really tell the whole story about the influence of *Greenman* because thirteen years after *Greenman* was decided, the so-called *Greenman* doctrine of strict product liability for manufacturers had been adopted by thirty-seven states. *Greenman* has been described as the single most dramatic legal change in tort law ever. Now in the tort realm also there's *Dillon v. Legg*. That was decided in 1968.⁵ And *Dillon*, you'll recall, allowed bystander recovery for negligent infliction of emotional distress. *Shepard's* codes *Dillon* as having been followed twenty times, more than any other state court cases ever have been coded as being followed.

Finally, in the tort realm, there's *Tarasoff v. The Regents of the University of California* in 1976.⁶ In *Tarasoff*, the California Supreme Court for the first time stated the duty of a mental health professional to protect others against a reasonably foreseeable serious risk of danger by a patient and that was, I recall, quite an earthshaking decision when it came down. *Tarasoff* has been followed by seventeen out-of-state decisions. Now, lest you think otherwise, I want to point out that not all of the California Supreme Court's

⁴ 59 Cal. 2d 57.

⁵ 68 Cal. 2d 728.

⁶ 17 Cal. 3d 425.

most influential tort decisions are ones that expanded tort liability. An example of that is *Cedars-Sinai Medical Center v. Superior Court*.⁷ In *Cedars-Sinai*, the Court declined to impose tort liability for a party's intentional destruction of evidence. *Cedars-Sinai* has been followed as many times as *Greenman*, and there are more.

Employment law is another area that is rich in innovation, and our good fortune is that we have an expert here who is going to speak to us about innovation in California employment law. Another area is criminal law, and we are very fortunate to also have an expert — that's Professor Uelmen, who is going to speak to us about criminal law and how California has been an innovator. I'll just mention the well-known case of *Wheeler*. In *Wheeler*,⁸ in 1978 — and I'm rather surprised that it's relatively that recent — for the first time the Court looked behind a peremptory challenge and stated the rule that you cannot exercise your peremptory challenges on the basis of race when you're challenging prospective jurors. *Shepard's* codes *Wheeler* as having been followed ten times, but an even greater import of *Wheeler* is that in *Batson v. Kentucky*,⁹ which the United States Supreme Court decided ten years later, they followed substantially the reasoning of *Wheeler*.

Now, as I suggested and Jake alluded to, a coding of followeds doesn't really tell you everything about whether a case or jurisprudence is influential. It's only part of the picture. The influence of some landmark cases is manifested not in how many decisions follow it, but in modifying behavior or motivating legislative action. For instance, in 1952 the case of *De Burgh v. De Burgh* gave birth to a revolution in family law.¹⁰ In *De Burgh*, the Court allowed both parties to get a divorce even though both were at fault. In so doing, the Court abolished the 100-year-old doctrine of recrimination pursuant to which nobody could get a divorce if you both were blameworthy. Can you imagine living under that system? [laughter] Actually, I think in its analysis the Court acknowledged that this doctrine of recrimination was honored more in the dissembling and the breach than in the fact, and they decided to be forthright about it and to declare that no longer would that be the case. Now, *De Burgh* does not show up on our list

⁷ 18 Cal. 4th 1 (1998).

⁸ 22 Cal. 3d 258.

⁹ 476 U.S. 79 (1986).

¹⁰ 39 Cal. 2d 858.

of top forty-five followed cases, but the decision had a dramatic impact. It ultimately led to the legislative enactment of no-fault divorce, first in California and later throughout the country.

Finally, some innovative cases turn out not to be influential. *Perez v. Sharp*, decided in 1948, is an example.¹¹ In *Perez*, the California Supreme Court struck the state's anti-miscegenation statute as violative of equal protection, the first high court to reach such a conclusion. This clearly was an innovative decision, but was it influential? Not by the *Shepard's* followed measure. In the nineteen years between *Perez* and *Loving v. Virginia*,¹² when the United States Supreme Court struck Virginia's statute, most state courts tried to avoid the issue of the legality of interracial marriage. The three courts that cited *Perez* did so only to reject its holding. Even the United States Supreme Court in *Loving v. Virginia* mentioned *Perez* only once, deep in a footnote, so there was innovation with, at least by any measure we've spoken about so far, no influence.

Now, looking to the future, in light of the subject matter or the issues in our cases now pending before us or likely to come our way, it seems that California will continue to be in a position to be an innovative Court, but whether we actually will fulfill that remains to be seen. I want to point out to you some of the issues before us that might allow us, should we choose to do so, to fulfill that role. The most obvious example of a high-profile issue sure to come our way was in the gay marriage decision that was just handed down two days ago [by the Court of Appeal].¹³ Issues already before us include whether an arbitration provision that prohibits employee class actions for violation of wage and hour laws is enforceable.¹⁴ Another is whether a physician, on First Amendment religious grounds, can refuse to provide reproductive services to a lesbian.¹⁵ Another novel issue — this is pending before us right now — is whether California can ban the importation and trade of wildlife (kangaroos), when the wildlife in question, the kangaroo, has been de-listed under the federal Endangered Species Act.¹⁶

¹¹ 32 Cal. 2d 711.

¹² 388 U.S. 1 (1967).

¹³ In re Marriage Cases, 143 Cal. App. 4th 873 (2006).

¹⁴ Gentry v. Superior Court, 42 Cal. 4th 443 (2007).

¹⁵ North Coast Women's Care Medical Group v. Superior Court, 44 Cal. 4th 1145 (2008).

¹⁶ Viva! International v. Adidas, 41 Cal. 4th 929 (2007).

In other words, does the doctrine of federal conflict preemption require California to allow the importation of kangaroos for the fashioning of sneakers? And the list goes on.

In closing, I must point out what I think is obvious to all of you, and it's not that the California Court is the only branch of our government that is innovative. Innovation comes from our legislature and the people of the state through the initiative power. Proposition 13 is a very well-known example. My fellow panelists are going to touch on this to a greater extent. But I'll just notice that the process continues. It's been reported that Prop 64, enacted two years ago, has ignited a momentum across the country to draft similar amendments putting limits on consumer class actions, and the *San Francisco Chronicle* reported just a couple of weeks ago that the new legislation mandating that California reduce its greenhouse gases will — and I'm going to quote to you — “serve as a catalyst for other states and the federal government to curtail fossil fuel emissions and will spur the development of innovative technologies and policies.”¹⁷ We'll just have to wait and see, but there you are. And thank you very much.

ELWOOD LUI: Thank you, Justice Werdegar. Our next speaker is Justice Joseph Grodin. Justice Grodin is a distinguished emeritus professor at the University of California Hastings College of the Law and a former associate justice of the California Supreme Court and presiding and associate justice of the Court of Appeal, First District. He graduated from UC Berkeley, obtained his law degree from Yale, and received his doctorate in labor law and labor relations from the London School of Economics. After graduating from law school, Justice Grodin practiced in San Francisco for seventeen years and then became a professor at UC Hastings for another seven years. In 1975, he became one of the original members of the California Agricultural Labor Relations Board and served in that capacity until 1979 when he was appointed to the bench. Upon leaving the bench in 1987, he returned to teaching at Hastings and, with leaves at Stanford Law School, became an emeritus professor at Hastings in 2005. He continues to teach, write, and serve as an arbitrator and mediator. Justice Grodin.

JOSEPH GRODIN: Thank you very much, Justice Lui. In my written materials [*included here after Justice Grodin's oral remarks*], I tried to play

¹⁷ Jane Kay, “A Critical Step” on Warming Impact, BEE (Sacramento), September 1, 2006.

around with this data which I find interesting and subject to an almost infinite variety of interpretations. But I don't intend to talk about that right now, but rather to focus, as Justice Werdegard indicated, on the field of labor and employment law and innovation in that area, and I intend to go beyond my written materials. I served on the Court of Appeal with a very fine justice who did not care much for oral argument. He prepared



very carefully for cases, read the briefs, went through the record, made up his mind, knew what he wanted to do, and he was quite impatient in oral argument, and so he developed a sort of one-two punch. When a lawyer started arguing things that were in his brief, this justice would say, "You've made that point very well in your brief, counsel." On the other hand, if the poor lawyer tried to say something outside of the brief, he would say, "This court does not hear arguments that were not stated in the brief." [laughter] So, with my apologies, I am going beyond my brief.

My story starts with the Constitutional Convention of 1879 and with a lawyer who has now become quite famous by the name of Clara Shortridge Foltz who had the misfortune but, as it turned out a misfortune which catapulted her into the legal hall of fame, of being rejected from my school, Hastings College of the Law, because the Hastings Board of Directors at that time believed that law was no profession for a woman. Clara was not a person to be put off by such an event. She brought suit in state court. She won. Hastings had the bad grace to appeal. While her appeal was pending before the California Supreme Court, the 1878 Constitutional Convention which led to the 1879 Constitution was in progress. It was dominated by, or at least heavily influenced by, the Workingmen's Party of San Francisco. The Workingmen's Party had its roots in organized labor. Its agenda was not, from a modern perspective, wholly progressive. It produced, among other things, some provisions that were virulently racist, but it was also kind to Clara Foltz. It proposed to the convention, and the convention adopted, a — for that time quite remarkable provision which is still in our Constitution though in expanded form — declaring that all persons have the right to pursue any business or occupation without regard to sex. This

was an early version of the Equal Rights Amendment. It was the first of its kind in the country.

On the legislative front, and here I'm following Justice Werdegarr's suggestion that if we want to talk about the influence of this state's legal system, we need to talk about more than the courts; we need to talk about the Constitution, about the initiative process, about statutes, about the interplay between the Legislature and the courts. The Progressive Movement was in dominance in the early part of the twentieth century in this country, and in this state it was responsible for a number of innovations, including our initiative referendum process, but also in terms of the field I'm talking about. The Worker's Compensation Act of 1913 was a landmark law, not the first, but probably the most progressive of worker's compensation laws in the country at the time. The California Legislature continued to be in the forefront in developing protections for workers, for example, through an unusual statute that was adopted in the 1930s which made it unlawful for an employer to discriminate against employees for political affiliation or activity.

On the judicial front, nothing much happened in the area of employment law or, for that matter I suppose one might say in any other area of the law, in the courts and perhaps for that reason the statistics we have start with 1940. In 1940, Cuthbert Olson was elected governor of California, the first Democratic governor since 1900, and in his first year in office he appointed as chief justice of the California Supreme Court a member of his cabinet, Phil Gibson, and [as associate justice] an obscure Boalt Hall law professor by the name of Roger Traynor. From that point, I think it's fair to say the California Supreme Court began to take off. We'll be talking during our discussion period about the why's of all this, but in passing let me observe that for the first time in the mid-thirties, California amended its Constitution to eliminate contested elections for appellate courts. And that had the effect, among other things, of providing justices with a longer period of tenure than was previously the case, and that perhaps had something to do with what happened.

In 1944, there came before the Court a case on the boundary between employment law and labor law. It was in the middle of the Second World War, and California shipyards were operating at peak capacity, but they needed more skilled workers, and workers from the South, many of them

black, flocked in to apply for those jobs. The problem was that the shipyards were under contracts with the skilled crafts unions. Those contracts contained closed-shop provisions requiring union membership as a condition of employment, and the crafts unions in those days did not admit Blacks to membership. But the unions couldn't be seen as impeding the war effort, so what the Boilermakers Union did was to establish an auxiliary local union to which black boilermakers could belong. They could pay their dues, their initiation fees. They would have no voice or vote in the affairs of the union or the election of officers. Black workers, represented in part by a lawyer named Thurgood Marshall, brought suit under a variety of theories. The case went to the California Supreme Court, and Chief Justice Gibson in a unanimous decision, in a case called *James v. Marinship*,¹⁸ rejected the union's argument that it was, after all, a private association which had the right to establish its own rules with respect to membership. The Court reached back into early common law doctrines of public utility, held that a labor union was in the nature of a public utility, and that, while it could have a closed shop, it couldn't have a closed union at the same time. Today, that proposition seems commonplace, but at the time it was quite revolutionary.

What we now call employment law, the law governing the individual employer–employee relationship, scarcely existed in the 1950s when I began to practice, but it was beginning to grow, at first through the common law and later through the courts. The centerpiece of the common law view of the employment relationship was the principle that employment is at will. This principle, in the absence of a labor union, empowers employers to determine terms and conditions of employment, subject only to the law of supply and demand. It is this principle which California courts came, in certain cases, to question. The first case to modify the at-will principle involved, ironically, a labor union as employer. The executive board of the Teamsters Union in San José fired the union's business agent, a man called Petermann, after he testified before a legislative committee in Sacramento, allegedly because the union disagreed with his testimony. Petermann sued for what we would now call wrongful termination. The trial court dismissed the suit, relying upon the principle of at-will employment, but the Court of Appeal for the

¹⁸ 25 Cal. 2d 721 (1944).

Second District, in a 1959 opinion by Justice Fox, reversed.¹⁹ The reasoning of the Court of Appeal was that to fire an employee for giving testimony the employer does not like is contrary to public policy and for that reason unlawful, giving rise to a cause of action and damages in tort. *Petermann* was the source nationwide for what was to become known as the public policy exception to the at-will rule. Two decades later, in a case called *Tameny v. Atlantic Richfield*, Justice Tobriner wrote an opinion for the California Supreme Court, widely cited and followed, confirming and at the same time broadening the public policy exception.²⁰

In 1972, by initiative, the California Constitution was amended to add the word “privacy” to article I, section 1, which previously had protected the right to pursue and obtain happiness and safety. The 1972 amendment said we have a constitutional right to pursue and obtain privacy as well. That amendment has had profound implications for employment law because it has provided a basis for the Court over time to recognize rights of privacy in the workplace, not only against governmental intrusions upon privacy but, in accordance with the ballot arguments which appeared at the time, against intrusions by private employers as well. About the same time as the Supreme Court decided *Tameny*, it decided also another important labor case, *Gay Law Students Assn. v. Pacific Tel & Tel*.²¹ The telephone company had the policy that it would not employ “manifest homosexuals” in customer-contact positions. This was before the California Fair Employment and Housing Act was amended to protect against discrimination on the basis of sexual orientation, and the Court, in an opinion by Justice Tobriner, acknowledged that the FEHA’s ban on sex discrimination did not apply. Nonetheless, the Court found the telephone company’s policy unlawful on two grounds. One was an extension of the public utility concept that was the foundation to the Court’s opinion in *James v. Marinship*. The other was a Labor Code prohibition on *political* discrimination that I mentioned. What did political discrimination have to do with manifest homosexuals? Well, the Court reasoned, at that time, back in 1959, for a gay or lesbian person to come out of the closet to become a manifest homosexual, whatever that meant, was often a political act, and therefore the

¹⁹ *Petermann v. International Brotherhood of Teamsters* 174 Cal. App. 2d 184 (1959).

²⁰ 27 Cal. 3d 167 (1980).

²¹ 24 Cal. 3d 458 (1979).

prohibition against discrimination against employees for political action or activities was applicable. The FEHA has since been amended to apply that principle more broadly, but at the time the Court's opinion stood as the first judicial protection, I believe, for homosexuality in the country.

The Court of Appeal for the First District decided *Pugh v. See's Candies*,²² which involved the application of contract principles to the at-will rule. More specifically, it considered whether an employee whose employment was presumptively at will might overcome that presumption on the basis of a promise, express or implied, of continued employment. Our Court held that Pugh was entitled to proceed to trial on his allegation that the circumstances in that case gave rise to an implied promise on the part of the employer not to terminate him without cause. Six years later, in *Foley v. Interactive Data*, the California Supreme Court confirmed what had become known as the *Pugh* exception to the at-will principle.²³ It also reconfirmed the public policy exception, although holding that it had no application to the facts of that case, and it limited the application of what had become a third exception to the at-will rule — based on the Covenant of Good Faith and Fair Dealing — holding that the violation of the covenant did not give rise to an action in tort. Despite these qualifications in the *Foley* opinion, California common law remained, and still remains, probably the most favorable in the nation to claims by employees of job security, notwithstanding the at-will rule.

Finally, let me briefly mention the California Fair Employment and Housing Act. Here we have a pattern of innovation which is a joint product of action and collaboration by the legislative and judicial branches. I teach employment discrimination law, and 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. The FEHA is broader in coverage, it provides more substantial remedies, it's broader in its definition of discrimination. Its substantive protection in certain areas, especially age and disability, go well beyond the federal statute. And the California Supreme Court has applied the FEHA with sensitivity to the intended role it plays as a supplement to federally protected rights and generally has not hesitated

²² 116 Cal. App. 3d 311 (1981).

²³ 47 Cal. 3d 654 (1988).

to depart from federal court interpretations of Title VII, not only where the language differs, but more broadly on the basis of differences in assessment of how the statute should be interpreted in order to achieve the goals of the Legislature. The Court has been in constant communication with the Legislature with respect to interpretation of the FEHA. The Legislature has responded to court decisions by modifying the FEHA in several respects to provide broader coverage or to give greater protection against discrimination. 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 I think, again, it is fair to say, is the most advanced in the nation. I have some thoughts about judicial innovation and how we go about explaining it, but I propose to leave that for our discussion period.

WRITTEN REMARKS BY JUSTICE GRODIN:

1. The Relationship Between Innovation and Influence: The Statistics

Jake Dear and Edward Jessen have presented a fascinating array of data which tends to show the extent of influence that California Supreme Court decisions have had on courts of other states by examining the LexisNexis characterization of a case being “followed.” While I have some doubts concerning both the reliability of the characterizations and the inferences which can be drawn, I put those doubts aside in the same spirit that one might put aside one’s doubts concerning the reliability or significance of baseball data. It’s interesting, and possibly it can lead to some insights.

I notice from the data that the cases which appear to have had the greatest impact in other states are clustered predominantly in the two decades from 1960 to 1980. For example, of the cases in the study spanning a sixty-six-year period from 1940 to 2005, I notice that two-thirds of the twenty-four cases that might be called the “blockbuster” cases — those which I have defined, somewhat arbitrarily, as having been followed from six to twenty times — were decided during that two-decade period. Only two of these cases were decided before 1960, suggesting that the cluster is not attributable to the amount of time which has elapsed since the case was decided. If one includes the cases which have been cited five or more times, the percentage decided during that two-decade period declines somewhat,

but is still disproportionately high (well over 50 percent) compared to the sixty-six-year period covered by the study.

I notice also that authorship of the blockbuster cases is predominantly concentrated in two justices. Attached as the Table of Blockbuster Cases [see p. 24] is a list of the twenty-four cases, accompanied by a brief description and the name of the justice who wrote the opinion. If each time a case is followed in another state a “run batted in” is scored, then two players — Justice Tobriner and Chief Justice Traynor — were responsible for two-thirds of the 150 RBI’s hit during the peak 1960–1980 period, Tobriner being first with 74 RBI’s and Traynor being second with 25.²⁴ I have not done this analysis for cases cited five or more times, but it might be useful for someone to do so.

This data suggests to me (though I concede it is open to other interpretations) that there was something unusual about the 1960s and 1970s, and about these two justices, in relation to the influence of California Supreme Court opinions on the opinions of other state courts. I think everyone would agree that Justices Traynor and Tobriner were outstanding judges for any period, but I suggest their batting averages were aided by the times. The period of the ’60s and ’70s was a turbulent period in our society. It was also a turbulent period in the development of certain areas of the law. The common law of torts and contracts was in a state of flux. In torts, the largely circular concept of “duty” was giving way to the dominance of “foreseeability” as the touchstone of liability, and in contracts the special problems posed by inequality of bargaining power and the lack of opportunity for bargaining in certain contexts was being recognized through the concept of “contracts of adhesion.” Legal commentators, the public, and ultimately and inevitably the courts perceived a need to protect consumers, make accident victims whole, and in general to protect individuals against what

²⁴ It is not my purpose here to rank the importance of judges, or assess their performance; indeed, I doubt the statistics are at all useful for those purposes. For those who are interested in numbers I am informed, I believe reliably, that if one were to look at all cases decided over the sixty-six-year period covered by the study which have been followed 3 or more times, one would find the following: In terms of the number of cases, Mosk would be first with 27, followed by Tobriner (16), Lucas (14) and Traynor (12). In terms of the numbers of followings (RBI’s), Tobriner would be first with 109, followed by Mosk (107), Lucas (69) and Traynor (61). It would be interesting to see when these cases were decided.

was widely viewed as the sometimes arbitrary power wielded by the public and private institutions of our society. The '60s and '70s were also a period in which the U.S. Supreme Court, in company with state courts around the nation, developed additional procedural protections for criminal defendants, relying upon either the federal constitution or (in the case of state courts) upon state constitutions. The California Supreme Court played a leading role in those developments — a fact I suspect could be demonstrated through examination of the leading casebooks of the period. And, within the California Supreme Court, Chief Justice Traynor and Justice Tobriner, along with Justice Mosk, were the predominant intellectual leaders during that period. This in itself may account for some of the respect their decisions received, but it must also be acknowledged that they there were playing, one might say, to a receptive audience.

Since the 1970s there has not been as much expansion of doctrine, either in the common law area or in the area of criminal procedure. Indeed, common law cases have gradually given way to cases involving interpretation of statutes, and such cases are less likely to produce followings by other state courts.²⁵ Criminal procedure has been largely federalized, and reliance upon the state constitution has been restricted in California by publicly supported constitutional initiatives. The opportunities for blockbuster influence may not be as great. I would not suggest that the only way a judge can have influence on other state courts is to write something innovative that pushes the law ahead in new directions. That proposition is belied by the many followings of California decisions that place limitations on the applicability of new doctrines, or which simply elaborate existing law in a way that other state courts find instructive. But it is apparently less likely that such decisions will produce the kind of effect that is found in some of the earlier cases. My hypothesis, tentatively offered, is that the cases most likely to produce multiple followings are cases which point the law in new directions.

2. Beyond the Statistics

The statistical analysis of “followings” does not fully capture either the innovative contributions of the California courts or the extent of their

²⁵ I concede, however, that there are still a good number of common law tort cases which produce followings; perhaps this is a ripe area for further analysis.

influence, as the proponents of the analysis explicitly recognize. For more complete understanding of the extent to which California courts have been a “laboratory of legal innovation,” it is necessary to look beyond the statistics to groups of cases involving particular issues or particular subject areas, and also, as Professor Scheiber demonstrates, to the interplay between the courts and the state legislature, as partners in innovation. For example:

a. Independent state constitutional analysis. As shown in the excellent papers of both Professors Williams and Scheiber, California courts were in the vanguard of the movement toward recognizing the independent significance of state constitutions, and the potential for positing decisions on independent state grounds. And it is common for courts to look to the decisions of other states premised on identical or similar constitutional provisions. Because the language of state constitutions differs, however, an interpretation which could be characterized as “innovative” may not show up in the “followed” column. One might look instead to a more qualitative analysis — casebooks, for example, or scholarly articles.

b. Federal constitutional analysis. State courts are frequently called upon to interpret the federal constitution as it applies to the case before them, and in the absence of authoritative U.S. Supreme Court guidance their interpretations can be said to be part of the “laboratory” of judicial innovation. Again, as shown in the Scheiber and Williams papers, California decisions often foreshadowed developments in the U.S. Supreme Court, but that sort of influence will not appear from examination of the decisions by other state courts.

c. Employment Law (see oral remarks).

3. *Some General Observations*

Whether a particular state’s legal culture has produced “innovation” is of necessity a rather subjective inquiry, and any attempt to measure the extent of innovation, much less to produce meaningful comparisons between one state and another, presents a daunting challenge. With respect to the courts, no doubt numerical analysis can be useful, as a starting point, but it needs to be supplemented with an understanding and evaluation of the context and the numerous variables that may affect the numbers. It would be interesting, for example, to examine and correlate the numbers with the subject

matter of the cases — a task which I have attempted in only a most superficial and limited way. My suggestion that the judicial process has moved away from common law adjudication needs to be tested, as does my suggestion that this movement has something to do with the extent of reliance by courts of other states. In any event, it seems clear that meaningful discussion of a state's innovations in the law must take into account the legislatures as well as the courts. I leave this work to others more qualified than I.

TABLE OF BLOCKBUSTER CASES

(prepared by Joseph Grodin)

A list of the twenty-four cases decided by the California Supreme Court between 1940 and 2005 that (according to LexisNexis) have been “followed” more than five times by other state courts, arranged by opinion authors, in order of number of cases per author. The number preceding each case indicates the number of times it has been followed.

JUSTICE MATHEW O. TOBRINER

- (20) *Dillon v. Legg*, 68 Cal. 2d 726 (1968) (allowing recovery for negligent infliction of foreseeable emotional distress)
- (17) *Tarasoff v. Regents of U.C.*, 17 Cal. 3d 425 (1976) (psychiatrist has duty to protect potential victim against threats of serious violence by patient)
- (12) *Tunkl v. Board of Regents*, 60 Cal. 2d 92 (1963) (attempted exculpatory release provision in standard form used for admission to hospital held invalid)
- (9) *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413 (1978) (Plaintiff in design defect case need not prove product was unreasonably dangerous for intended use, but only that it was dangerous for reasonably foreseeable use).
- (6) *In re Marriage of Brown*, 15 Cal. 3d 838 (1976) (husband's non-vested pension rights constitutes community property subject to division upon dissolution of marriage)
- (6) *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263 (1966) (clause in insurance policy limiting duty to defend must be interpreted according to reasonable expectations of insured)

CHIEF JUSTICE ROGER TRAYNOR

- (10) *Seely v. White Motor Co.*, 53 Cal. 2d 9 (1965) (economic loss recoverable for breach of warranty by manufacturer, but not through doctrine of strict product liability)
- (8) *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57 (1963) (manufacturer of defective product strictly liable without regard to warranty)
- (7) *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601 (1962) (res judicata principles preclude plaintiffs from suing insurance company for loss of property plaintiffs had been convicted of stealing)
- (6) *Bernhard v. Bank of America*, 19 Cal. 2d 807 (1942) (analyzing the elements of res judicata)
- (6) *Pridonoff v. Balokovich*, 36 Cal. 2d 788 (1951) (plaintiff in libel action of author of libelous newspaper article may not recover general damages absent request for modification or retraction)

JUSTICE STANLEY MOSK

- (10) *People v. Wheeler*, 22 Cal. 3d 258 (1978) (prohibiting use of peremptory challenges to exclude prospective jurors on the basis of race)
- (8) *Mozzetti v. Superior Court*, 4 Cal. 3d 699 (1971) (police inventory of contents of vehicle prior to statutorily authorized impoundment constituted unreasonable search in violation of Fourth Amendment)
- (6) *Cobbs v. Grant*, 8 Cal. 3d 229 (1972) (Prior to surgery, physician has duty to disclose available choices and dangers)

CHIEF JUSTICE MALCOLM LUCAS

- (15) *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654 (1988) (affirming, applying, and limiting several doctrinal exceptions to principle of at-will employment)
- (7) *Lucido v. Superior Court*, 51 Cal. 3d 335 (1990) (Res judicata principles did not bar the People from prosecuting defendant for indecent exposure despite justice court's finding at hearing on revocation of probation that there was insufficient evidence of that crime)

CHIEF JUSTICE DONALD WRIGHT

- (13) *Ray v. Alad*, 19 Cal. 3d 22 (1977) (purchaser of manufacturing business held strictly liable for defective ladder produced by its predecessor)

CHIEF JUSTICE RONALD GEORGE

- (7) *In re Alvernaz*, 2 Cal. 4th 924 (1992) (overturning conviction for ineffective assistance of counsel)
- (6) *Temple Community Hospital v. Superior Ct.*, 20 Cal. 4th 464 (1999) (no tort action for spoliation by person not a party)

JUSTICE JOYCE KENNARD

- (8) *Cedars-Sinai Med. Ctr. v. Superior Ct.*, 18 Cal. 4th 1 (1998) (no tort action for intentional spoliation of evidence committed by a party, where victim knows or should have known of spoliation before trial or decision on the merits)

JUSTICE RAY PETERS

- (6) *Rowland v. Christian*, 69 Cal. 2d 108 (1968) (discussing parameters of liability of property owner for injury caused by dangerous condition on premises)

JUSTICE RAYMOND SULLIVAN

- (6) *Gruenberg v. Aetna Ins. Co.* 9 Cal. 3d 566 (1973) (insurance company liable in tort for breach of covenant of good faith and fair dealing)

CHIEF JUSTICE PHIL GIBSON

- (6) *Lucas v. Hamm*, 56 Cal. 2d 583 (1961) (lawyer who negligently drafted will liable to intended beneficiary)

JUSTICE MARCUS KAUFMAN

- (6) *People v. Bloom*, 48 Cal. 3d 1194 (1989) (criminal defendant who chose to represent himself could not complain of ineffective counsel)

ELWOOD LUI: Thank you, Justice Grodin. Our next speaker is Professor Robert Williams, a distinguished professor of law at Rutgers University School of Law in Camden, New Jersey. He received his Bachelor's degree from Florida State University in 1967 and his Juris Doctorate from the University of Florida College of Law in 1969. He's practiced law with Legal Services in Florida and has represented clients before the 1978 Constitutional Revision Commission. Professor Williams received an LLM from New York University School of Law in 1971 and an LLM from Columbia

Law School in 1980. He's the author of *State Constitutional Law: Cases and Materials*, published by Lexis Law Publishers (2006) and *The New Jersey State Constitution: A Reference Guide*, published by Rutgers University in 1997, and also is an author of numerous journal articles about state constitutional law and legislation. He's also our one visitor who is going to critique our observations in California about the leadership we have in state courts' opinions. Professor Williams.

ROBERT F. WILLIAMS: Thank you very much, Justice Lui. I am honored to be here as a participant on a panel that contains people of such distinction. I'm humbled to be here, and I appreciate very much the invitation. I want to say a special thanks to Selma Smith who, over my travels in the last six or eight weeks, has worked tirelessly to keep me in the loop and, I think, literally provided a homing beam for me to arrive here late last night and make it to this room today, so I want to thank you on behalf of myself and, I think probably, all the rest of the panelists.



I've taught law in New Jersey for twenty-seven years, and I've spent a lot of that time as, frankly, a partisan of the New Jersey Supreme Court, so I feel today a little bit like a college football coach appearing at a postgame press conference after a sound beating, but I'm going to follow the approach of those college football coaches by extolling the virtues of the victor but making one or two comments about the game, and, of course, I'm referring to the data that were summarized earlier in the program. I'm wondering if there's a chance that these data might have a little "But, see . . ." with the New Jersey data that says, "Well, we didn't have a real supreme court at all between 1940 and 1950. We didn't really have a supreme court that operated in New Jersey until 1950," but I'll talk to you about that in detail later.

But I do want to talk about the California Supreme Court in the context of what we've come to call the New Judicial Federalism.²⁶ I think a lot of you

²⁶ The broad outlines and features of the New Judicial Federalism are outlined in a wide range of legal literature. For example: *Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Randall T. Shepard, *The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U.L. REV. 421 (1996);

are aware of this phenomenon. I want to highlight eight or nine key points in the development of this phenomenon over the last thirty years or so. By the New Judicial Federalism, we mean the realization by state 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 United States Constitution by the U.S. Supreme Court.²⁷ In saying this, I don't mean that the New Judicial Federalism always involves state courts going beyond or being more protective than what the United States Supreme Court says about federal constitutional rights. What I really mean to say is that state courts recognize the potential for such an outcome, that lawyers in those states recognize the viability of such arguments, such as that a search-and-seizure case might be won under the state constitution when the same argument has already lost in the United States Supreme Court.

Thirty years ago, this was kind of an unusual concept, and, depending on the nature of the practice of the lawyers in this room, it might even sound unusual to you now, but it's been an extremely important development in our federal legal system. It's interesting because this sort of a notion that you could have rights under a state constitutional interpretation that might be more protective, oftentimes more liberal but not always, than the federal minimum national standard — you could never make that argument except in a federal country like ours. So, this kind of argument is beginning to be made in eight or ten other federal countries out there that have states or the equivalent of states which have their own constitutions. I was skimming a new article for our law journal the other day at my vacation cottage (somehow, they found me there — I'm on sabbatical; that's why I've been traveling around — please don't tell the taxpayers of New Jersey). I read a new article about the newly emerging state constitutions in the Sudan — I'm no expert on the Sudan; I think a lot of us think of it as a place where a genocide is going on and what have you — there are state

G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997); Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211 (2003) and Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U.L. REV. xiii (1996).

²⁷ "Over the years, state judges in numerous cases have interpreted their state constitutional rights provisions to provide more protection than the national minimum standard guaranteed by the Federal Constitution." Williams, *Third Stage*, *supra* at 211; See also Williams, *Looking Back*, *supra*.

constitutions being drafted there — this was an article written by a South African professor — that some of these newly drafted state constitutions actually outlaw the horrendous practice of female genital mutilation. They can't get it into the national constitution of the Sudan, but some pockets of rights protection are developing there. It remains to be seen if they'll be enforced or not, but back to Justice Grodin's point, if I was a lawyer in one of those states in the Sudan and I failed to make an argument based on the new state constitution in the Sudan, I think I'd be committing malpractice.

Back to the U.S. context, the central feature of this phenomenon of the New Judicial Federalism was probably an article written by Justice William J. Brennan of New Jersey [laughter] in the *Harvard Law Review* in 1977,²⁸ a few years before I started teaching these things, and as I've said in my outline and materials [*included here in their entirety as footnotes to Professor Williams' oral remarks*], the first case that Justice Brennan relied on was, of course, a California case, the famous *People v. Disbrow*. I'm not going to read the quote, except a line from it — here's 1976, the California Supreme Court saying, "We pause . . . to reaffirm the independent nature of the California Constitution and our own responsibility to separately define and protect the rights of California citizens, despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution."²⁹ Now, we have to be careful — this sounds very odd to people — no one would say the California Supreme Court could interpret the California Constitution to provide *fewer* rights than are required by the federal constitution. As an academic matter in fact, you could, but you couldn't enforce it. What we're talking about is *more* rights, *more* protection, above the national minimum standard, and here's the California Supreme Court in 1976, and it's not the first time it said it — but I emphasize it here because it was the centerpiece of Justice Brennan's famous article, which may be the most important development in the New Judicial Federalism.³⁰ For a United States Supreme

²⁸ *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 498–99 (1977).

²⁹ 16 Cal. 3d 101 (1976), 114–15. *See also*, 90 HARV. L. REV. at 500, *citing* *People v. Brisendine*, 531 P.2d 1099 (Cal. 1975).

³⁰ Justice Brennan's article was referred to as the "Magna Carta of state constitutional law." Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

Court justice to write this in the *Harvard Law Review* is a very big deal, once again relying on the California Supreme Court. That decision, *People v. Disbrow*, it seems to me was an intentional attempt at teaching the bar, the rest of the judiciary, possibly the citizens of California, and clearly it taught people outside of California. So, it was very influential, helped along a little bit by Justice Brennan there. In my outline, I follow a little bit of the influence of Justice Brennan's article,³¹ but I'm not going to bother with that now, except to go outside my brief, too, to say that Brennan actually said toward the end of his life that he thought this phenomenon of the New Judicial Federalism was the "most important development in constitutional jurisprudence of our time." That's a big idea, coming from him.³²

Now, back to my point that you could only have this phenomenon in a federal system where you have a national government with a national constitution and governments within the national government also operating under their state constitutions.³³ This is what leads to the notion that you can have these laboratories of federalism, these bubbling experiments going on out there, if that's not a disrespectful way to describe your Court, cooking away, attempting different solutions to legal and societal problems.³⁴ You're not going to see that image in France or England, or any of the other countries that are unitary, that don't have states that have

³¹ Justice Brennan's article is among the most often cited law reviews. Ann Lousin, *Justice Brennan: A Tribute to a Federal Judge who Believes in States' Rights*, 20 J. MARSHALL L. REV. 1, 2n.3 (1986).

³² Justice Brennan updated his views in 1986, initially relying once again on a California case. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) citing *Robins v. Pruneyard*, 23 Cal. 3d 899 (1979), *aff'd*, 447 U.S. 74 (1980).

³³ For example, *Pruneyard* upheld by a 9–0 vote the California Supreme Court's decision to recognize free speech and assembly rights in privately-owned shopping malls. Justice Rehnquist noted that the federal constitution did not "limit the authority of the state to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.*, at 81. For this proposition, Justice Rehnquist cited *another* California case, *Cooper v. California*, 386 U.S. 58, 62 (1967).

Although expressing a truism, Justice Rehnquist's statement for the majority placed the United States Supreme Court's imprimatur on the New Judicial Federalism.

³⁴ The California Supreme Court had an early record of concern with state constitutional rights. See Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 HAST. CONST. L.Q. 141 (2004). California was also an

sovereign authority and their own constitutions. The “laboratory of experiment” metaphor goes back, most people say, to Justice Brandeis in the 1930s, dissenting in a case.³⁵ It’s interesting, there’s even Justice Holmes, eleven years earlier, who talked about “social experiments . . . in the insulated chambers” of the states.³⁶ It makes me think a little bit of those old Frankenstein movies late at night, but let’s hope the results are better. There are a few nay-saying scholars who challenge this laboratory metaphor; I’m not going to dwell on what they say because I don’t agree with it.³⁷ They have a point. This isn’t science; you’re not required to adopt the outcome of favorable experiments, and all that. Oh, yeah, yeah, but lay off. Political scientists call it “the diffusion of innovation.” That’s not a bad term, and they study how these things move through the country. Some of them look specifically at judicial innovations. I do a lot of work with political scientists. I love them, but I don’t like the way they only look at outcomes. They don’t understand the nature of legal argument and the nature of following precedent. We know that the hard cases sometimes can go one way or the other despite the precedents, but they tend to only look at outcomes without thinking about this. If people are interested, I’ve cited some of that material in my outline.³⁸

early leader in the New Judicial Federalism. JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 68, 118–30 (1989).

³⁵ Justice Brandeis made the reference to states as “laboratories” in 1932. “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³⁶ *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting, discussing “social experiments . . . in the insulated chambers afforded by the several States”).

³⁷ James A. Gardner, *The “States-As-Laboratories” Metaphor in State Constitutional Law*, 30 VAL. U.L. REV. 475 (1996).

³⁸ Political scientists refer to the adoption of successful measures tested in the “laboratories” of other states as “diffusion of innovation.” See Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174 (1973); Symposium, *Policy Diffusion in a Federal System*, *PUBLIUS*, Fall 1985 (Robert L. Savage ed.); Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969). There is also a specialized literature on diffusion of *judicial* innovations among the states. See James N. G. Cauthen, *Judicial Innovation under State Constitutions: and Internal Determinants Investigation*, 21 AM. REV. POL. 19 (spring, 2000).

Let me point to some of these highpoints in what I think are the contributions of California,³⁹ and not just the courts, to the advent of this “most important development in constitutional jurisprudence of our time.” In 1972, all of you know, the case *People v. Anderson* declared the death penalty in this state unconstitutional, based on the California clause banning “cruel *or* unusual” punishment,⁴⁰ not “cruel *and* unusual” punishment, the way the Eighth Amendment to the federal constitution reads. That case had a tremendous stimulating effect — it also had a backlash that you all are aware of — a tremendous educational effect on the legal system in this country. It, first, underlined the fact that state constitutional rights clauses often read differently from the federal clause that all of us are so much more familiar with,⁴¹ that we’re required to study in law school — nobody’s required to take my course on state constitutional law; I never understood that, but I can’t get our faculty to make it required. But what could be a more convincing lawyers’ and judges’ argument than, “Hey, the text just reads differently.” It doesn’t mean everybody agreed with the outcome of *People v. Anderson*, but in federal law you had to show that the punishment was not only cruel but it was also unusual. In California, you didn’t have to do that. So, this began the attention to differing texts in state constitutional rights adjudication.

It also alerted people to the adequate and independent state ground doctrine, once again that you would never have except in a federal system, so that when a state court decision is based on a state ground that’s independent of federal law, the state case is not reviewable by the United States Supreme Court. *People v. Anderson* was a *cert-denied* in the United States Supreme Court, and as I’ve quoted in my outline from a book by a guy that nobody heard of at the time, Bob Woodward, *The Brethren*, Justice Douglas, a couple of days after *People v. Anderson*, dismissed a hundred pending death penalty cases in the

³⁹ Not only did the Westward Movement carry innovations toward the West Coast, but after the frontier was settled, in the words of Frederick Jackson Turner, the Eastern states felt the “stir in the air raised by the Western winds of Jacksonian democracy.” FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* 1982 (1920). The same can be said now of the New Judicial Federalism.

⁴⁰ 6 Cal. 3d 628 (1972).

⁴¹ This approach underscored the importance of textual distinctions between the state and federal constitutions. Analysis of textual distinctions is one of the central features of the New Judicial Federalism.

United States Supreme Court, [saying], there's no death penalty in California anymore; these cases are out.⁴² And the Supreme Court could say nothing about it. This was a California-based decision. I've indicated in my outline that I think it was the beginning of the "rights protective" version of the adequate and independent state ground doctrine.⁴³ The adequate and independent state ground doctrine *used* to stand for the proposition that a criminal — it went beyond criminal law, but in the criminal context — a criminal defendant had not properly raised a federal constitutional claim — there was a state rule that said you had to raise it, and that was an adequate and independent state ground.⁴⁴ People were executed in this country based on that. If I may say, the liberals and the criminal defense lawyers discovered this doctrine, turned it around, and said, "Hey, I *won* my case in the state court. It's based on state law. The Supreme Court has no business hearing it." And the Supreme Court has been pretty careful to honor that over the years. In my outline, I go through this business, but I'm not going to cover it here.⁴⁵ It's something that's — later, in

⁴² "[T]he California Supreme Court decided that the state's death penalty violated the California constitution's prohibition against 'cruel or unusual punishment.' Douglas's chambers got advance notice of the decision, and within three days, Douglas had distributed a *per curiam* draft dismissing the one hundred California cases that were awaiting the Court's ruling." BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 212 (1979).

⁴³ *People v. Anderson* stimulated academic interest in, and development of the adequate and independent state ground doctrine as a "rights protective" doctrine. *See, e.g.*, Scott H. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750 (1972); Jerome B. Falk, Jr., *Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Donald R. Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CAL. L. REV. 1262 (1972); Edward L. Barrett, Jr., *Comment, Anderson and the Judicial Function*, 45 S. CAL. L. REV. 739 (1972).

⁴⁴ Older, "rights depriving" approach. *See, e.g.*, *Williams v. State*, 88 S.E. 2d 376 (Ga. 1955), *cert. den.* 350 U.S. 950 (1956) (federal review denied, even for obvious federal constitutional violation of racial discrimination in state jury selection, where failure to raise pre-trial objection deemed an adequate and independent state ground). *See* STEPHEN L. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT* 198 (1970) and Walter Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017, 1021 (1959).

⁴⁵ Earlier California cases had been vacated and remanded, without reaching the federal constitutional issue, where the state court opinion was unclear as to whether it was based on federal or state constitutional law. *Mental Hygiene Dept. v. Kirchner*, 380 U.S. 194, 196–97 (1965); *California v. Krivda*, 409 U.S. 33, 35 (1972).

the *Michigan v. Long* decision⁴⁶ — been sort of resolved in a way that’s a little easier to apply than it was in the earlier years.

I want to move on, to the next thing that happened with respect to this *People v. Anderson* decision. It was overruled by a constitutional

⁴⁶ In 1983 the United States Supreme Court resolved the procedural approach to the adequate and independent state ground doctrine in *Michigan v. Long*, 463 U.S. 1032 (1983):

- (1) “If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.”

463 U.S. 1032, 1041 (1983).

- (2) “These are not cases in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather, they are cases in which a state court has upheld a citizen’s assertion of a right, finding the citizen to be protected under both federal and state law. The complaining party is an officer of the state itself, who asks us to rule that the state court interpreted federal rights too broadly and ‘overprotected’ the citizen.

Such cases should not be of inherent concern to this Court.”

463 U.S. 1032, 1067–68 (1983) (Stevens, J., dissenting).

- (3) The impact of *Michigan v. Long*.
 - (a) A survey of over 500 decisions, from all 50 states, between the 1983 *Michigan v. Long* decision and the beginning of 1988, concluded that “few states have adopted a consistent, concise way of communicating the bases for their constitutional decisions.” Felicia A. Rosenfield, *Fulfilling the Goals of Michigan v. Long: The State Court Reaction*, 56 *FORDHAM L. REV.* 1041, 1068 (1988). For a similar conclusion many years later, see Mathew G. Simon, Note, *Revisiting Michigan v. Long After Twenty Years*, 66 *ALB. L. REV.* 969, 970 (2003).
 - (b) In *Arizona v. Evans*, 514 U.S. 1, 24 (1995), Justice Ginsburg dissented and joined Justice Stevens’ criticism of the *Michigan v. Long* approach:

The *Long* presumption, as I see it, impedes the States’ ability to serve as laboratories for testing solutions to novel legal problems. I would apply the opposite presumption and assume that Arizona’s Supreme Court has ruled for its own State and people, under its own constitutional recognition of individual security against unwarranted state intrusion.

Justice O’Conner explained her *Michigan v. Long* approach in Justice Sandra Day O’Conner, *Our Judicial Federalism*, 35 *CASE WEST. RES. L. REV.* 1, 5–9 (1984).

amendment.⁴⁷ I think everybody knows that. You can't do that in federal constitutional law, realistically — theoretically, you could. In state constitutional law, you can do that. This was the first example in California, in 1972, within nine months of the decision. That's been followed by a lot of states out there. You get these decisions by a state supreme court interpreting the state constitution above the national minimum — majority rule, that's not the way we think of constitutional rights in this country, but it is how state constitutional rights work. You've had a lot of amendments — some more in California, as well — and in other states doing this, so it's an important feature of state constitutional law that we've learned from California.⁴⁸

California began the school finance revolution — United States Supreme Court, hands-off — 1973, a Texas case, California hands-on, followed by New Jersey and a number of other states.⁴⁹ One of the most important ar-

⁴⁷ In 1972 the California voters approved an amendment “overruling” *People v. Anderson*. CAL. CONST. art. I, § 27. JOSEPH R. GRODIN, CALVIN R. MASSEY, AND RICHARD B. CUNNINGHAM, *THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE* 60–61 (1993).

⁴⁸ In 1974 the California constitution was amended to add article I § 24: “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” Grodin, *et al.*, *supra*, at 59.

The next year the California Supreme Court observed: “Of course this declaration of constitutional independence did not originate at that recent election; indeed, the voters were told the provision was a mere reaffirmation of existing law.” *People v. Brisendine*, 13 Cal. 3d 528 (1975). *See also* *People v. Norman*, 14 Cal. 3d 929 (1975); Robin B. Johansen, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297, 312 (1977).

A 1978 attempt in Florida to adopt a similar constitutional provision failed with the rejection of the entire package of proposals by the 1977–1978 Constitution Revision Commission. Patricia Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U.L. REV. 610, 612 (1978) (“The purpose of this beguilingly simple proposal was to breathe new life into the declaration of rights of the Florida Constitution. It was to remind the bench and the bar that federal constitutional rights are only minimum guarantees. They do not exhaust the possibilities for human freedom.”).

Rhode Island copied California's provision in 1986. R.I. CONST. art. I, § 24.

⁴⁹ In 1971, the California Supreme Court initiated the state constitutional school finance litigation revolution. *Serrano v. Priest*, 5 Cal. 3d 584 (1971) (Serrano I); *Serrano v. Priest*, 18 Cal. 3d 728 (1976) (Serrano II). Kenneth L. Karst, *Serrano v. Priest: A State Court's Responsibilities and Opportunities in the Development of Federal Constitutional Law*, 60 CAL. L. REV. 720, 743–48 (1972).

eas of state constitutional litigation — are you close to getting on your feet, Justice Lui? Okay, I want to just — I didn't want to, but I will conclude with this: The *People v. Wheeler* case, that Justice Werdegar mentioned, illustrates another issue about the experimental laboratories. Actually, that case, as progressive as it was,⁵⁰ and as important as it was to other states,⁵¹ it actually inhibited the United States Supreme Court from reaching this.⁵² In my out-

⁵⁰ In 1978 the California Supreme Court banned the use of racially-motivated peremptory challenges. *People v. Wheeler*, 22 Cal. 3d 258 (1978).

⁵¹ Wheeler was followed the next year in *Massachusetts. Commonwealth v. Soares*, 387 N.E. 2d 499 (Mass. 1979): "We are especially aided in this endeavor by the California Supreme Court's recent decision in *People v. Wheeler* . . . , which has broken much of the ground for us." *Id.*, at 510n.12.

⁵² United States Supreme Court continued to defer to experiments in laboratories of the states. *Guillard v. Mississippi*, 464 U.S. 867 (1983):

For the third time this year, this Court has refused to review a case in which an all-white jury has sentenced a Negro defendant to death after the prosecution used peremptory challenges to remove all Negroes from the jury

I write today to address those of my colleagues who agree with me that the use of peremptory challenges in these cases presents important constitutional questions, but believe that this Court should postpone consideration of the issue until more State Supreme Courts and federal circuits have experimented with substantive and procedural solutions to the problem

When Justice Brandeis originally analogized the States to laboratories in need of freedom to experiment, he was dissenting from a decision by the Court applying a now-discredited interpretation of the Due Process Clause to strike down an Oklahoma statute regulating the sale and distribution of ice. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–311 (1932). As Justice Brandeis recognized, an overly protective view of substantive due process unnecessarily stifles public welfare legislation at the state level. Since then, however, the power of the States-as-laboratories metaphor has propelled Justice Brandeis' concept far beyond the sphere of social and economic regulation. Now we find the metaphor employed to justify this Court's abstention from reaching an important issue involving the rights of individual defendants under the Federal Constitution.

Even though *Swain v. Alabama* has been roundly and regularly criticized by commentators, see sources cited in *McCray v. New York*, *supra*, at 964–965, n. 1 (MARSHALL, J., dissenting), in the 18 years since *Swain* was decided only two State Supreme Courts have interpreted their State Constitutions to provide criminal defendants greater protection against discriminatory use of peremptory challenges. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979).

line, I quote from Justice Marshall, dissenting, saying, you're experimenting with people's lives. The Supreme Court said, "Let's let the states work on this a little bit." Justice Marshall goes, "People are being executed," you know. And finally, in *Batson* the Supreme Court did follow the *Wheeler* decision.⁵³ I suppose I'll close by saying maybe the people at *Shepard's* should have another signal or — let me put it this way, it would be unusual to go to *Shepard's* and see a state supreme court decision and to look there and see a little "f" and the cite — this is a state court decision — is the United States Supreme Court. Maybe some other states other than California, and I hope we can say it in New Jersey, but I can't prove it yet. Thank you.

ELWOOD LUI: Professor Williams, thank you.

Our next speaker is Professor Gerald Uelmen, who is professor of law at Santa Clara University School of Law, where he served as dean from 1986 to 1994. He is also currently the executive director of the California Commission on the Fair Administration of Justice, established by the California Legislature to examine wrongful convictions in California and to propose reforms to improve the fairness and accuracy of our criminal justice system. He is a past president of the California Academy of Appellate Lawyers and of California Attorneys for Criminal Justice. Since 1986, he has authored an annual review of the work of the California Supreme Court, published each year in the *California Lawyer* magazine, which Justice Werdegar may comment about if she likes.

KATHRYN WERDEGAR: About his review? I wouldn't say a word. [general laughter]

ELWOOD LUI: He's also been an active practitioner in criminal cases, having served as counsel to Daniel Ellsberg, Christian Brando, and O. J. Simpson. This year, Professor Uelmen was named one of the top 100 lawyers in California by the *Daily Journal*. Professor Uelmen.

Contrary to my colleagues' assumptions, these two recent decisions by the California and Massachusetts high courts have not inspired other State Supreme Courts to deviate from the rule of Swain and experiment with new remedies for peremptory challenge misuse.

Id., at 867–70 (Marshall, J., dissenting).

⁵³ In 1986, the United States Supreme Court finally banned racially motivated peremptory challenges, *Batson v. Kentucky*, 476 U.S. 79 (1986).

GERALD UELMEN: Thank you. I'm really honored to join this distinguished panel, but I'm especially pleased to have an opportunity to congratulate Jake Dear and Ed Jessen on just a marvelous piece of research. This paper is fascinating. It breaks new ground. It will be widely cited. You know, counting how many [times] we've been cited is a favored pastime of law professors. We don't have Emmys or Oscars, but writing one of the most cited law reviews is a mark of great distinction for law professors. In an effort to confound this competition, I conspired with the editors of the *Brigham Young University Law Review* to publish an article in their symposium on legal humor, which we entitled, "*Id.*" The title of the article was I-D-period, in italics, and then we put in a footnote that this article can be cited with no further reference to the author or the law review, so I can now claim that I am the author of the most cited law review article in history. At last count, my article has been cited sixteen million times. [general laughter]



Despite its limitations, counting up citations may be the only objective measure that we have to count up the influence of a particular court. This may be the only game in town. Back in 1936, one of the pioneer researchers of judicial influence, Professor Rodney Mott, proposed five measures of the influence of state supreme courts. He said, well, we should look at the esteem in which these courts are held by law professors; we should look at how many of their opinions are used in law school casebooks; we should count up citations by other state courts; and we should look at the extent to which the decisions are cited or upheld by the United States Supreme Court. He also had a factor he called "prestige ratings" which I won't go into.

But law professors represent a pool of abysmal ignorance about state high courts. Everyone studies and salivates over every nuance of United States Supreme Court decisions, but scholars like Bob Williams are a rather rare breed in the academy. I think if we were to survey law professors as to the degree of esteem in which they hold any particular state supreme court, we would get a pretty uninformed set of opinions.

Casebooks: If that were the measure, we would have to say that the most influential decision ever written was *Pennoyer v. Neff*,⁵⁴ [laughter] and just as often as not, casebook editors use bad cases to illustrate their points. Just last week, my poor Evidence students were all required to read a case in George Fisher's evidence casebook of an old decision from the Supreme Court of Pennsylvania in which the Court explained that the past sexual conduct of women was relevant in assessing their credibility but not the past sexual conduct of men because, the opinion explained, many very distinguished men had rather adventurous sex lives.

Now, when we look at what happens in the U.S. Supreme Court, I find very rarely does the Supreme Court ever even cite the decision of a state court. In my recent assessment of the ten years of the George Court for *California Lawyer* magazine, I took a look at how the George Court has fared in the U.S. Supreme Court, and I was kind of surprised. The most remarkable aspect of U.S. Supreme Court review of state supreme court decisions is how little there is. During the Warren Court era, the U.S. Supreme Court reviewed an average of twenty-nine state supreme court decisions each term. Under the Rehnquist Court, the average fell to fifteen per term, so U.S. Supreme Court scrutiny of state supreme courts has declined across the board, and during the last ten years the high court has directly reviewed only two judgments of the California Supreme Court. One was affirmed, one was reversed. More often, California Supreme Court precedents are scrutinized by the U.S. Supreme Court in the course of reviewing judgments of lower courts or of federal circuit court rulings. Lots of California death penalty judgments get reviewed, but usually only after [Ninth Circuit Court Judge] Steve Reinhardt has granted a federal writ of habeas corpus. [laughter] And then, of course, the judgment of the state court is reviewed with a greatly enhanced level of deference.

Next week, the United States Supreme Court is reviewing the California Supreme Court decision in *People v. Black*,⁵⁵ but they're not reviewing *People v. Black*. The decision that will, I think, be reversed will be the unpublished decision of the California Court of Appeal in *U.S.*

⁵⁴ 95 U.S. 714 (1878).

⁵⁵ 35 Cal. 4th 1238 (2005).

v. Cunningham,⁵⁶ which followed *People v. Black*, so it wouldn't even be recorded as a reversal of *Black*. Incidentally, I looked at whether *Black*, which I labeled as one of the two worst decisions of the California Supreme Court in the last ten years, would qualify as a decision that has been followed by the high courts of other states, and lo and behold I discovered that the supreme courts in New Mexico and Hawaii actually followed *Black*, which suggests that the influence of the California Supreme Court may occasionally be a perverse influence, leading other courts astray. *Black*, incidentally, was criticized by six other state supreme courts, and it might be interesting to count up all of the state supreme court decisions that have been questioned or criticized by other state supreme courts. I would not be surprised to find that, when you count it all up, the same states that have the most decisions followed by other courts are precisely the same states that have the most decisions questioned or criticized by other courts. In any event, I think how a court fares in the U.S. Supreme Court today would be a very skewed measure of any court's influence, so like I say, I think this is probably the only game in town.

I was struck by how many of the followed decisions of the California Supreme Court are tort decisions and how few of them are decisions in my field, criminal law and procedure. If you look at the list of blockbusters, only five of the twenty-four cases listed there are criminal cases, even though one-half of the Court's docket is made up of criminal cases and has been for quite a substantial period of time. Now, why is that? In my field, I think the most influential state supreme courts are New Jersey, New York, Wisconsin — states that have been at the forefront of the movement that Bob described of using independent state grounds in interpreting the extent of constitutional liberties. And the reason that California is no longer in the forefront of that movement is because, 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 (1982). With the enactment of Proposition 8, sixty California Supreme Court precedents bit the dust, and ever since we've had to march

⁵⁶ See *Cunningham v. California*, 549 U.S. 270 (2007).

lockstep with the United States Supreme Court, with no option to reject their interpretation of constitutional protections in the context of exclusionary rules. As the Supreme Court of the United States has demonstrated its hostility to exclusionary rules, manifested in cases like *United States v. Leon*⁵⁷ and more recently in *Hudson v. Michigan*,⁵⁸ many of the most influential state supreme courts have refused to go along and relied on their state constitution, but that is not an option available to us or to our Supreme Court in California.

I think the other reason that we see less influence of the California Supreme Court in the criminal arena is the dominance of the death penalty docket as a proportion of the California Supreme Court's workload. Death penalty decisions are not where it's at in influencing other courts. You won't find any death judgments, I think, among the cases that are followed by other courts, and when you have to devote at least one-fourth of your docket to a backlog of over three hundred death penalty cases, it has a dramatic impact, I think, on how influential your court can be.

My final point: 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 of the California Supreme Court and the professionalism and competence of its staff — which I think we *should* celebrate. Well, one factor that is frequently overlooked is the competence of the appellate bar of the state of California. I can attest beyond question that the appellate bar that practices in the state of California is the best in the country, and one reason that our Supreme Court gets an incredible menu of issues to decide is because we have a deep pool of expertise and excellent lawyers who are raising and litigating those issues and presenting them to the Court. So the excellence of the California appellate courts and the excellence of its appellate bar have a synergistic effect. We do feed on each other. We depend on each other. We don't always love each other, but we do need each other. Thank you.

ELWOOD LUI: Thank you, Professor Uelmen.

⁵⁷ 468 U.S. 897 (1984).

⁵⁸ 547 U.S. 586 (2006).

[Editor's note: the following remarks were prepared in advance by Professor Scheiber and were distributed at the event but not published until now.]

WRITTEN REMARKS BY HARRY N. SCHEIBER (Stefan A. Riesenfeld Professor of Law and History, UC Berkeley School of Law):

How Does Law Evolve? — The Many Dimensions of Legal Innovation in California History

In the debates at the 1879 California state constitutional convention, any number of delegates made a great point of saying that California ought to be original in writing its basic law, instead of merely copying provisions from other states' constitutions. These delegates declared — and many of them may well have actually believed — that they were shaping a document that would permit California to be a leader and not merely a follower in shaping American law. The Golden State, they asserted, ought to take a unique place as a model for the other states of the Union.



A Sacramento *Bee* writer expressed this same idea when the delegates were convening: He wrote that California was “the natural leader of the other States in every reform that proposes to solve the problems of social, commercial and political life” The convention’s duty was “to set the world an example, and show other States how they can emerge from the difficulties which time, indifference, and corruption have thrown around them”!⁵⁹

One hastens to add that these instances of enthusiasm for leadership in law reform in 1879 did not include a faith that the judiciary would play a major part in this process of being a model for other states of the Union. On the contrary, there was considerable sentiment at the time for focusing on California’s high court as itself a prime target of reform efforts because of the influence that the railroads, giant land and cattle companies, and other special interests had allegedly exercised on the operation of the court — the same kind of influence as that with which the special interests had so notoriously corrupted lawmaking in the state legislature. This

⁵⁹ *California Leadership*, BEE (Sacramento), May 17, 1878.

is a consummate irony of the 1879 Constitution-makers' view of California's Supreme Court, however. For as has been made evident in the earlier papers in this panel session, the California Supreme Court of the late twentieth century, from the Gibson Court to the present day, has had great influence nationally because of the unusual number and type of its decisions that have been cited, and, more importantly, the great number "followed" (that is, adopted) by the highest courts of appeal in other states.

I am certain that the convention delegates who gathered at Sacramento in 1878–79 would have been astounded by this judicial record. However that may be, the modern California high court for several decades after 1940 seized and has held a position of leadership in the doctrinal sphere for the reform and advancement of both common law and state constitutional law in the United States. At any time from the 1940s to very recent years, the record of the California Supreme Court could be cited with confidence as the case *par excellence* for illustrating how the "laboratories" vision of Justices Holmes and Brandeis actually worked — a vision of the states as the "laboratories of democracy," in which a single state's laws, expressing the citizenry's desire for social and economic innovation could be tried out on an experimental basis, providing a lesson or example from which other states could learn.

The great journalist and social critic Carey McWilliams once termed California "the great exception," asserting that the geographic conditions, cultural mix, economic structure, and social milieu of the state made it authentically unique, even in a nation rich in diversity and contrasts — but unique also because changes in political and cultural ideas were often coming to the surface well in advance of similar developments elsewhere in America. McWilliams wrote prior to the time when the California Supreme Court hit full stride as an innovating judicial body with national influence; but when the Court did emerge in that role, it gave further meaning to McWilliams's term "the great exception": for the justices of this Court broke new ground on multiple fronts in both the common law and constitutional law during the era of hectic growth and change in California society that began with World War II and has continued to our own day.

The earlier papers today, which report some truly impressive new research in the sources to provide new insights and evidence on the issue, give substance to the view long held by legal scholars and historians: the

view that the California high court's decisions have been cited and followed since the 1940s to a much greater extent than the decisions of any other state court. In the law, then, as in so many other spheres of social life and political thought and action, California has an established position as a bellwether for the nation.

(A caveat: I resist the temptation to be churlish by insisting too forcefully that raw numbers are only one way of assessing influence, even in the narrow sense of influence measured by decision citations: In fact, because Washington and Arizona are states that have been of much smaller population than California's, one could argue that the supreme courts of Washington and Arizona had *relatively* greater influence than the California court when adjusted by a per capita standard! This, it must be admitted, is not only churlish but only one of many ways, ranging from the playful to the ingenious, by which one can manipulate and interpret the statistics of court citation and "following." To their great credit, the authors whose work was presented earlier in this panel take great care to indicate the very considerable number of considerations that have to be taken into account, and the most salient alternative interpretations to their own that are "on the table" in the literature of court studies, before coming to firm conclusions about the degrees and types of "influence" that case data can be said to represent.)

The influence thus exerted by the California Supreme Court is routinely associated with what may be termed the "liberal" position of the 1940s–90s era — prior to the time when by the mysterious, and one may say poisonous, chemistry of media-driven and language-manipulated politics, the term "liberal" was transformed into a generalized put-down or smear word. The California high court in the post-1940 period for which it is best remembered (and documented) for its innovations and influence in other states was "liberal" in the sense that its shifting majorities were in a broad sense and a straightforward way favorable to the validation of state and local governments' regulatory powers in the economic sphere; they were receptive to the reappraisal of how what the ideal of "equal protection of the laws" should mean in its application in such areas of the law as public education or marriage law or criminal process; and they were concerned to bring the constitutional standards of personal liberty and freedom into

line with changing (and as they saw it, more enlightened) standards with regard to fundamental and inalienable rights.

The decisions of the Court in this “liberal” era are remembered and by many commentators celebrated as the product of a judicial “Golden Age.” For the Court’s critics, of course, these decisions and the Court’s record taken as a whole in the “liberal” period are the object of sometimes angry criticism — criticism that became especially intense once the Court had ventured into the treacherous territory of the death penalty, a volatile political issue on its own terms but one that also served as a proxy for the more general posture of the Court with regard to environmental regulation, government oversight of business practices, real estate development, and other “gut” economic issues of the day.

In time, historians may come around to the view that the Court’s “liberal” posture on race relations, business regulation, environmental protection, and the like was not a questionable departure from inherited judicial norms but instead should be regarded more as a manifestation of the spirit of the country with regard to law in the days of the FDR, Truman, Eisenhower, Kennedy, and Johnson presidencies: that is to say, the dominant political ethos at a time when — with the fresh memory of a world war fought in the name of democracy and freedom, and with the Cold War confrontation as the immediate backdrop, at least in states outside the hard-line racially segregated South — a broad commitment to human rights had merged very dramatically in American law with the much narrower inherited concepts of liberty and equality.

If there is ample time, our panel and audience might profitably explore more fully this question of how a court becomes in this way such a beacon light for the reform of law — an instrument for legal innovation that creates a more capacious view in constitutional doctrine for the ideals of equal protection and individual freedoms.

To be sure, in this instance the Court’s record also resulted from the initiatives taken by strong-minded individual justices who had a clear vision of judicial obligations that led them to act as they did. It is a complicated interpretive issue, but one that is worth our pondering in the context so vividly suggested by the authors of today’s earlier presentations. For example, I do not see how anyone can make good sense of Traynor’s position on the law and achievements in jurisprudence if one forgets that he once

wrote that many of the inherited doctrines of the common law needed to go out for “cleaning and pressing” — and that many of these doctrines probably would disintegrate immediately if subjected to the cleaning! As is so tellingly recounted in Justice Grodin’s book reflecting on his experience in the law and on the Court,⁶⁰ and in the reflections of Justices Sullivan, Newman, and Richardson that have been published in the California Supreme Court Historical Society *Yearbook* issues and the law journals, the posture and receptivity to reforms of law on their courts was in intimate ways related to their personal experiences in legal practice, politics, public office, and view of general ethical obligations — all in tension with taught and long-revered precepts that militated against any easy process of change. The phrase that stands out for me as a concise expression of this vital aspect of judging is a quotation of how one justice in conference on an important death penalty case explained what finally conditioned his position on the criminal process as it had treated a defendant in the case in question: “I just don’t want to live in that kind of society.”

I would like to offer now some very brief observations with regard to the record of California “as a laboratory of legal innovation” that I believe need to be kept in mind when we appraise the meaning of that record.

My first point builds directly on what Professor Williams has already suggested — that the history of legal innovation by the California Supreme Court is only one aspect of the larger history that concerns us when we seek to appraise the state’s overall record in breaking new ground in law. That overall record includes the statute law generated by the California Legislature, after all, not only judicial doctrines. In many instances historically, the statutes have been at least as influential on policy in other states as our high court’s decisions have been with other states’ judiciaries. (A major case in point, from modern times, would be the way in which California has led in many vitals ways in environmental law and the structure of its administration at the state level, or led, or at least joined in leading, in divorce law.) But apart from the judicial and legislative records, there is also that dramatic additional lawmaking dimension in which California has been an active (and often hyperactive) leader since 1911 — the use of the

⁶⁰ JOSEPH R. GRODIN, *IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE* (1989).

popular ballot in initiatives, referenda, recall, and (let it be remembered) judicial retention.

Finally, there is the constitutional convention itself as an instrument of legal innovation. The delegates of 1878–79 whom I have mentioned, and no less those of the 1960s revision commission, each wrote new provisions that were of great moment for the governance of California itself but also were of importance insofar as they gave additional impetus to ideas already instituted by other states; and each expressed concepts that were new at least in their language or configuration. Standing out above the others was the provision in the state constitution as now in effect that reasserted the independent state grounds doctrine; for as we have been reminded so forcefully in this panel, this doctrine has had an enormous impact on the constitutional law of the state and also in reinforcing the concept's legitimacy in national constitutional law.

Let me offer now a few illustrations of how and why a full historical appraisal of “legal innovation” needs to embrace the evidence from what these other law-making institutions have done in the history of California law.

First, if one were to ask: “What has been the legal innovation in California that has had the greatest impact on law and policy in the United States more generally?,” I have no doubt that most of us in a gathering of professionals in the law would think of the innovations of California's supreme court in the storied “golden age” of doctrinal reforms, the main subject of our first paper today. I think it is quite safe to say that a different answer is likely to come forth from an audience drawn from the general citizenry of either California or the nation today: Their answer, I believe, would be: Proposition 13 of 1978. This proved to be the trigger for what spread quickly as the national “Tax Revolt” which itself undergirded and impelled the more general assault on active government — that is, the political movement against the “liberal” legal doctrines and legislative policies to which I referred earlier, itself merging with the religious Right and its campaigns in the “cultural wars.”

In a larger sense, the success of Jarvis and Gann with Proposition 13 and a series of later direct ballots have given California a governing structure in which the Legislature's latitude for discretionary policy and spending has been dramatically reduced in the face of both tax limits and mandatory spending fields. This result, as has been variously celebrated by its

champions and deplored by its critics, gave a boost in other states with the direct ballot, with the result that there has been a dramatic increase in volatility in American politics generally and more narrowly with regard to the outcomes of the direct ballot in the law — witness the impact, however one may view it as to its desirability, of Propositions 8 and 115, with their basic revisions in the criminal code by popular ballot, in the history of the judicial system and criminal process in California. Even a long-time scholarly champion of the initiative and referendum such as the eminent political scientist and expert on state government, Professor Emeritus Eugene Lee of UC Berkeley, has come around, in a poignant conversion, to the view that we now have begun to suffer from this volatility in what he terms “an excess of democracy.”

As we have said, the results of heightened reliance on the direct ballot have been mixed. Provisions for protection of individual privacy and similar changes through the popular ballot, termed by some analysts as “rights expanding,” have been voted into state constitutions and their bills of rights — whereas other ballots have been “rights reducing,” most notably in California in the criminal justice reform ballots.

In another instance, a constitutional amendment initiative (Proposition 14) was passed by California voters that would have vested “absolute discretion” in any California property owner as to the sale, lease, or rental of his or her property — a precursor, as it were (albeit one drawn from the race-relations arena), of the “property rights” movement that has arisen so noisily in the economic and environmental arenas of today’s politics. Proposition 14, a striking instance of “legal innovation” originating in California was overturned in 1967 by the Supreme Court of the United States in its decision in *Reitman v. Mulkey*,⁶¹ — Chief Justice Warren joining with the majority in a decision declaring that the national constitution’s provisions for equal protection could not permit the voters of any state to engage in this type of “rights-reducing” activity through the ballot.

The very different outcome of federal appeals in the later cases involving a challenge to Prop 209 and its ban on affirmative action is an instructive counterpoint, illustrating further for us the complexity of the matter when we consider how federalism and judicial review have given room for

⁶¹ 387 U.S. 369.

— or, alternatively, derailed — home-grown efforts at legal innovation in California (or other states) — and as to where, on the overall historical balance sheet, one has to chalk up a “win” for either rights expansion or rights reduction.

Much depends, of course, on how one prioritizes rights — in Prop 14, it was property rights of individuals as defined to include the right to discriminate, that was “reduced”; in Prop 209, it was the question whether, in a similar dynamic, an overturning by popular ballot of state law with specific exception for recognition of federal requirements, was constitutional as written and administered. A vitally important enterprise in the prioritizing of rights had been engaged in by the federal courts under the framework given in the famous “Footnote 4” language that enshrined a special protected category for basic political rights. How this worked out in an independent state grounds context was vividly illustrated in the *Pruneyard* decision of the California high court,⁶² giving priority to speech as exercised by political advocates on the grounds of a privately owned shopping mall, when appealed to the Supreme Court — which upheld the California decision under our state constitution, at the same time not adopting the California rule for national law.

My final point relates to an earlier set of constitutional provisions as expressions of “legal innovation,” their place in the “rights enhancing” and “rights reducing” spectra, and their role in the evolving late nineteenth century drama of federal judicial review. I have reference here to a set of provisions adopted by the Constitutional Convention in the 1879 document and approved by the voters of the state — provisions that were explicitly designed to validate discrimination against the state’s Chinese residents and to resist or evade the commitments under federal treaties, the facial meaning of the Fourteenth Amendment, and established national policy. These provisions were struck down by the Ninth Circuit and the Supreme Court — the best remembered case being *Yick Wo v. Hopkins*,⁶³ overturning a San Francisco laundry regulation ordinance clearly aimed narrowly at the Chinese — in a series of Fourteenth Amendment decisions on equal protection, several of them at the hand of California’s own Justice Stephen Field.

⁶² *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979).

⁶³ 118 U.S. 356 (1886).

An ironic footnote to this unsavory history of innovation in the cause of discrimination is the fact that the 1879 delegates who argued for making state guarantees of rights independent of the national Constitution's Bill of Rights and other guarantees included a faction, among whom were some outspoken Confederate States veterans. Their real interest was in reasserting the general doctrine of "state rights" against the "liberal" movement toward expansion of rights that the post-Civil War Congress had taken up as a major cause in its larger Reconstruction policy. It was a classic case illustrating how "original intent" and the constitutional language resulting can establish a basis for rulings in future years by supreme court justices interpreting that language to warrant a course of jurisprudence very much different than what the original language had been intended to expedite and validate.

It was a further irony that the same national Supreme Court that overturned the anti-Chinese provisions and asserted protection of this minority group under terms of the Fourteenth Amendment was in those same years stripping the amendment of all its clear original meaning as a protection for African Americans. That process was given firm shape in the 1883 *Civil Rights Cases*,⁶⁴ on the road to *Plessy v. Ferguson*,⁶⁵ the notorious decision in 1896 that embedded the "separate but equal" doctrine into the U.S. Constitution and thus gave most of Jim Crow law and discrimination against Blacks in civil rights their constitutional protection for another eighty long years.

Such contradictions, complexities, ironies and some puzzlements are the inevitable result when one expands the definition of "legal innovation" to encompass the acts of legislatures, constitutional conventions, and the people themselves in popular constitutional making by ballot. The perspective that results is very different than occurs when one keeps the field of vision closely confined to a state's high court — in this case, our own California court, and mainly in its period of modern "liberally oriented" and very active law-making both in the common law and the constitutional field. The sources of legal innovation have varied historically, as one goes back to the 1878 period, as we have seen. The record would present even greater variety if we had

⁶⁴ 109 U.S. 3.

⁶⁵ 163 U.S. 537.

time here to consider, for example, the extraordinary creativity and active-style lawmaking by the California Supreme Court in the initial twenty years of Anglo-American rule under the 1849 Constitution in regard to mining claims, prioritizing of miners' versus agriculturists' property rights in torts and trespass, the public trust doctrine and pueblo rights, eminent domain, and criminal procedure.

It is, in sum, a record with many dimensions and a variety of outcomes. It has not been linear in its direction and thrust. It has been strikingly inconsistent over time in the results produced by the stream of state–federal legal confrontations in law, even in the history specifically of how independent state grounds doctrine originated and has been deployed.

The record of legal innovation, its permutations and variations, and its mixed effects both on California law internally and on relations with other states and with the national government, raises again the most interesting question of all, at least for us historians. This is the question of how, why, and in what ways in particular periods of its history, a state that has truly and accurately lived up to the “bellwether” and the “great exception” titles, has produced the kind of law — and innovations — that have come forward from its lawmaking and judicial bodies, not least the high court in the modern period to which most of our attention has been given in this session.

There is no simple answer. Rather than taking the posture of having a full and persuasive solution to that historical puzzle, I take courage in ending with that thought from an early occasion in my career: It happened at a panel on a subject which represents a narrow but interesting slice of today's topic. It was a panel at a UC Davis–sponsored meeting on the subject of legal innovation and agricultural development in the history of the Far West. I had the great honor of being introduced as speaker by Chief Justice, then retired, Roger Traynor, the legendary jurist whose career as judge is part of the warp and woof of all the talks on the modern Court we have heard today. In light of Chief Justice Traynor's reputation for oratory, which was no smaller than his reputation for erudition, all of us historians and others in that room were looking forward to what he would say in his assigned ten-minute slot as panel chair. We were certain he would provide an exposition offering important guidance on the approach we should be taking in analyzing the historical dynamics of legal change and innovation.

Roger Traynor did indeed give us his views — but to our amazement he took only about twenty seconds to do it. Let me quote his words. The papers in that panel, he said “confront questions much like the one I was once called upon to unriddle: *How does law evolve?*” He paused . . . then continued. “Well, how does a garden grow?” Another pause, . . . and then he ended with, “How does agriculture in the West evolve?” That was it. He sat down and graciously turned the podium over to us.

I have reflected on Traynor’s statement of the question many times over the years, and I am still at a loss to come up with a better description of what is involved when we give our own best efforts at “unriddling,” to use his word, of the processes of legal evolution, including the dynamics of legal innovation.

Traynor’s analogy with a garden’s growing reminded us that we have addressed ourselves today to a process with complex and multiple dimensions. Chemists, biologists and other scientists grapple constantly, of course, with this question, as to gardens in particular and the dynamics of their growth. The late Melvin Calvin, a UC Berkeley chemistry professor, won a Nobel Prize for successfully describing the process of photosynthesis. Professor Calvin thus gave the world a wonderful gift of knowledge; but it was never in doubt that his monumental work was about only a piece, albeit a key piece, of the larger process of plant life and growth, involving a vast and ramifying complexity of ecological relationships — physical, chemical, biological, atmospheric, and also human interventions: the gardener! — all of them essential components that must be considered in any explanation of how a garden grows.

The papers previously read in today’s session offer us an excellent example of how we can respond creatively to Traynor’s challenge — in this instance, to take on the complexity that inheres in legal change, as the first paper today does, by zeroing in with intensive analysis of statistics on a particular court and its judges, its decisions, and its influence. There were some answers and insights into one piece of the puzzle of how legal innovation has come forth and what its concrete impacts may have been.

I hope, however, that the comments and examples of legal change in California history that are offered in these remarks of mine will be a reminder of the need to go further and tackle the larger question of how, why, and with what results legal innovation has occurred — the question

that involves the more embracing “ecology” of the processes of change in legal development. That ecology involves the institutions, social forces, political ideas and events, individual personalities and intellects, and other factors at work in legal innovation; and they need to be integrated into the larger story that is so important an element in the history not only of California but of the nation in an age of rapid and sweeping socio-economic and cultural change.

ELWOOD LUI: Let me take the opportunity to ask a few questions and to perhaps question some of the theories that have been proposed between the panel members. Professor Williams, I’ll let you have the first shot in the interest of fairness and fair play. The score is — the baseball score; let’s change it to basketball — California, on Chart 2, 160-to-66. How do you compare — is this fact or fiction? Are there some influencing factors that make California — at least, statistically, you’re using independent sources, as they say, *Shepard’s* to demonstrate this — is it because we have more litigation in this state? What do you think about those? Do those statistics truly bear out the notions that we’ve been projecting in this seminar or not?

ROBERT F. WILLIAMS: Well, I think it’s hard to pinpoint *the* top court or *the* top legal system, but I think we can imagine the three or four or five at the top over the years, and I think it’s because of both objective factors and intangible factors. One of the crucial ones, I think, is what the judges on the high court think of themselves. What are they there to do? Are they there to push the Ten Commandments, if you get my drift? Are they there as a capstone of a long career as a trial and appellate judge where they followed precedent, and that’s what they intend to do, to close out their judicial career? Or, on the other hand, do they aspire to the highest court to really tackle hard issues, to really do something as judges? Actually, political scientists have done some interviewing about this (anonymously) of judges, and there’s really a difference in the judicial culture in different states. In the top states, California, New York (despite the numbers), Washington (it doesn’t surprise me when I see it, but it surprised me originally), New Jersey, the judges want to be a high court judge to actually accomplish something. In other states, high court judges are not there to do anything. So I think that’s one thing — what’s the culture? — and the culture in our state, in New Jersey, changed fifty years ago. I mentioned, we didn’t have a supreme court until fifty years

ago. It's been different over those fifty years ago. I think your state changed when you went to the appointed judiciary. So, some objective factors, not intangible factors, are appointed judiciary, the presence of an intermediate appeals court so that the supreme court can concentrate on major issues, staffing, preparation — we were talking at lunch — is the court prepared, have the justices discussed the matter before oral argument, before the draft opinions circulate or not. Do they have enough staffing? Something near and dear to my heart, does the personnel of the high court come sometimes from the academic bar? It sounds like in California, Traynor, Grodin, Werdegard, probably a lot that I'm missing, came out of the legal academy. You can imagine I support this greatly [laughter], although I think we have a better job than state high court judges. Appointed for a longer term. High-quality bar, as Gerry just said. High-quality law schools — what's going on in the legal system in the state — lots of high-quality legal literature in the state. In a state like California, you've got a lot of top law schools, a lot of top law reviews. A lot of it is about national stuff, but a lot of it is about California stuff. I think it's a mix of things, but I don't think it's fiction. I think the numbers say something very important. It's just harder to go behind and say, why do the numbers read that way? These are a couple of ideas that I have.

ELWOOD LUI: What about the differences in the political appointment process between New Jersey and California? Are your judges appointed by the governor, elected to the high court?

ROBERT F. WILLIAMS: In New Jersey, I think we have a system that's better than the federal system. Our judges are appointed by the governor for a seven-year probation period. They're appointed, and they have to be confirmed by the Senate. Then they have to be renominated and reconfirmed for a life appointment or until they're seventy. There's a funny story. Justice Brennan worked on drafting the judicial article of the New Jersey Constitution fifty years ago, and he put in the seventy-year-old retirement age. He came back at eighty-four and gave a speech and said he'd changed his mind. [laughter] You could see why I say it's better than the federal system. The only risk is that judges would not be reconfirmed because of political opposition to their decisions, and that's just not in the culture of New Jersey. It came close to Justice Robert Wilentz, who wrote the *Mount*

Laurel decisions⁶⁶ and some of those things, the early school finance decisions, but even he was nominated by a governor who said he hated the justice's decision — called him a Communist — he nominated him anyway, supported his confirmation, and he was confirmed. In California, do you have a mandatory retirement age? [responses: no] But you have — we could ask the person who's lived it — you have a retention election?

JOSEPH GRODIN: Yes, we do! [general laughter] As you were saying, it is not part of the culture of New Jersey to remove judges for political reasons. I was whispering to Gerry that it wasn't part of the culture of California, either, up until just about that time.

ELWOOD LUI: Professor Uelmen, I think you're right. As a member of the California Academy [of Appellate Lawyers], I have to agree with you that we have the finest appellate lawyers in the state. [laughter] What about our Court of Appeal? Our Court of Appeal was set up to be commissioners of the former Supreme Court until they organized the Court of Appeal [in 1903]. What about the general quality of our appellate courts, and have you seen any trends in the way the appellate court operation has helped to improve the decisions coming out of the Supreme Court, in your view?

EDWARD JESSEN: I think one of the most significant factors as to why California leads the pack has to do with the selection of the menu of the cases that the California Supreme Court is going to decide, and of course those cases working their way up through our intermediate Court of Appeal, which very often is the first place that a lot of these really cutting-edge issues are sorted out. When you try to compare a state like California with a state like New Jersey, we have a lot of advantages. We have advantages in terms of wealth, in terms of population, in terms of diversity of our population. These are the factors that the originator of this research, Caldeira, identified as what makes the most influential state court.⁶⁷ It's the issues that are percolating because of the nature of the population, the wealth of the population, the diversity of the population. And we've just got a lot

⁶⁶ *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*, 67 N.J. 151 (1975); *South Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*, 92 N.J. 158 (1983).

⁶⁷ Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83 (1983) (analyzing citation data from 1975).

percolating in California, so when our justices decide what cases are we going to grant a hearing on, the criteria they're applying are, what are the cutting edge issues, where do we need more guidance, how can we best spend the limited resource of our review? And I think by and large they do a pretty good job of picking the issues that are going to be the most significant, the most cutting-edge, and are going to be cited and followed by other state supreme courts.

ELWOOD LUI: Thank you, Ed. That provokes another question that I had in mind. In another time of my life, I served on the Court of Appeal, and we would go back annually at least one time to the New York University Appellate Institute. There, you get to meet and work with, and study with, for two weeks other appellate justices in the country. There was one seminar on writing opinions, and the overwhelming majority opinion from other states was that California had a screwy system; they had these intermediate appellate court judges writing lengthy opinions — twenty-five, thirty, forty pages — and why do they do that? I believe it was a Florida judge who said to me, “I just take two pages and say, ‘After review of the reasoned trial court decision, affirmed.’” And I’d say, “Well, how do you help people understand what you did?” And on another occasion, they would say to me, “Perhaps you put people to sleep with your thirty-page opinion, Lui.” But I’ve always benefited from reading decisions from colleagues, like Justice Grodin who wrote excellent opinions that were lengthy and well thought out. What is the California rule on reasoned opinions, and how did it help you as a Supreme Court Justice look at issues for determining cases for review and deciding cases, Justice Grodin?

JOSEPH GRODIN: Well, we do have a state constitutional provision — I don’t know whether it’s unique —

KATHRYN WERDEGAR: I’m told there’s only two states that have this. Jake, is that correct? [response: yes] Washington and California have a constitutional provision requiring that our cases be resolved by written decisions, with reasons stated. Now, I’m myself, surprised to hear only two states have that requirement. So we couldn’t, for instance, go to a *per curiam*, as a way of sorting out conflicts in the law, saying, “That one disapproved, this one affirmed.” So, there you are.

JOSEPH GRODIN: That was the product of an amendment to the state constitution — I forget the year. Prior to the constitutional amendment which added the language to which Justice Werdegarr refers, it was not uncommon for the California Supreme Court to issue decisions which simply said “Affirmed” or “Reversed,” without any explanation at all. One of the most notorious cases was that involving the conviction of Abe Ruef, the mayor of San Francisco who served during the period of the (1906) earthquake and was indicted and found guilty on corruption charges. The conviction went up to the Supreme Court, and the Supreme Court, for reasons which were not stated but which appeared to many observers to be highly political, simply reversed. So we have this constitutional provision which requires opinions with reasons stated. That may have been an impetus for the courts to write reasoned decisions, but I don’t think it accounts for what I would characterize as a fairly scholarly analytical approach that is the tradition of the California Supreme Court. I think that has to be attributed more to the legal culture that Bob Williams talks about, and that is a practice I think you find stemming primarily from the 1940s and on, although that’s not to say there were not beautifully reasoned decisions before then. But I think it’s about that time that you found the California Supreme Court rendering decisions that were really designed to explain and persuade. I have to say I’ve been reading about the doubts that have been expressed about string theory — we thought perhaps we’d discovered the theory of everything — and now it appears that maybe we haven’t. The problem is that no one can think of a way of testing the theory. That is, no one can think of a way of demonstrating that the theory is false, and that is the very essence of the scientific process. And it occurs to me that the same is true here. To the extent that we have identified multiple reasons, all of which are quite plausible, for California being in the lead, we’ve reduced the possibility of isolating any of those factors and demonstrating it to be either true or false, which gives us an entirely free hand to talk about this.

I note that the paper Jake was talking about contains on pages twelve and thirteen some suggestions of possible explanations as to why California courts have been in the lead in these sorts of things, but I think if we’re talking about legal innovation more broadly than judicial innovation, if we’re talking also about innovative constitutional provisions, innovative initiative measures, innovative statutes, then the explanation has

to lie elsewhere. I'm not quite sure where it lies. I think diversity has a lot to do with it. California's diverse population, stemming from its very early days — if you've never been to Colton Hall, which is three blocks away from here and which was the site of the first 1849 Constitutional Convention, you should take the time to go down and visit it because on the second floor, where the Constitutional Convention took place, you will find spread out on the tables as if they're left there by the delegates going out for lunch, drafts of the Constitution that they were considering. And these were delegates that included relatively uneducated miners, highly educated people from Western colleges, Californios who didn't speak English, and they took the process of what they were doing very seriously. The same is true for the Constitution of 1879. I think that California has been a laboratory of experiment from the very beginning and that the explanations for that need to go beyond these more restricted or parochial considerations of why all of us are such great justices.

ELWOOD LUI: Professor Williams, do you have anything to add to that, and is there a similar type of diversity that you have in New Jersey that you can account for the preeminence of New Jersey? In any dimension, you see that New Jersey is up with California, throwing away the numbers — what do you account for the influence of New Jersey to the process of state court decisions?

ROBERT F. WILLIAMS: Well, remember I've only been there twenty-seven years. I don't think it has as diverse a population as California. Let me answer the question I want to answer rather than the question you asked. [laughter] It also is, I think, by contrast to California, a more moderate state, and this has an effect on judicial appointments by the way. Neither of the political parties has the extreme wings that I think you have out here in your political parties, and you probably have a couple other political parties we never heard of back East. You get a Republican governor, Christine Whitman, who's pro-choice, and she appoints a Republican chief justice, Deborah Poritz, who then strikes down abortion regulation statutes, and everybody goes, "Wait, these are Republicans; what is this?" And then you get a Democrat like Robert Wilentz, who's chief justice, who upholds the death penalty, and all this sort of stuff. And the same is true with the

Legislature. It has a few people on the wings of each party, but more or less it's pretty moderate on both sides.

JOSEPH GRODIN: Whereas we had the extremist rightwing Republican Earl Warren, who — [laughter]

ROBERT F. WILLIAMS: Right, right, famous, easy-to-predict fellow. You know, it's complicated because New Jersey has had a terrible record of corruption and all of that sort of thing, and most people think it's nothing but oil refineries that you have to drive through to get to New York. They don't know why we call it the Garden State. There is a reason for that where I live; it's a garden.

ELWOOD LUI: I didn't see the garden the last time I was there. [laughter]

ROBERT F. WILLIAMS: In our *judicial* culture, there is something to point to, and that's that this new judicial article — new in 1947, written partly by Justice Brennan and a guy called Arthur Vanderbilt who was at the time president of the American Judicature Society and dean of NYU Law School. They had a vision for the judiciary that was based on the United States Supreme Court, and they put in a highly centralized, very powerful state supreme court with maybe one of the most powerful chief justices in the country — I haven't double-checked all of your powers, Chief Justice George — but with a statewide appellate court, not districts, and gubernatorial appointments all the way down. This was actually intended to do exactly what it's done. If you could go back into the grave and talk to Vanderbilt or Brennan — they wouldn't have imagined the New Judicial Federalism [then], or any of this stuff — and if you said, "Did you imagine that you wanted to create a court that was a policy-making court?" — that would do what Gerry said, pick the cutting-edge topics of the day, and in the 1950s they were very different from now — they would say, "Yes, and that's what we said at the time." You can actually see them saying that. Ours is a much newer system. It was actually designed that way, and it operates that way.

ELWOOD LUI: Well, what's remarkable to me, without having the benefit of these excellent graphs by Jake Dear and Ed Jessen, I would have, and I would have ventured a lot of people would have, just put down other states in the order. People who grew up in the West have been influenced by the Eastern establishment — you know, the Eastern states are the intellectual



L-R: PROFESSORS ROBERT F. WILLIAMS AND GERALD F. UELMEN,
JUSTICES JOSEPH R. GRODIN AND KATHRYN M. WERDEGAR.

Photo: Howard Watkins

power — but you don't see their presence in these charts as high up as California or New Jersey. Why is that? Any notion why you don't see Massachusetts way up there, you don't see Connecticut way up there, New York isn't as high as you would think it would be?

JOSEPH GRODIN: You know, I think a little more attention has to be paid than we've paid so far this afternoon to the subject matter of this innovation and the areas within which the Court has been innovative. If you think about it, what are the areas that a state court *can* be innovative in, in the sense of having influence upon other states, if you take that connection between innovation and influence. It's not likely to be in the statutory arena because the language of statutes varies from state to state, and increasingly the business of courts has been statutory interpretation. It is primarily in the areas of common law and constitutional adjudication, and the time beginning roughly in the beginning of the 1960s through the '70s, that was a period of enormous innovation in the common law in the areas that Justice Werdegar mentioned. The torts area, the expansion of product liability, the expansion of responsibility as in the *Tarasoff* case, that imposed affirmative duties upon people rather than simply the duty to refrain from acting

negligently. In the area of contact law, the concept of adhesion which led to rules which became protective of consumers and consumer transactions. All of that was a revolution brewing, and it just so happened that California was pretty much in the lead of that revolution.

KATHRYN WERDEGAR: I would agree with that. Courts, unlike legislatures and people who circulate initiatives, have to wait until the right case comes to us. And so, picking up on what Justice Grodin was saying, because of our population — everybody's mentioned it — the diversity of our population, our generally progressive pioneer spirit, the size of numbers, the richness of our inventory, we often are able, or have to, for the first time look at some of these issue that later go across the country. I mentioned the gay marriage case; we're not the first court in the country to look at it, but one of the very early ones, and I don't think that's just an accident. I think it has to do with our population and the people who are wanting to bring these issues to us, so that was just picking up on what you were saying.

May I just say also, I do feel that the independence of the judiciary, which goes back to what Professor Williams was saying about the appointment process, the tenure, the confirmation process . . . I hadn't heard of this other system where you're on probation for seven years, and then it's for life or until you're seventy — as opposed to contested elections, which everyone in this room I'm sure knows is a disaster for the judicial branch. We were talking about Pennsylvania at lunch today, and I won't even scare you with the stories of that. But we are a retention election state, and although our governors' politics differ, there's a real tradition of appointing really solid people, not political people who have tried to work their way into the judiciary by playing politics. It's the tenure of the judiciary, the independence of the judiciary, the richness of our possible inventory, and also legal aid societies and public interest groups that we have here that just very much want to bring these cases to us. That's part of it.

ELWOOD LUI: Professor Williams —

ROBERT F. WILLIAMS: I just had a question; it's quick. Has there ever been a candidate for governor of California — I should know this, but I don't — who's run against the Court, the way President Nixon ran against the United States Supreme Court?

ELWOOD LUI: Gerry, you respond to that.

GERALD UELMEN: George Deukmejian made a point of purging our Supreme Court so that he could make a number of new appointments. I don't know of anyone else who was quite that overt.

ROBERT F. WILLIAMS: It's never happened in New Jersey. The populace doesn't get whipped up against the judges the way it happens with federal judges — not that they can do anything about it with federal judges, but in some of the other states — it's not part of our political culture to attack the court.⁶⁸

ELWOOD LUI: Gerry, did you have something else you want to add on that?

GERALD UELMEN: I have a little comparison I just did that really struck me. When you look at the top ten state supreme courts in terms of the extent to which their decisions are followed, Jake's data shows that seven of those ten states are west of the Mississippi. When you compare the data that Caldeira did in 1975, three of the ten states were west of the Mississippi. I think that reflects what's going on here in terms of where the fulcrum of innovation and cutting-edge issues percolating has shifted, and Western states are just likely to get the menu of cases that are going to be more cutting edge than the old, staid, dried-up Eastern states. [laughter]

⁶⁸ On the political and academic backlash against the New Judicial Federalism, see Robert F. Williams, *Third Stage*, *supra*, at 215–19; George Deukmejian and Clifford K. Thompson, Jr., *All Sail and No Anchor — Judicial Review Under the California Constitution*, 6 HAST. CONST. L.Q. 975 (1979):

The growing use of the doctrine of independent grounds, combined with a minimum of judicial restraint, threatens irreparable harm to our system of government. It emasculates the people's right to govern through the legislative process, and substitutes for legislation the judicial decree process. This process destroys the people's sense of certainty in relying on the decisions of the nation's highest court.

Id., at 1009–10.

In 1986 three California Supreme Court Justices were defeated by the electorate, largely based on criticism of expansive state constitutional rulings, including death penalty cases. See Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988); John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California*, 70 JUDICATURE 81 (1987); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987). See also JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 162–86 (1989).

ELWOOD LUI: Justice Werdegar, if I may ask you as delicately as I can, what happens on Wednesday morning? You meet in a room, and the chief has the junior judge close the door, does hell break out, or does Justice Moreno come with his list of blockbuster cases that he wants to author, what happens? [laughter]

KATHRYN WERDEGAR: Oh, yes, that's how it starts out, Justice Moreno — [laughter] well, we have coffee, and we used to have muffins, and then we read this South Beach Diet, so now we just have coffee. [laughter] It's true. This is one time you can count the seven members of the Court coming together — well, no, and after oral argument we do, as well — every Wednesday, except when we hear oral argument. We heard oral argument this week, so next week we'll have two weeks' worth of petitions, so I can look forward to going home to a list of maybe two hundred, four hundred, petitions for review that are ready to be heard. In any case, we have the petitions, and we have our staff's analysis, and we have our own thoughts that we've given to it as we prepare for conference.

I'll just tell you the procedure because I had to learn it the hard way — no one told *me* — but you sit down. The chief announces the case, and you take them in order, but he votes last; the most senior judge, now Justice Kennard, votes first — “grant” / “deny” — and Justice Baxter then votes, and I speak, and Justice Chin, and Justice Moreno, and Justice Corrigan, and then the chief. And I always love it when it's three-to-three by the time it gets to the chief [laughing], but it's not so often three-to-three; we usually are in accord, because we have certain guiding principles as to what cases we're going to grant review. We do not look — despite Justice Moreno's hypothetical list of blockbuster cases he wants to write on — we do not have a view to what is going to make my reputation if I get assigned this case, or whatever. It's very clear. We're guided by a rule and by common sense, which is, if there are conflicting Court of Appeal opinions, that means the courts and the litigants and the citizens need our guidance. And then, in another respect, if it's an initiative, the state needs our guidance, and we can't wait for the Courts of Appeal to percolate and think about the issue. So, if it's an issue of statewide concern, we will take it, and if there's a conflict, we will take it. Often, what we don't take is a case where we feel perhaps the losing litigant in the Court of Appeal didn't get perhaps what was coming her way, but we really can't correct for error, and, as you

know, every citizen in the state has, as of right, that intermediate Court of Appeal. It was asked in Santa Barbara, where we just had oral argument — wonderful experience in our outreach mode, and I'd outreach there again anytime; it was just beautiful — but we have students ask questions, and I think one of the questions had to do with, well, if it's a celebrity case, like if it's Britney Spears' divorce, are we, "Oh, yes, we'll grant"; no, we've had a divorce case pass through, probably more than one, where the money involved was tremendous, but we're just looking at the legal issue; is there something there that needs to be resolved? So that's how our Wednesday mornings go. It's funny, sometimes the bigger the pile of petitions — it just works out — the fewer grants; and you get this skinny little pile, and you grant five cases. It just all depends on whether the issues need to be resolved. And one further point: There may be an issue that we do think ultimately is going to have to be resolved, but to go back to my point, we can't reach out. We can only work with what's brought to us. There'll be a case that we'll say is not a good vehicle — the facts are bad, the procedure is bad — but if it's important we think amicus will come in. Sometimes there's some reference to the quality of the lawyering that we see, and we want the best to be brought to us, but I will say amicus can always come in. We get about seven to ten thousand petitions a year, and we grant about three or four percent of those, and we decide about 115 cases a year.

ELWOOD LUI: Thank you. What about the somewhat of a controversial issue, but I think it's being handled appropriately — in New Jersey, do you have a rule on depublication, and how does that impact court decisions?

ROBERT F. WILLIAMS: We don't have a rule on that. I heard you talking about it at lunch, and I've read about it. We don't have that, so I can't say much about it.

KATHRYN WERDEGAR: Well, you mean every appellate decision that is handed down is published?

ROBERT F. WILLIAMS: Oh. No, I don't mean that, but they're not published and then un-published. Is there such a thing as depublication, literally, I mean?

KATHRYN WERDEGAR: Yes, in this state, it's up to the Court of Appeal whether to publish or not publish its opinion, depending on whether they

think the issue — and sometimes, if they have published it, the Supreme Court has been known to depublish it. But I'd like to ask you, if I might, what happens to the Court of Appeal opinions, are they published or not published?

ROBERT F. WILLIAMS: In our state, there's what is called the Committee on Publication, and it's made up of judges. The judge who writes the opinion can submit it — even trial judge opinions are published. It's true out here, isn't it as well? Some? None at all? [response: none at all] In the *Atlantic 2nd*, you can find trial judge opinions in New Jersey, not very many, but some. The Appellate Division opinions are published, depending on the decision of this Committee on Opinions. Most of them are published. What happens if you depublish a case and it's online?

KATHRYN WERDEGAR: In the state of California, now that we do have online, and so forth, every opinion that's handed down by any appellate court is available. But if it's overruled by the Supreme Court, then it becomes uncitable. We soon will be having a report as to the citability of opinions in California. It's led to some discussion. You might not realize that if every opinion that every Court of Appeal handed down in the state of California every year [were published], there would be thousands of opinions, so that poses a problem for the attorneys and their resources, and for the judges, but we're working with how to achieve a balance, to have opinions published and citable that really say something newsworthy and noteworthy, about the law, and we're working with that. I don't think any jurisdiction in the country has the number of cases that we have that are decided, so we have a rather unique situation.

JOSEPH GRODIN: Can I pose a question to the panel? What's so good about innovation? We've been proceeding on the assumption that innovation is a good thing, and in many cases I would argue that it is, but is it good in itself? Do we say, well, a judge is a better judge if he or she writes an opinion which marks a new path in the law? If we're talking about getting followed by other states, if that's a good thing, then I suppose the answer is yes. But I don't know that it should be an attribute of a good judge that he looks toward being followed in other states. And we do have high regard, do we not, for judges who are cautious about the development of the law — Justice Harlan, for example, on the United States Supreme Court — so, just to be pesky, I thought I would raise that question. [laughter]

ELWOOD LUI: Did you want to answer that question, Gerry, or?

GERALD UELMEN: No, I have another question.

ELWOOD LUI: Let me just answer it by giving two comments. If you are the appellant, and the decision is innovative, you think it's good because that's your chance of being successful on appeal. And the other part of being innovative — it would seem to me, it should be totally irrelevant to the justices. 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 upon.

ROBERT F. WILLIAMS: The current terminology for innovative judging is "legislating from the bench," right?

ELWOOD LUI: Yes. Actually, I think we have time for one more question.

EDWARD W. JESSEN: My interest was piqued by a couple lines in Caldeira's study, which was the last published study of the influence of state supreme courts. He said, "The California Supreme Court has over time begun to rely less and less on the decisions of sister courts. As this court has grown in reputation, it has become more insular. Of the forty-nine other state supreme courts, California referred to New York most often." That struck me as counterintuitive. My sense is that I've seen *more* citations to sister courts in recent decisions of the California Supreme Court, and I wanted to ask Justice Werdegar, which other state court decisions do you find most influential?

KATHRYN WERDEGAR: Well, I personally would not be naming a particular state. We *would* look through research across the board. We wouldn't say, well, let's see what New Jersey did, or let's see what New York did. But once various answers come to the fore, if we had a need to go out of state, certainly — and this sort of brings full circle — the prestige of the court, the weight of its reasoning is what it's all about. If we're doing something brand-new, you will look to what others have done before you, just as others will look to us if you do something that's brand-new.

GERALD UELMEN: Were there any surprises for you in how other courts lined up?

KATHRYN WERDEGAR: No, actually, I have not myself before this paid attention to that. I think innovation has some value. I don't think any judge sets out to have a career being an innovator, but I think innovation,



ELWOOD LUI AND SELMA MOIDEL SMITH.

as Justice Lui so aptly said, it's not for us to say whether we're influential or innovative. We do the best we can with what we're given, but I think the concept of innovation has value because you're not ossified. You are responding to changing social-economic conditions, and you don't race to do it — that would be activist if you're reaching out trying to change the world — but you can't be blind and deaf to what's happening around or you'd be abdicating your responsibility. Every branch of government has to be responsive to what's happening out there.

JOSEPH GRODIN: That's an excellent answer to the question I posed.

ELWOOD LUI: Let me close by offering my thanks to Jake and Ed for these excellent statistics, and I would be remiss if I did not thank — and the panel echoes this as well — the work that Selma Smith did in conceiving and creating and managing this seminar has just been delightful. You've been excellent.

SPECIAL SECTION
TEN UNPUBLISHED SPEECHES
BY
JUSTICE
CARLOS R. MORENO

TEN UNPUBLISHED SPEECHES BY JUSTICE CARLOS R. MORENO

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

¹ Published by permission of Justice Carlos Moreno and by courtesy of the Department of Special Collections, Stanford University Libraries (M1855, Box 7, Justice Carlos Moreno speeches).



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.

* Partner, Alston & Bird, Los Angeles

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.

★ ★ ★

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 to 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>.

ORAL HISTORY

JUDGE
DOROTHY W. NELSON

NINTH CIRCUIT COURT OF APPEALS

Oral History of JUDGE DOROTHY W. NELSON

EDITOR'S NOTE

In 1988 — the year before the California Supreme Court Historical Society was founded — I had the privilege of conducting an oral history interview of Judge Dorothy W. Nelson of the Ninth Circuit Court of Appeals. This was done on behalf of the Ninth Judicial Circuit Historical Society at the request of their executive director, Chet Orloff. An excerpt pertaining specifically to Dorothy Nelson's experience of becoming a judge was published by the NJCHS at that time.¹ Now, by permission of Judge Nelson and also of the NJCHS, given by current Executive Director Robyn Lipsky, the complete interview appears below. As of 2019, Judge Nelson has continued to serve on the Ninth Circuit Court of Appeals, assuming senior status in 1995.²

— SELMA MOIDEL SMITH

¹ Dorothy W. Nelson, "Reflections on Becoming a Judge," *Western Legal History* 2, No. 1 (Winter/Spring 1989): 107–13.

² See also the interview by the ABA Women Trailblazers Oral History Project, which gives particular attention to aspects of her life as a woman law student, professor, dean, and judge, available at <https://abawtp.law.stanford.edu/exhibits/show/dorothy-w-nelson>.



JUDGE DOROTHY W. NELSON,
NINTH CIRCUIT COURT OF APPEALS

SMITH: This is an interview of Judge Dorothy W. Nelson of the United States Court of Appeals for the Ninth Circuit. Judge Nelson is also a past dean of the Law Center of the University of Southern California. The interview is being conducted on June 16 and 21, 1988, in Judge Nelson's chambers in Pasadena, California. The interviewer is Selma Moidel Smith, past president of the Women Lawyers Association of Los Angeles, on behalf of the Ninth Judicial Circuit Historical Society.

Dorothy Nelson, what were some of your recollections of your early childhood?

NELSON: I have wonderful recollections of my early childhood. I was born in San Pedro on September 30, 1928. I was the middle of three girls, my older sister two years older, my younger sister two years younger; and early in my life we moved to Los Angeles, California. My mother was a school teacher and a psychologist, and my father was a building contractor, but our home was always very active and very dynamic.

My parents were very involved in the community, particularly my mother. My father loved animals, so we grew up with cocker spaniels and a lovely garden that I remember especially — at all of our homes; and in Los Angeles I had one experience at the University Elementary School at UCLA because my father's sister was a teacher at Columbia University at the very progressive Lincoln School, and I can remember that experience at UCLA where we pretended to be Communists for four weeks and then we pretended to be Capitalists for four weeks and the school was investigated, and I, at that early age, was sort of conscious of the fact that there were certain people that didn't want other people to learn about certain things, particularly young children. But my Aunt Lou, as she was called, had a great influence on my life, as did my parents.

And then I went to Wilton Place Grammar School, where I was in the Opportunity Room from the second grade through the fifth grade; and I remember that teacher in particular, Miss Henry, who had a remarkable influence on my life in the sense of her valuing human values, encouraging everyone in the class to perform at the best of his or her ability. We were all allowed to work at our own speed, and when we finished with our work we were permitted to go and write poetry, paint pictures, make puppets; and so my experience in grammar school was just a marvelous one. In fact, in the fifth grade, when Miss Henry had to go have a tooth pulled,

I got to be teacher for the day; and I thought at that time — the principal popped in about every hour to see how we were all doing — I thought that teaching was really the greatest profession of all; and with my mother being a teacher and my aunt being a teacher, I sort of thought at that age that that's what I'd like to be. So I remember a family life where my mother, although she was a teacher, was always at home when we came home from school because she got out the same time we did, always having a house full of people of all backgrounds. I, later as a mother, look back upon that time and realize why everything was always at our house. My sisters and I sometimes would say, "Why can't the Scouts meet someplace else?" "Why can't the parties be someplace else?" because we were involved in clean-



DOROTHY W. NELSON AT THE AGE OF NINE (CENTER) WITH SISTERS NANCY (LEFT), AGE SEVEN, AND ELIZABETH, AGE ELEVEN, POSING WITH THEIR DOGS.

ing the yard or polishing the floor because we were having company. But then as a parent I realized that my parents always knew where we were, who we were with, were able to help along our environment, but always having us very much involved in things that were going around. So we were part of the Girl Reserves and the Girl Scouts and then the Mariner Scouts. My old-

er sister was particularly close to me in the early years because she sort of paved the way. She first became the Girl Reserve and took me on my first camping trip to Catalina Island, and then she went into Scouts and then I went into Scouts, and then she went into Mariner Scouts and I went into Mariner Scouts. I always admired her a lot. She was the academic of the family, the real reader.

I was more athletically inclined and indeed recall that before I was tested for the Opportunity Room my parents encouraged me athletically because they really felt I wasn't going to do too well academically; and, in fact, when I was given my first IQ test and they asked me my mother's maiden name and I said "Lorna Amy" because her maiden name *was* Lorna

Amy, where it later became Lorna Amy Wright. They said, “No, dear, we want her full maiden name.” I said, “Her name is Lorna Amy.” And the tester responded, “That’s all right,” and sent me home with a note that I wouldn’t cooperate on the IQ test. Someone else gave it to me, and I think they were a little surprised and put me in the Opportunity Room, which began my happy career at Wilton Place Grammar School.

SMITH: Well, it is interesting to hear that you were first so interested in the field of teaching as a career. I wonder, what was it that determined later for you that you were going into the law?

NELSON: Teaching was always an option with me, and with the encouragement of my family, my sisters and I became very active — really it was in high school — with the YMCA. It was during the time of World War II, a shortage of men, and they needed some women to be counselors, basically for underprivileged children in the Culver City area; and I had a Boys’ Club with eighteen little eight-year-olds and my husband-to-be had a Boys’ Club of eighteen little eight-year-old boys. His were the Cherokees and mine were the Gorillas. They got to choose their own names. And I found that many of them had problems in the community. They had problems with schools. They had problems with housing. They had problems with health care. And yet the answers, when I would go around and inquire about getting help for them, were, “The law says this, the judge said that,” and I came home and said to my mother, “Well, certainly social workers have no power in the community. I think maybe I ought to be a lawyer if I want to do something about these matters.” And so I had it sort of in the back of my mind.

And then when I was doing Girls’ Week at L.A. High School, I got to be a judge for a day. I remember Judge Georgia Bullock was then the Juvenile Court judge, and then on Girls’ Day at the big banquet that evening I gave the speech for the high school students. And a number of women lawyers invited me down to their chambers and encouraged me to think about going into the law. I liked the judge part of it. I didn’t think I would like the adversarial system at all.

And I became a general major when I first started college. I was still sort of uncertain about what I would do.

SMITH: Where did you go to college?

NELSON: I went to college at UCLA. I first went to Mt. Vernon Junior High School, where I also had a very happy time, but I was the only one from my grammar school who went to Mt. Vernon Junior High School. And when I went to the junior high school, I felt quite excluded because most who attended formed social clubs and all of these kinds of things, and it was my first sort of experience of being on the outside. And at that time, in talking it over with my parents, they said, “Whenever you feel on the outside, you ought to go out of your way to find someone else who is feeling similarly on the outside and form the friendships that you can with other people who feel as you do.” And it was a wonderful tool because I never felt on the outside again. But that junior high school experience — the seventh and the eighth grades — were very good for me. And when I finally reached the last semester of the eighth grade I felt very much one of the group, but not just of the “social group,” but I had formed friendships with a very broad and diverse range of people, which helped me in the next step going on to L.A. High School, where a lot of my grammar school friends then rejoined me. And yet I never felt that I wanted to be a member of any exclusive group. I always wanted to be a member of groups that included all people, having once felt that terrible feeling of being on the outside.

And then after L.A. High School I went to UCLA. I thought of going to Mills College, where I was offered a scholarship, but my father had gone to Caltech and felt that colleges that had only a single sex really missed a dimension and that he hadn’t really started living until about four or five years after he graduated from Caltech, which, when he started, was Throop Academy and later became Caltech. So he had a very strong preference toward all of us going to a coeducational school. And since my sister Elizabeth had already started at UCLA, again she sort of paved the way and I decided to go to UCLA.

SMITH: And then you went from UCLA to which law school?

NELSON: I went to the UCLA Law School. I was in the second class at the UCLA Law School, and part of my going to UCLA had to do with my husband-to-be. My husband-to-be I had met way back in the eleventh grade through the Culver–Palms YMCA. And he’d started out at Stanford, but the summer after he started at Stanford we both came back to a YMCA camp during the summer together. He was the camp director, and I was

the swimming director. And from that time on we went together. He transferred from Stanford down to UCLA, and we both graduated from UCLA.

He was going to go to medical school, and he went and took the medical school admission test, and then on a lark decided to take the law school admission test with me. The law school admission test at that time was the first four hours (it was an eight-hour test), and the first four hours were the same as the medical exam, and that was when I decided, "Never take an exam next to my husband again," because he flipped through it very quickly as I was trying to decipher the questions. Well, he got his acceptance at Stanford Medical School but he was also asked to deposit \$1,800 for his first microscope and for the first fees. At that point we had decided that we would probably be getting married, and so he changed his mind and decided to go to law school first and then let me put him through medical school. He looked for a law school where he could go during the day and also work part time. And although we both could have gone to UCLA, UCLA required you to attend six days a week — it followed the Harvard method — whereas Loyola Law School permitted you to go to school from 8:00 until 12:00; and Jim got a job with a law firm downtown and went to school from 8:00 until 12:00, and then worked for the firm from 1:00 until 6:00 every day. How he did it I'll never know.

We were going to get married after law school, but after we started, I was either spending time at his home or he at mine; and we did a very silly thing, now that I look back on it.

We got married December 27, 1950, just before my first finals at UCLA, just after his finals. And we got married out at St. Alban's at UCLA, which is another story in and of itself because I was an Episcopalian and Jim was a Presbyterian.

But growing up as a small child, I grew up in St. James' Episcopal Church and always asked questions about, "What about the Jews?" "What about the Hindus?" "What about the Buddhists?" "What about the Zoroastrians?" "Why are we the ones to be saved?" And I was told that I would understand when I grew up. But Jim was very active in the Beverly Vista Presbyterian Church. In fact, one of the first times I saw him was delivering the sermon to the children's classes at 9:30 at the Beverly Vista Presbyterian Church. When we decided to get married, he was so fond of his minister, Dr. Stewart, and I was so fond of mine, Dr. Miller, that we decided



**DOROTHY W. NELSON WITH HER
HUSBAND, JUDGE JAMES NELSON.**

to have them both marry us. And since we had such close ties to UCLA, we decided to get married on campus at St. Alban's. And the first thing that happened to us when we planned our wedding — a woman was in charge of weddings at St. Alban's, and when I introduced her to Dr. Stewart from the Beverly Vista Presbyterian Church, she said, "But, of course, Dr. Stewart cannot come behind

the altar rail." Whereupon Dr. Miller, my Episcopalian minister, said to Dr. Stewart, "Please join me behind the altar rail." And then she said, "Oh, but he can't read the marriage vows." Whereupon Dr. Stewart, the Presbyterian, said, "I'd be so pleased if you would read the marriage vows." And Jim and I thought to ourselves, "How silly this is! We both believe in God and yet there is this separation because of denomination." I tell you this because later on both of us changed our religious affiliations.

At any rate, I started at UCLA and then went on to UCLA Law School while Jim went to Loyola Law School. We got married the middle of my first year before my finals, and we went down to Mexico on our honeymoon for one week. And as I put my law books in the trunk, my husband said, "Oh, you must be kidding." I said, "But I have finals when I come home."

At any rate, it turned out to be a wonderful move on both our parts, although when I started to study for the bar exam, what I remembered from my first semester in law school on Contracts and Torts and Property, I must say, was very, very little; and I was very happy that I took a review course and finally learned what creation, interpretation, breach, and discharge, and damage were. But it was very nice to have that kind of emotional support in law school. I did not do well my first semester, and, indeed, when I got my first semester's grades, which were just practice exams (days of old Common Law Actions and Contracts), I walked down the hall to resign

from law school, thinking, “I’m going to take a year off and I probably will come back. Maybe I’ll go into teaching for a while.”

I was met in the hall by the wonderful Roscoe Pound, who had left the Harvard Law School to come out and be associated with the UCLA Law School for a few years, and I had taken his Common Law Actions exam. And as I walked down the hall, he held up my paper in Common Law Actions and said, “Brilliant, Mrs. Nelson, brilliant!” And it was the one grade that hadn’t come in. My Contracts grade was terrible, my Torts grade was terrible, my Property grade was terrible. I had been used to getting very good grades, and it was the first time in my life where I really felt depressed over grades.

But that one little statement in front of my classmates who knew my terrible grades, sort of caused me to pause and say, “Well, maybe I’ll go in and talk to Dean Pound.” He was not the real dean but was dean emeritus. He was given this title. And I sat down to talk to him about my exams. Now his exam had been a short answer exam, the sort of exams I had been used to in undergraduate school. The other exams he looked at for me, and he read a couple of my answers, and he said, “Mrs. Nelson, you didn’t answer the question. You told them everything you knew, but you didn’t answer the question.” And that was one of the most startling revelations to me in my first year of law school. It caused me to remain in law school, and once I caught on to the system, I was all right.

But later, when I became a law professor and then dean, I always had law faculty — or was one of the faculty — to counsel freshman students. And one of the first things I told them about exams, and I would always give my counselees practice exams because I don’t care how bright you are in law school if you don’t understand what they’re asking for, you can end up not doing as well as you would otherwise be able to do, and telling them to answer the question was a very important part of all of that.

SMITH: During your years at USC as a dean you must have found many influences that you were able to communicate as well to these freshmen — things you had learned in the course of your, shall I say, interesting . . .

NELSON: Struggle is a good word for it.

SMITH: Well, I’m afraid struggle is the word, isn’t it? But I think perhaps, don’t we find that that produces some of the best results?

NELSON: I really think so because when I first got my grades back from that first semester, I had, for the first time in my life, begun to suffer headaches, and I had never had headaches. I had always been extremely healthy all of my life. And when I went to see our family doctor he said, "You know what's causing those, don't you? It's emotional stress. You are bringing them on yourself." That's all he had to say because the next time I felt one of those headaches coming on, I immediately took a candy bar to get the blood flowing away from my head and would just sit and relax for about five minutes. I never had another headache. I've never had one in my entire life.

But when I became dean of the law school and would find students coming in saying, "I am really struggling. I'm beginning to get these stress headaches." I could say, "I know exactly what's happening. Let me give you my advice." And it was just as if everything had descended upon me.

SMITH: Well, will you describe how it was that you who attended UCLA both as an undergraduate and in law school, how you came to be a faculty member at the USC Law School?

NELSON: Well, this is an interesting story from some perspectives because that goes back to the famed Roscoe Pound once again because (I think he was about eighty-two years old) we became fast friends, and I took all of his courses. And in law school he had what he called his Tenth Legion. You all wanted to become members of his Tenth Legion. If you gave a good answer in class he might say, "Well, you're a member of my Tenth Legion," and that meant when he had very difficult questions he would say, "I am now going to turn to the Tenth Legion," and I was thrilled to become a member of his Tenth Legion.

There were only two women in my class, and when it came time to graduate we had no placement office; none of us knew where we were going to go for a job.

SMITH: What year was this?

NELSON: This was 1953. And Dean Pound called me into his office and said, "I have just recommended you for a research project at that other school." I said, "You mean USC?" And he said, "Yes. The American Bar Association is going to conduct a project to investigate the court system in the county, and they are looking for two research assistants, and they are offering a Master's degree to go with it. Now you may or may not be

interested in it, but I wanted you to know that I had recommended you for this position.”

I went over and was interviewed at USC by a wonderful professor, James Holbrook, a former president of the Illinois Bar Association who had come to USC to — he had always wanted to teach. He was a master on Evidence but always had an interest in Judicial Administration. And he interviewed me and told me later that he nearly didn’t hire me because when he asked why I was interested in the system as a system, I first told him that Roscoe Pound had said in one of his courses that it didn’t matter what the substantive law was, if the procedures were not good the whole system would fail. And so I had always been interested in improving the system, but I was primarily interested in the Juvenile Court because I saw what terrible things it had done to some of my former club members from the Gorillas. And he thought maybe I had a cause to fight; and he was a little uncertain that I was going to take this job, if I took it, to fight that cause. And I think he later realized that I was just expressing my strong feelings about the juvenile system.

Happily, I was selected, and although I was offered a job in downtown Los Angeles, and I went down to look at this very big law firm, one of the few firms at that time offering jobs to recent graduates who were women. I was told that I could spend six months in this office and I would be promoted to the next floor where I would spend six months in another office. And the firm offered me \$100 more a month, that is to say, \$350 a month, whereas USC offered me \$250 a month to start but said that I would have a scholarship for my Master’s degree and that I would be given credit for the book I was writing, toward the writing credit, and that I would end up then, I would get a \$50 raise the second year and another \$50 raise the third year but I’d end up with a Master’s degree. Having always had academics and teachers in my family, it appeared to be a good opportunity to get to learn more about the court system, to give me more time to decide what I really wanted to do. I was going to interview all the lawyers in the county. I was going to interview 200 of the most outstanding lawyers as well as the judges, and I thought this might be a wonderful learning experience to add to my law school experience. And I also was interested in ultimately starting a family, and I thought that this might be something that would work out very well.

SMITH: When did you begin to start your family?

NELSON: Not until 1958. But this is how I made the transfer over to USC, and I began to realize that there was this great rivalry. I had been student body vice president at UCLA and so had these very strong feelings about UCLA, a strong feeling of loyalty, and when I arrived at USC it was sort of “Well, it’s that other school, but I’m going to get some good experience here.” I found that the professional schools had very strong ties to each other. They were in competition with each other, but the faculty knew the faculty on both sides. And I realized that at least as far as the professional schools were concerned, I could give a few of my loyalties to USC. Although it was interesting, when I started teaching at USC and then became dean, one of the fringe benefits of becoming dean was the fifty-yard-line seats at the football games. And my children were young and we would bring them, and they became loyal Trojan fans. My son later ended up at the USC Law School. But when I was vice president of the student body at UCLA, I signed Johnny Wooden’s contract, the head basketball coach, and was never — and still to this day — have been unable to transfer my basketball loyalties from UCLA.

SMITH: How many children do you have?

NELSON: I have two children, a boy and a girl. My son is now twenty-nine years old and became a computer expert and graduated and went from USC undergraduate. He attended Occidental for two years and then transferred to USC and is a loyal Trojan fan. And his hope was to advise businesses on computer needs. And he started work first with Security Bank and found that boring, transferred to USC Computer Science Center, which he loved, and then decided to hold his nose and go to law school. He was sure he was not going to be interested in law school and ended up loving his experience at the USC Law School and became one of the editors of the *Major Tax Planning Journal* and *Computer Law Journal* and is currently studying for the bar exam.

My daughter is our housewife in the family. I should mention that my younger sister, Nancy, who had three little girls, died when her children were six, seven, and nine and my children were five and eight. And although the children remained with their father, they spent great periods of time with our family. So really, basically, my children grew up with Julie,

Janice, and Jill, and my daughter Lorna was the youngest. She was five at this time, and then little Jill was six, Janice was seven, my son Frank was eight, and Julie was nine. So there have been very close ties. The older four were always very, very strong academically. My youngest was not as interested in academic life, and I think sort of didn't want to compete with all of that although she was an honors graduate from her junior high school and did very well in high school. But she went on and took a course to become an animal care consultant, and, in fact, when she lived in San Diego (she is happily married), had a little card listing her as training at UCLA as an animal care consultant and adviser to five pet shops, and gives personal consultations on animals and indeed at the San Diego Zoo volunteered her time in the snake department and the elephant department. She now lives in Corona and is still an animal care consultant advising people mostly on the care of cats and dogs, although her brother always had snakes in the home. In fact, I was a good mother in the sense I wanted my children to explore all possibilities, so we did grow up with every animal known to man in our house. But her love for animals and particularly wounded animals She belongs to every society for the prevention of killing whales to save all endangered species, and she has continued with that interest.

My youngest niece is a graduate of UC Santa Cruz and is a business-woman. With her Gucci bags and her Beverly Hills apartment, we're not quite sure where she is going to end up.

Janice just received her Master's from Claremont Graduate School and is a specialist in early childhood education.

Julie just received her Master's from the Harvard School of International Education and is very interested in international education and has spent a year in Colombia, a year in Papua New Guinea teaching the new math. She has really been all over the world, in Oman, and is married to a young architect who has just graduated from the Harvard School of Architecture.

SMITH: Well, this has certainly provided you with a very busy and full life.

NELSON: It has and still does, I might add. It is a myth that children at age twenty-one leave the home and you see them occasionally. We find, just as one has left the home, another one comes back home to go to graduate school.

SMITH: Well, now back to your own very special career. When did you get the first intimations that you were being considered for a position on the federal bench?

NELSON: Well, here again it's a long story because when I was getting my Master's at USC, I was in a seminar called Judicial Administration. The professor of that seminar was called away to Europe. He actually was vice president of the university. Because I was working on my Master's program and knew all the judges and had become quite familiar with all the issues in judicial administration, I was asked to teach the last nine weeks of the course. The course had not been very interesting, to put it mildly, and because I had all the connections downtown I said, "We're going to leave the law school, and we're going go downtown and start at the drunk tank, and we're going to move through the criminal justice system. One day a week is going to be a field trip. Everyone is going to do a paper with a judge on how to improve the system, either in the juvenile courts, the traffic courts, the probate courts, whatever they are, and then we are going to do the same with the civil justice system."

Justice Tom Clark was a dear, dear man, and he agreed to come and meet with my seminar the very last day when we had the brunch, to talk about the administration of justice from the perspective of a Supreme Court judge. As you undoubtedly recall, Justice Clark was so responsible for many innovations — the National Center for State Courts, the Institute for Court Management, and a real inspiration. At the end of that course the students marched in and said to the dean, "Hire her, hire her!" and oddly enough, I was hired. I was the first woman member on the USC faculty but maintained my interest in judicial administration and always taught, no matter what else I taught — and I taught practically everything in the curriculum — I maintained my interest in judicial administration.

Since there were so few law faculty in the country with that interest and also so few women, as boards and advisory boards were established through the American Bar or through the National Center for State Courts or through the Federal Judicial Center, I became a member of many of those advisory boards and as a result came to know Griffin Bell quite well.

When President Carter and President Ford were running against each other for the presidency, I was at that point chairman of the Board of Directors of the American Judicature Society, my favorite society because it

admits laypersons and its prime purpose when it was organized in 1914 was to improve the selection of federal judges. And we asked President Carter and President Ford, "If elected, would you adopt a merit system for selecting federal judges?" Both replied that they would. Much to my surprise, shortly after President Carter was elected, his new attorney general, Griffin Bell, called me and said, "All right, Dorothy, bring your people to Washington, and let's figure out how we all are going to do this." All of the Southerners, Tom Clark and Griffin Bell, always would say, "How are we all going to accomplish this?" With some members of the American Judicature Society we met in Martha Mitchell's (the wife of the former attorney general) old dining room. And I remember it well because it had red flocked wallpaper, red velvet roses in the center of the table. It was still so soon in the Carter administration that none of this had been changed. And we plotted out a system for merit selection of federal judges during the Carter administration. And President Carter indicated that he wanted special emphasis on the selection of women and members of minority groups. Little did I think that a couple of years later I would be approached by Mr. Sam Williams, head of the twelfth (there were twelve committees around the country, and Sam Williams was head of the one that included our circuit) calling and saying they wanted to submit my name for consideration. Did I have any objection?

It took me a couple of weeks to think about this. I, being the first woman dean of a major accredited school, had because of this been asked to serve on many boards of directors, including the Federal Reserve Board, Farmers Insurance, the Southern California Edison, and the like. I did this for two reasons: (1) I learned a great deal by being on the boards, but the second reason was it was a good fundraising source for the law school; and my job as dean was to bring a good deal of money to the law school, and as a result of serving on those boards a good deal of money was brought to the law school. But in addition, I was permitted under the rules of the university to keep the money that I made by being a member of a board of directors, which is substantial. On every board on which you sit it's \$12,000 to \$15,000 to \$20,000 a year for meeting four to six times a year. So my income as dean had been heavily supplemented by my membership on those boards; and with various members of my family being in school and in graduate school, it meant taking a decrease in salary. But it was my dear

husband who said, “Look, you have been studying the judiciary from the outside all these years. Why don’t you go on the inside and see if all of your theories are correct?” So it was really with his encouragement that I went on the bench.

But the first intimation came with the phone call from Sam Williams, and then twenty-seven of us were proposed for investigation by the American Bar, by the FBI, by all of these various groups. And I received questionnaire upon questionnaire, upon questionnaire. Then it was narrowed down to seventeen finalists.

SMITH: What were the kinds of questions they were asking you?

NELSON: Well, some of them were basically improper. Some of them were, how would you vote on such and such an issue — abortion, desegregation, on issues of this kind. Other questions came from minority groups, “What have you done for minorities lately?” others from women’s groups, “How do you feel about the women’s movement?” Those from the FBI were just basically checkups, “Do you have an alcohol problem, do you have a drug problem? Tell us about your family. Have you ever been arrested?” From the American Bar Association more serious questions about my lack of a great deal of trial experience, and it was true I had some trial experience but I had been a law professor all of these years, and they wanted to know whether or not I felt that I could handle the job.

So there were just far-ranging questions. Most of the questionnaires I filled out. Some questions I refused to answer.

Then it was narrowed down to seventeen of us, and we were interviewed by a group of laypersons and lawyers, the persons selected on the basis of our recommended plan. But the first question I was asked during these interviews was, “You have been a law school dean, and after all, that just involves taking care of the students and the faculty. What makes you think you can be a federal judge?” Happily, on the interviewing committee was John Frank, who had been a law professor at Yale, who was now a Phoenix lawyer, who knew what law school deans had been through — everything from the Kent State Cambodia days to fundraising, to many, many constituencies such as your own students, your own faculty, the law school alumni, the law school supporters, the Board of Trustees, the universities, the community constituencies as well. And the law school

faculties had changed. We had moved from a regional school to a major national school dealing with publications, dealing with all of these kinds of things. So he gave a little lecture to the committee on what law school deans really did and that, if anything, it would be retirement to go on the federal bench. After his kind words of encouragement all the other questions appeared to be quite friendly, and the list was narrowed down to six of us, five from Southern California, only one from Northern California, who were recommended to the president.

The fact that five were recommended from Southern California infuriated the Northern Californians. It infuriated Senator Hayakawa. Because of this my nomination was held up for a period of seven months, along with the nominations of some of my other colleagues. And ultimately when I went back for my Senate hearing with the Senate Judiciary Committee, Senator Cranston said to me, "Now Dorothy, Senator Hayakawa will probably just introduce you very formally and then I will give you a proper introduction." Senator Hayakawa asked to meet with me before he was to introduce me. I was very familiar with his book called *The Meaning of Words* which my mother had used in her classrooms for years, and I started off on this note. We had the most wonderful conversation, and when he introduced me to the Senate Judiciary Committee it really was as if I were his daughter. He went through practically line by line of my résumé; and Senator Cranston, in great amazement, looked at me and then stood up and said, "I really have nothing to add to what my dear colleague, Senator Hayakawa, said." But the very first question I was asked by a Democratically dominated Senate Judiciary Committee — and I should add I have always been an Independent, I have never belonged to a political party — was "What have you done for minorities lately?" And I gave what I felt was an adequate answer. And then I was really before the committee for quite a long period of time, but I was followed by Terry Hatter, a black law professor who had headed the Western Center on Law and Poverty that we created at USC after the Watts riots. And when he sat down, he said to the Senate Judiciary Committee, "Before I answer your questions, I want to amplify Dean Nelson's answer to the question that was posed, 'And what has she done for minorities lately?'" And I treasure his words to this day. It was a sweet and wonderful thing for him to do, but he described our affirmative action programs at the USC Law School,

our Western Center on Law and Poverty, our National Senior Citizens Law Center, the Black Law Students Association, the kinds of things that we had tried to develop, and then went on and said, “Now you may ask me any questions you want of me.”

So the day that I was officially sworn in at USC, Terry Hatter had his swearing-in ceremony. I gave him his oath of office for the District Court and then my formal swearing-in was at USC, and then we had sort of a joint reception together, and it was a lovely way to start out my career as a federal judge.

SMITH: Do you remember the first case you had to decide in your new position?

NELSON: Actually I remember very few cases, but I happen to remember the first two cases because on the federal circuit we have a system whereby we sit on 18 points a day. We have staff attorneys who screen our cases; and if they are very, very difficult they are given a high ranking, say a 10. If they are very, very routine and easy, they’ll be given a ranking of a 3, and there is 3, 5, 7, and 10. I was first assigned to Portland, Oregon because, of course, in our circuit we sit from Anchorage to Seattle to Portland to Pasadena, Honolulu, and the like. And they gave me just two days of sitting instead of four. Now we have five days of sitting a month. And the first two days had one 10, one 5, and one 3. On both days I was assigned the 10, and I was a little aghast because here I was starting out, and they were both very complex cases.

SMITH: How did this happen? Was this by chance or was this to test the new member of the bench?

NELSON: Well, I’m not quite sure. They were both cases I felt very strongly about, and I have since learned in conferences afterwards, if you feel very strongly about a case, the other judges who may not feel as strongly are very happy to have you write the opinion. But I got sort of a bad start that day because I went into the courtroom — it’s a lovely courtroom in the Old Pioneer Courthouse in Portland, has a fireplace, has an old John Adams desk, has a lovely antique clock ticking away, it was raining outside, there was a fire in the fireplace, and I came in — the last of the three judges to walk in. And the presiding judge came in and sat in his chair and leaned way back, and the next judge came in and sat in the chair and leaned way



FIRST KNOWN ALL-WOMAN PANEL ON THE NINTH CIRCUIT —
(L.-R.) JUDGES DOROTHY W. NELSON, BETTY BINNS FLETCHER, AND
JUDITH NELSON KEEP (BY DESIGNATION),
SAN FRANCISCO, MARCH 11, 1981.

back. I came in and sat in my chair and leaned way back and went right to the floor. My head banged on the floor, and I was a little disoriented because it was these old, old chairs that are wonderful for men but simply don't fit short women.

So I came into the first conference sort of a little embarrassed about what had happened; and I began talking about — it was an Indian rights case — and I really guess I got very excited about the case, and the presiding judge said, "Well, Judge Nelson, I'm going to let you write that opinion." In the first place I said, "Well, there are many issues here. I'd like to know how you all feel." And he said to me, "Well, are you for the Indians or against the Indians?" And I said, "Well I'm coming down, if all these other issues work out, I'm probably going to hold for the Indians in this case." He said, "Fine, write it that way." And I said, "But . . . but . . . but I'd like to know how you feel on these other issues." He said, "Well, write it, and we'll see how it comes out."

And that led me later to when I preside, I ask the judges to come an hour early — if it's in the morning, I'll bring a continental breakfast; if it's in the afternoon, I'll promise to bring sandwiches — to sort of, first of all, ask what bothers us about the briefs. We have what we call a hot court. All of our judges read all of the briefs. We have our clerks — most judges have clerks — prepare neutral bench memoranda telling us what they think are

the real hard issues and the kinds of questions that might be helpful to ask on appeal. I found as a new judge, sometimes I have all these questions and I wouldn't get them in. And I think it's helpful if we all agree on what is really bothering us. Sometimes we still might not have enough time. But then I feel it is very helpful to discuss the cases when we are looking at each other. It saves a lot of memos that go over our computer. I think it's much easier to talk out issues since we are all well prepared for oral argument, without exception, on this court rather than coming back to chambers and then trying to send mail to the other two and try to work them out in the end. So input is the way I work when I preside, and now I'm halfway up the totem pole in seniority. I preside a good deal these days.

SMITH: Do you have particular work habits?

NELSON: Oh indeed.

SMITH: What are those?

NELSON: Well, the best part of this life are your clerks, and I might say my secretaries, too. We are a working team, and I look for people — I get over 300 applicants for the three clerkship positions — they all are very bright; in fact, I could probably choose any of 100 of the 300 and be very, very happy with them. But I am looking for people who are not only very bright but who like a collegial atmosphere, who will consider the work of the chambers the work of everyone, who are not concerned with being No. 1 clerk or No. 2 clerk, are concerned with working with each other, growing together — my work needs as much editing as anyone else's — but who don't mind having their work edited, who will drop what they are doing at the drop of a hat when someone says, "Help, I need help," or we often have round tables in my chambers when we get to difficult issues. It seems every year we have one or two cases that require all of us. I can recall this past year a case dealing with the Marcos property, the ex-president of the Philippines, involving 4.5 billion dollars. The year before we had a case with the Oakland Raiders, whether they could move to Los Angeles and become the Los Angeles Raiders. The year before that was a patent and trademark case involving the Levi Strauss Company. Those were our big ones during the year where everybody sort of knew what was going on, in fact, different clerks took different parts of the case.

Generally, in chambers, when we get summaries of what our cases are to be six weeks hence, I sit around with my clerks and we say, "What looks good? What would we like to work on?" And we negotiate with the other chambers. We will take some of the cases that we think are better than others. They'll take some. We'll take some that we really are not so excited about. They'll take some. And it balances out. And I try to let my clerks have input so that at least every other month they are all working on some case that they really care a lot about, which I think is very important.

But we have a very collegial atmosphere. The clerks help to select the cases. In preparing bench memos my door is always open. They walk in and out. And they talk to each other all the time. They write draft opinions, and they check them out with each other. Nothing goes out of my chambers unless it has been reviewed by at least two of us very thoroughly. And then I have my marvelous secretaries, who have been with me for some time, and they often will catch things that none of us see. They will see a paragraph — and they read for meaning as well as for just to see if we have complied with the court rules — saying, "Judge, this doesn't make any sense." And I will look at it and say, "We were reading this paragraph having in mind all these things, but let's rework it." So basically I have six wonderful helpers.

SMITH: Do you find that the clerks have gone on to do other things since you've started in your position? Have any of your clerks gone on to other courts?

NELSON: Well, of course I've only been on the bench now, I'm in my ninth year.

SMITH: Well, yes, however —

NELSON: So my clerks have not yet become judges, although, of the nineteen judges on the District Court, nine of them are former students of mine who took my seminar in Judicial Administration; and I am still grading their papers, as they say.

I have an annual clerks' party every year in my home. And they come in from Washington, from New York, from San Francisco, from the Midwest. I have now four former clerks who are law professors, one who became associate dean of the University of Chicago Law School, one who became assistant dean of the UCLA Law School. And I enjoy correspondence with them

all the time. Two of them came through from Washington last week, and we had lunch together. But it's a lifelong friendship. And what is so exciting about the clerks, I get postpartum depression about the beginning of summer because I know I am about to lose my wonderful clerks, and then three equally wonderful clerks come in about the end of September. My secretaries and I say, "Aren't we lucky again? We've got another wonderful group!"

In addition to my clerks I take an extern each semester coming from USC, UCLA, Stanford — we had one from Yale — who spends a semester with us getting fifteen units credit or a semester's credit from the school. And we find the externs are a marvelous source as well. But with the externs and the clerks you get a fresh perspective on kinds of cases. For instance, you'll get a whole run on search and seizure cases, and you'll say, "Oh, another search and seizure case." And the extern or the clerk will say, "Oh, but Judge, Professor Kamisar says this is the most important issue before the courts today." And I say, "Really! Tell me about it." And I get a new enthusiasm for the issue. So it's a wonderful part of the whole, of running a chambers.

And I have my clerks travel with me. I am permitted to take up to two clerks to travel, and I feel this is a marvelous chance for them to get to know other judges and other clerks. And when you're away from chambers you tend to have lunch together and dinner together, and you get to know each other very well personally.

SMITH: In these nine years, do you feel that you have innovated in any of the procedural elements of the judicial system?

NELSON: Oh heavens, yes.

SMITH: Would you like to describe some of those?

NELSON: It's been lively. On the Ninth Circuit, our chief judge, who just retired yesterday — he retired June 15, 1988 — was very open to innovation and very open to new ideas. So it's been like a child in a sandbox. Since I've been on the circuit we have a lot of fellow judges who are interested in such things as alternative forms of resolving disputes: now in an experiment in our District Court in San Francisco, all cases involving \$100,000 or less are referred to arbitration automatically, and we are getting only about two percent of those back in the trial court. This was against the opposition of some members of the bar but now is fully accepted.

On our appellate system we have pre-briefing conferences before the appellate attorneys even file their briefs in a large number of cases to see if we can simplify the issues, address the questions that should be briefed. Oftentimes during those pre-briefing conferences, the parties come together and realize they don't really have a lot to worry about.

We have done a lot with our Judicial Conference, which I chaired just two years ago — our annual meeting where all the judges come together with some of the lawyers to discuss what might be done to improve the administration of justice in the circuit. As a result of some innovations, instead of just meeting with the lawyers once a year, we have ongoing meetings with lawyer delegates all year long, sometimes three and four meetings, which lead to proposed changes in our court rules to benefit both the lawyers and the judges.

There are just innumerable innovations that have taken place in the Ninth Circuit under the leadership of Judge James Browning. And one of the things that, when I was chairman of the circuit and we knew that Judge Browning was going to retire, someone suggested, "Well let's put his speeches in a leather-bound volume and give them to him." And I said, "No, that won't be a lasting monument to him. Let's bring in eight scholars from the academic world." And I might say that Judge Browning has been very open to making closer ties with law schools, bringing in law professors: Judi Resnik of USC, who has written some articles on managerial judging for instance, was the centerpiece of one of our conferences. At any rate, we are bringing in eight scholars from across the country to critique the various procedures and various innovations of the Ninth Circuit that have taken place basically in the last several years. And so we are going to have a volume that will be useful to judicial administrators, to all chief judges in state and federal courts, to teachers of political science, of business administration, public administration, judicial administration. And this particular volume will be presented to Judge Browning at our summer conference this year as a living monument to his encouragement of innovation in the Ninth Circuit.

SMITH: Well, that should be quite a living memorial. It would be a better thing by far than what was proposed, just a notebook.

NELSON: I talked about it because I am so happy that we will have something of a permanent nature that will be useful to other people but describe

really wonderful innovations in our own circuit. We were about to be split. The proposal was that our circuit be split because it is so large. We have twenty-eight active judges and seven retired judges. The next largest circuit, the Fifth, has fifteen. And Chief Justice Warren Burger expressed the view that he thought that we ought to be split, which led to many of our innovations to show that, really, the wave of the future will probably be fewer circuits with good internal administration rather than continuing to split our circuits in the country. And so those are the kinds of things that we have worked on, and we feel, very successfully. Not only has the Ninth Circuit remained intact, it has shown a way to Congress, a possible future way. We have twelve regional circuits and one United States Federal Circuit that handles patents and Court of Claims cases. But the wave of the future in judicial administration may be to even combine some of our circuits and have good internal judicial administration within those fewer circuits.

The advantages are many, including probably eliminating the need for another level of review. There have been many people who have talked about the need for another court of appeals between the current courts of appeals and the Supreme Court because of the large number of inter-circuit conflicts. If you have fewer circuits, you have fewer inter-circuit conflicts.

And so I feel that I have been in a wonderful circuit, open to innovation and change and that we probably, hopefully, have created a model and are continuing to create a model for the twenty-first century.

SMITH: We have spoken about the procedural. Referring now to the decision-making itself, is it your view, as it is of certain others, that the decisions should be innovative as well? Should they point the way, or should the decisions be more conservatively following what they feel precedent has been?

NELSON: I guess you're talking about, "Should there be an activist court as opposed to a non-activist court?" Well, I'll take you back to my academic background. One of the courses I taught was Legal Process with some marvelous materials by Professors Hart and Sacks of the Harvard Law School. I taught this course for almost nine years, I guess seven years, before I became dean. And one of the things that we talked about in that course was that words have no single plain meaning. And what that means

to me is this: That one of the strengths of our system is our system of stare decisis, our system of precedent, which gives stability to the law.

Uniformity enables us to predict our lifestyles and how we should behave. But anyone who says to me that you can look at a case and say it can tell you exactly what's going to happen in all of the cases to follow, I think, to me, doesn't understand the legal process — that even in cases where you have precedent, where you have a statute, there is always room for interpretation. And my bias is toward stability and toward giving words the common meaning or the meaning based upon the internal social, economic, and legislative history and the external social, economic, and legislative history. But there comes a time when you have a case where some people will say, "It's very clear," and I say to myself, "Nothing is absolutely clear."

So I hope that no one can ever predict how I will vote on a given case. I will feel that I have been a successful judge if I am known to be a judge that looks at everything that is involved in a given case — the precedent, internal, external, legislative history, the social, the political, the economic history. I am not one who believes that you can determine how a case should go by looking to the intent of the original writers of the Constitution, those forty-four men who in those hot four days in Philadelphia wrote what was originally a four-page document, leaving out the rights of women, leaving out the rights of minorities, and so forth. Until it was amended four years later, we didn't even have a Bill of Rights. I think it's a good starting point, but I think there were so many things put into the Constitution — equal protection of the laws, the due process clauses and the like — which showed the genius of the original framers of the Constitution, that there were certain open-ended questions where rights of persons would have to evolve over a period of time, depending upon the maturity of our nation, depending on social, economic, political developments. So I think we ought to start with the original framers and look to the purpose of these various clauses. It is just those framers who left these open-ended clauses for us in the federal judiciary to interpret. I think it makes a great deal of difference if we interpreted certain clauses in a certain way over a long period of time. I think that lends a certain stability which should not be overturned unless we have very, very good reasons for overturning it.

But I think that the congressional hearings, the open hearings, on the nominees for the Supreme Court were so wonderful, a wonderful lesson in

American constitutional history because there were so many people who testified, including academics. All in all, it was a wonderful experience for all of us.

SMITH: Well, yes. As a Circuit Court judge, what is your perception of the District Court and the Supreme Court?

NELSON: I really have a very good feeling about the District Court. I think the judges as a whole are very hard working, very dedicated to their jobs. Some of them even have two trials going on at one time. I think the hard part of their job is the heavy caseload, the press for time, and they're often forced to make decisions on the spot that if they had time for reflection or research they probably would not make. I find that the work as it comes to me is extremely good. It helps in our circuit that we get to meet together twice a year, once at our annual conference and once at seminars, where we have informal discussions about what we like about what we all do and what we'd like to improve. For instance, I find it much easier to make a decision when there are findings of facts and conclusions of law as found by the District Court judge rather than just an outright ruling. And they have let me know that they prefer it in my own opinions if instead of reversing and remanding when I occasionally do this, that in accordance with the above opinion that I specifically tell them what I wish them to do on remand.

SMITH: And referring to the Supreme Court?

NELSON: Oh, the Supreme Court. Again, one of the privileges of a Court of Appeals judge is to sit in moot court competitions, often with a member of the United States Supreme Court. I sat this past year with Justice Scalia at Stanford and Harvard and the University of Chicago. And I find that I get to know the justices much better just having this close association with them. And I must say I have extreme admiration for all members of the United States Supreme Court. I feel that they are dedicated, that they really do a lot of extraordinary research; and I think that the writing on the Supreme Court is extremely good. I don't always agree with it, and the Supreme Court doesn't always agree with me either. But I always have a feeling that the members of the Supreme Court are really truly sincere in what they write and sometimes convince me. Even when they occasionally reverse me, I feel that it is justified.

SMITH: And in your turn, have you written dissenting opinions?

NELSON: Yes, I have written a number of dissenting opinions. I really don't write a lot of them. I feel that it is much better to try to work out the differences among the members of the court. I think it is better for the profession. I think it is better for the court. It is only occasionally when I feel that something is extremely important to the administration of justice as a whole. This past year I had a case involving foreign heads of government, and I dissented from the opinion that it was none of our business, that it was the business of the other government.

I had a very difficult patent case at one time where I felt it was important to dissent because it affected the law of the whole country in a very important way.

I will not dissent if I just disagree; and indeed, as I say, I think to mediate the differences among us and perhaps leave a paragraph out of an opinion is far more important than having it remain and trying to file a dissent.

SMITH: What would you say you have found is the hardest part of your work?

NELSON: The hardest part of the work, I think, is the constant rise in the caseload; and I think one would love to sit with a number of these cases for a month or two at a time and sit and think about it, talk about it, and read not only the legal literature but read in the social sciences as well. But with 22 to 25 to 30 cases a month, we are writing approximately 10 opinions a month (not all published, of course), but it forces us to produce at a much faster pace than I think would be ideal under the circumstances. I think one possible solution to this would be new forms of dispute resolution to keep some of these cases out of the court system. But as long as the caseload is as it is, I think I would say the hardest part is trying to do a very good job, which of course you want to do, with the cases constantly coming into the chambers.

SMITH: Do you feel that there is perhaps some opinion you have rendered, some decision which perhaps even in the dissent will have a far-reaching or lasting effect on our judicial system?

NELSON: One never knows about one's opinions. But one of the very first opinions I was privileged to write I felt very good about. When I was dean of the law school my field of specialty, as I have mentioned, was Judicial

Administration, how to improve the court system. Part of that was a study of the commitment of the mentally ill. In the California Superior Court it is called Department 95. And I was very distressed at what I saw there, not because of what the judges did but because of what the law permitted. And one of my very first cases was *Doe v. California*, where a UCLA student was picked up on the street, could not identify himself, had no identification on him, was acting “strangely” according to the police, and was brought down to Department 95 and given drugs to calm him down. He became quite upset about being in Department 95 and actually was held there fourteen days without requesting a hearing. And in *Doe v. California* I said no one could be held more than seventy-two hours without being given a hearing whether requested or not. Because the department is permitted to administer drugs, it is very understandable why this young man did not request a hearing; and later, when he was released and off drugs and so forth, was quite upset about what had happened to him. And it did change the law of the commitment of the mentally ill of California, and it remains that to this day. And I am very pleased with that decision.

SMITH: That, indeed, is the kind I was referring to.

NELSON: Good.

SMITH: Of the many honors that you have received, awards that you have been given throughout your career, is there one perhaps that stands out for you, that has particular significance for you?

NELSON: I think I was very happy to be among the group of four women who in 1975 received a World Peace Through Law award. This was 1975, as you may recall United Nations Year of Women, and I was a delegate to the United Nations Conference in Mexico City. I was a delegate representing the Baha’i International Community; and it was in law school



DOROTHY W. NELSON SPEAKING
AT THE SEVENTH WORLD PEACE
THROUGH LAW CONFERENCE,
WASHINGTON D.C., OCTOBER 1975.

that I became a Baha'i, which is a world religion, basically, that believes in the oneness of God and the oneness of religion, that all religions come from the same source, and the oneness of humanity. When I was a first-year law student at UCLA in 1950, and I say the date because it was before *Brown v. Board of Education*, out of my class of fifty only — we were the second class at UCLA Law School — were two women and one Black student. We were all invited to join the Phi Delta Phi legal fraternity. Three weeks later, word came from the national that everyone but the women and the Black were welcome, but they were not welcome. The president of our law school class pulled our whole class together and said, "This is ludicrous. Let's all resign and form the UCLA Legal Association," which we did. And I walked up to him (his name was Donald Barrett), and I said, "Donald, that was a very nice thing to do, but whatever led you to do this?" I had known Donald in undergraduate days. He was a big fraternity man, not exactly concerned with social issues. He said, "I don't know what's happening, but my whole life is changing. I've been going to Baha'i meetings in Westwood Village. Would you like to come?" I said, "Oh, what is that? Is that an ancient sect of some ancient religion?" And he said, "No, it is an independent world religion and no priesthood and no clergy, but you can learn about it through firesides." So I said, "Well, Donald, I am a good Episcopalian and my husband is a good Presbyterian, but thank you very much."

Two weeks later he had us to dinner and to play bridge, and right in the middle of a bridge rubber, he said, "Oh, there is a Baha'i meeting going on just a block down the street. Would you like to go?" My husband rolled his eyes as if, "What are we into?" but we went to that Baha'i meeting where we had people from Hollywood. I remember Vic Damone was there. We had professors from UCLA. We had people of all backgrounds, and it began a five-year study of comparative religion for me and my husband. And we never thought we would become Baha'is. We thought, "Well, there are five million Baha'is in the world, why not know what it is all about." And we found that basically I read the Koran for the first time — and the beauty of that book! In Sunday School I remember a picture of Mohammed on a white horse cutting off the heads of the Christians, and my view of Islam was one of a wicked sort of evil religion. And when I found in the Koran the fatherhood of God, the brotherhood of man, the Golden Rule, the common prayer, and so forth, I felt I had been very deprived all of my life. Oddly

enough, seventeen members and their families of our law school class became Baha'is.

Several of the principles of the Baha'i faith have greatly influenced my life — the equality of men and women, the need for universal education, a universal auxiliary language, a world government, a world federation of nations, and so forth. But all of these principles, we as Baha'is believe, must be recognized at the same time before world peace will be possible. But on the principle of equality of men and women, the Baha'i belief is that men and women should have equality of opportunity but that the station of motherhood is very, very high, that the family is the central unit of society; and, therefore, I had the best of both worlds in the sense I have always been a family person, but I had always been drawn to the women's movement about equality of opportunity, and here was a religion that exalted the role of the mother but also very firmly believed in equality of men and women to the point that in our religion until women achieve high policy-making positions, the peace of the world is not possible.

And so, when I was named a delegate to the International Women's Conference, I was invited to Cairo to meet with Mrs. Sadat, the wife of the then-president of Egypt, who was also going to speak at the conference. I was to deliver one of the addresses, talking about the role of women in the West, and she was going to talk about the role of women in the East; and she was very interested in my views as I was interested in hers. And Mrs. Sadat had done a lot in Egypt to ensure equal education for women, which was quite difficult to do. And so, when I first met with her, it was sort of interesting. I was invited to the palace, and she was as nervous as I. And when she first greeted me, she said, and her secretary was standing next to her, "Dean Nelson" (I was then dean of the law school), "I want you to know how pleased I am to see you, but before we begin to talk I do want you to know I love my husband and I love my children, and I do believe in the family as the central unit of society, and I just want you to understand that I don't think we'll be ready for the feminism you know in the West for many, many years to come, if ever." And I said, "Oh, Mrs. Sadat, you know I am a Baha'i, and we, too, believe that the family is the central unit of society." And I said, "I, too, love my husband, and I love my children." And she turned to Mr. Fawzi, her secretary, as if to say, "It's all right." She said, "You may be excused now. Dean Nelson and I will have a lot to talk about."

And we agreed on the importance of educating women and, indeed, if you have to make a choice between educating a boy and a girl, you educate the girl because she is the first teacher of the child.

And then, we went on to talk about the importance of the equality of men and women in achieving world peace. And she told this wonderful story about after the 1973 war which Egypt won, she received this letter from a woman from Jerusalem, who wrote to Mrs. Sadat and said, "I write to you not as the wife of the president, but I write to you as one woman to another. My husband is dead. My only child was captured. Would you find him and send him home to me?" And Mrs. Sadat not only found the child, the young man, but sent him home and published in the *Jerusalem Post* this wonderful reply, "As one woman to another, I return your child to you. Until we, the women of the world, refuse to give up our sons and daughters to war, we will have no peace." And that is why when I received that particular award, having gone to the UN conference in Mexico City, I felt that it signified something in which I truly believed.

SMITH: And what was the auxiliary language that was proposed?

NELSON: Well, we as Baha'is believe that the peoples of the world will choose this universal auxiliary language. We have many Baha'i Esperantists; but the founder of our faith, Baha'u'llah, said, "The governments of the world will recognize the need and will choose an auxiliary language." As I go to international conferences, I am very pleased, however, to note that a lot of people have learned English, even the Chinese women and the Russian women, and I'm not very good at languages so I'm sort of holding out for English.

SMITH: Well I hope you have what you like then.

NELSON: Thank you.

SMITH: Going back to more of your personal life and to its earliest periods, would you say that travel has been an influence in your life?

NELSON: I think I can say that travel has been, although my family accuse me of becoming a Baha'i and seeing the world. My mother was Episcopalian and my father was a Baptist. Both of them had Baha'i memorial services. My mother-in-law at age eighty-one became a Baha'i, which was interesting. But that had to do with travel because I had not traveled a great

deal. As an undergraduate I was the national president of a sophomore honorary called Spurs, and I got to go to Laramie, Wyoming. And then my next big trip was to Tucson, Arizona. But after we became Baha'is, there was a World International Congress in London in 1963. We took our young son who was then age four. I left my young baby home with my sister. If I had to do it again, I would have taken my baby as well. And our families thought we were crazy. Paying off our law school debts, here we are going off to London to meet with 9,000 people from around the world. But from that point on, travel has been very influential in the lives of my family. We flew now and paid later. We took our children with us.

I took my first sabbatical, and because the Baha'i World Center is in Haifa, Israel, I tried to figure out something I could write about in Israel. And I did a comparative study of the laws of marriage and divorce in Israel. In the eastern countries, as you know, the laws of personal status are governed by religious law. So in Israel we have the Rabbinical courts for the Jews, the Christian courts for the Christians, the Shari'a or Moslem courts for the Moslems, and the Baha'i administration for the Baha'is. So I proposed this as a study, got a grant, went to Israel. My husband took leave from his law firm, and we took our two children, who were then four and seven; and indeed they picked up a little Hebrew along the way. And our children saw Paris before they saw Chicago, and they saw Frankfurt before they saw Washington, D.C. But in 1970, when I was named to the Children's Commission, there was a National Conference on Children. President Nixon named me to the commission. We took both of our children with us then, and they had a wonderful two weeks in Washington, D.C.

On all of these trips they would write essays each day about what they had done, would bring along their math books and do their required math, which my husband did with them in the evenings. And we found that our whole family became greatly enriched by this travel.

SMITH: And it was something all of you could share together.

NELSON: Something we could all share and have memories of and have pictures of. It also let our children see other parts of the world. And I think that now with travel becoming more accessible I think the whole feeling — of course we believe the earth is really one country and mankind its citizens as Baha'i law says, that we're all the leaves of one tree, the fruits of one

branch — all of these things in our own writings about world citizenship. The best way to become a world citizen is to become friends with peoples in other parts of the world. And so, from India to Africa to Western Europe and the South Pacific our children have had these experiences with us and we with them.

And being a career mother, I was very fortunate in that I didn't become an assistant dean until my children were in school full time. But I value the time with my children, and to take them out of school didn't bother me one bit because I felt that they were doubly enriched. It also meant that I didn't have to be separated from them during those crucial times.

SMITH: Speaking of relationships, did you find that your friendships with other people were the same or were they changed before and after your appointment to the bench?

NELSON: I think that relationships with young lawyers have changed a bit. When I was dean I was used to writing and being used as a reference for hundreds of former students. And when I first became a judge, I continued to write these letters of recommendation until some judge pointed out to me that I might be used as a reference but I couldn't write a letter of recommendation unless it was requested of me. And I thought, "Oh dear." And then I began to notice that I was so used to — when wonderful things happened to former students — getting together for lunch and so forth, and although people are always welcome in my chambers I have to be very careful about these kinds of relationships with lawyers in the community who appear before me. Although I am still very active in the community, I sit on Americas Watch and Asian Watch dealing with human rights violations around the world, and prominent members of law firms are members of those kinds of committees or the Community Dispute Resolution Center or the L.A. County Bar Foundation and the like. But I am much more circumspect in my personal social relationships with these particular people.

SMITH: And do you find you have time for activities which in no way relate to your profession?

NELSON: Yes, of course I am very active in the Baha'i faith, and around the world Baha'is are organized in a local, a national, and an international level. There is a National Assembly of the Baha'is of the United States. There are National Assemblies of 169 countries and territories of the world.



JUDGE DOROTHY W. NELSON
WITH MAYOR TOM BRADLEY, WHO
DECLARED BAHÁ'Í DAY IN LOS
ANGELES, CA. 1985.

I am the chairperson of the National Assembly of Baha'is of the United States at the current time, after having been treasurer for seventeen years. It was just recently that I was elected, and this involves a great deal of my time. We meet in Chicago once a month for three days. We have an International Youth Conference coming up in Indianapolis with 9,000 youths, both Baha'i and non-Baha'i youth. I am meeting this coming week up in Santa Cruz with women from several countries, including thirty women from Russia, talking about the role of women in world peace, planning an international convo-

cation of women one to two years from now with women from around the world. All of this basically has come about I think largely through my Baha'i connection and involves a great deal of time. Just this past weekend we had a Children's Peace Conference in Pasadena with 1,400 children and their parents, half of them non-Baha'i, children from all races, colors, creeds, backgrounds, ages, about 300 youth; and this is a very stimulating and exciting part of my own life.

With respect to the court, I also have auxiliary activities. We are establishing, north of my own courthouse here, a Western Justice Center. We are bringing people interested in alternative forms of dispute resolution, law-related education for primary and secondary school children, ways to improve the selection of judges, the competence of judges and lawyers and so forth. This is continuing with my own interest in judicial administration and the improvement of the justice system.

But those are the kinds of things that I think help you to be a better judge, give you a more balanced life, and they are thoroughly enjoyable.

SMITH: What would you think are the most valuable attributes of a good judge, and then you might compare to a good lawyer and to a good administrator.

NELSON: That is a very interesting question and one which might take several hours to respond to. But very quickly, I am more interested in the character of the person than I am in either academic achievements or worldly achievements, although both of those can be a good indication of character. But it is very easy, it seems to me, to teach an honest, trustworthy, compassionate, bright person to be a good judge than it is to train someone who happens to be very successful in the legal profession to be trustworthy, warm, and compassionate. And I think oftentimes when committees go out looking for people, they ask the wrong people; they ask the person's partner about, "Is he a good lawyer?" and so forth, and "Is he all right as a person?" I would ask the persons who worked for the people, frankly. I think that the secretaries, the people in the office, can often give you a greater insight into judicial temperament, for instance, or the balance of the person, or is there a problem with self starting and hard working, and so forth. Some of these are attributes that I think are very important in a judge that are not often measured in worldly terms.

Happily, I think our method of selection . . . I have the greatest respect for all of my twenty-seven active colleagues and my seven senior judges on the bench. In fact, I am thrilled, each time I sit with a new panel of judges, about the sense of commitment, the sense of hard-workingness, the sense of caring about the people these decisions affect. Some judges have a greater sense of compassion than others.

In working on Immigration cases, it doesn't mean that one judge is better than another because the judge doesn't seem to be as compassionate, but I do think that a broad range of experiences informs a judge and might affect the decision in a particular case.

SMITH: And what would you say are the attributes of a good lawyer?

NELSON: From my perspective as a Circuit Court judge, what I appreciate is a lawyer who writes a brief that is straightforward, well organized, does not misquote, does not become super-adversarial. I realize that lawyers are

in the position of representing a client to the best of his or her ability, but I find that some lawyers go over the bounds and keep information from me or mischaracterize information improperly or mischaracterize facts. And so, once I find that a lawyer does that, I never trust that lawyer again. Once I find a lawyer who doesn't do that, I tend to receive a brief from that lawyer when he or she reappears, and I tend to have a feeling of trust. And so I really seek that out.

In oral argument I like the lawyer who answers the question. It always amuses me when a lawyer responds and says, "Well, that's a good question, Judge" (as if the lawyer would dare say, "That's a bad question"), but then doesn't say, "I'll get to that later" but proceeds to answer it because I perceive the purpose of oral argument is to assist me in trying to make the best possible decision. The briefs should have covered all of the arguments, and it is nice to have oral argument to reemphasize the important arguments. But if I have a question on my mind, I greatly appreciate it if the lawyer answers that question so that I might be assisted in making my ultimate decision.

SMITH: And what would you say are the qualities of a good administrator?

NELSON: I think the qualities of a good administrator . . . the ability to consult. And by consultation, we have a little Baha'i song that says, "Consultation means finding out what everybody is thinking about. You listen to them, and they listen to you. Then you all do what most of you want to do." I think an administrator has to have the ability to listen. And I think an administrator ought to also be personally interested in the people with whom he or she works. I think oftentimes administration becomes very dry and very mechanical. A person is hired to be a secretary. That person should be a secretary and go home and forget about it. Or a person is hired to be an assistant administrator, and we shouldn't be concerned with that person's personal life. I think you have to become involved in the lives of the people with whom you work. I think it enriches your life. It enriches their lives.

My young daughter prescribes the dog food for Judge Pregerson, and she just loves doing it. And we have some nice relationships that build up, particularly because we do travel with each other and get to know each other. But I think that's true with staff, and I think you are really a mini-administrator here as a Circuit Court judge because you have three clerks

and you have an extern — and some judges have five externs — and two secretaries. And then you relate to the central clerk's office, and you relate to the central staff attorneys' office. So you really must have some administrative skills.

I think, trying to keep up to date with your work and not letting things slide by and get old. I was sort of shocked when I first came on the court to find that there were some cases in our circuit that were four and five years old. I think we have a responsibility as judges to administer our chambers so that cases don't become that old, and I am very happy to say that in recent years our court has really basically caught up to date. I do think it is a responsibility to the litigants; and if we have to make our opinions shorter to keep up to date, then I think we have to make our opinions shorter. If we are able to tell the litigants what we are ruling and why we are ruling, that's the first thing we should do. And then if we want to embellish our opinions and make them learned so to speak, I think that's fine. I don't think we have the luxury of writing the opinions of a Learned Hand, of a Cardozo, of a Frankfurter, except in the most unusual case. Not that we have the ability to write those opinions, mind you, but what I'm talking about is the extra time it takes to try to make your opinions a little bit more literate, so to speak.

SMITH: You have mentioned the term "extern" on several occasions. Would you like to describe what is an extern as it obviously might compare to intern?

NELSON: In our profession we, like others, have our own special terminology. An extern could well be called an intern. It arose in the law schools when students were permitted to work for certain select judges or legislators outside the law school premises, off premises so to speak, externs. Interns refer to those law students who work for law professors within the law school framework. And so the judiciary picked up the term "extern," but they are really interning for us in every sense of the word.

SMITH: That very much clarifies it. Referring again to your very personal life, has literature played an influential part in your outlook on life?

NELSON: Yes, indeed it has, and, of course, I grew up with a mother who was an English teacher; and so we were read to from the time we were born, probably read to before we were born, and going to the library twice a week, where we would each get our allotment of five or six books and bringing them

home. And I can remember Christmas time was always a time of books. My lovely Aunt Lou, who taught at Columbia and wrote children's books, would always send us a box of books. We always knew that we had books. So literature and reading was a great part of my early life and has remained so to this day. In fact, when I do have to be away from home, away from my family, the only way I can get to sleep is by reading something.

One of the things I enjoy most are autobiographies and biographies. I remember when Eleanor Roosevelt came to UCLA where I was student body vice president, we got to have lunch with her. Seven students were selected, and we asked her about the literature she enjoyed. And she said that she learned more from biographies and autobiographies than from any other kind, as I guess you could call this literature.

And so, I read all the biographies and autobiographies I can get my hands on. I find I enjoy more nonfiction than fiction. I have read all the books about the Kennedys, all the books about the Roosevelts, all the books about the Nixons, and so forth. I guess, I was a political science major, always sort of interested in people who went into government.

But I do love historical novels: and my sister, who is an elementary school teacher, is an avid reader, and we trade books all the time, everything from the wonderful thick book, *Ladies of the Club*, to books about early American history or historical novels about early American history. I love things dealing with past presidents and the Constitution, both fiction and nonfiction. And then the old classics that always come back and are fun to reread from time to time. Often as I am heading for an airplane, I'll just pick up an old Charles Dickens or something just to reread while I am away. My rule on the airplane is I do work, unless I'm way behind, until the meal is served, and then I indulge in reading anything that I want to read. My secretaries, my clerks, we have a little shelf where we bring books that we're reading.

On a recent trip to Israel I lugged along six books with me, ranging in everything from the No. 1 best seller dealing with, I guess it was *Presumed Innocent*, to a marvelous story about a family in Mexico and how they survived on the land, a good book that was brought to me by Stella, my secretary.

So I find that reading, in addition to being relaxing, constantly enhances my ability to relate to people of all backgrounds, of all kinds.

Just as music. For instance, in being a Baha'i I have been exposed to a new kind of modern music, Seals and Crofts. And because Dizzy Gillespie

has become a very dear friend, and I love his records, and I didn't appreciate them before I got to know him.

I have always loved classical music and play a little piano on the side just for my own enjoyment. My son plays very well and took music for twelve years, and he plays the classics wonderfully well, as well as playing things like Scott Joplin and Dixieland Jazz and things of that nature. So my whole family tends A weekend, we love to go to the opera. We love to go to a concert. We love to go to — the hard rock is still not appealing to me, but the soft rock I have learned to enjoy and appreciate.

SMITH: These are things you obviously have shared with your family.

NELSON: Yes, and we're a dancing family, too. My husband grew up as an only child, and I grew up with my two sisters. And after dinner or something, music was turned on. My father would waltz through the house with my mother. We would all get up and dance with each other. In fact, I thought I wanted to be a ballet dancer when I was very little, or a tap dancer, one or the other. I remember the old Shirley Temple movies where she danced, and I would get up; I could do all the same steps that she could.

We still all enjoy dancing. We taught my husband to love dancing; and, in fact, oftentimes we even go to the old German restaurants and do the old German folk dancing, which is also a favorite of ours, and square dancing are our wonderful family pastimes, and we have friends that enjoy the same things. In all the Baha'i schools and Baha'i summer schools we have the kind of dancing that includes everybody, the round dances, the Israeli dances, the Greek dances, and so forth. And so this has been a part of our family life as well.

SMITH: In reading your biographies and autobiographies, has it ever occurred to you that they will be writing biographies of you?

NELSON: Oh heavens, no. Oh, absolutely not. There are so many thousand people about whom to write these days. I can't imagine that they would run out of that kind of material. But I think I encourage my children and my friends, the youth — I am going to be speaking at a Youth Conference in a couple of weeks — to do the same thing that Mrs. Roosevelt told me to do and told us to do when we had that luncheon with her because you find that things that you've worried about in your life — have I done this right or have I done this wrong or maybe I should have done this — when you get really

good biographies where they tell you about the hard times as well as the good times, I think it gives you a kind of inner strength and an inner assurance that although all of us goof every once in a while and we wish we'd done this instead of that, but this is a part of growing and that tests are really here to enable us to grow and to become strong and nothing to worry about.

Again, Mrs. Roosevelt had a big impression on me and she would often say, "You know, sometimes I would go and give a speech. At the end I would know it wasn't quite the right thing, but I didn't have time to worry about it. I just picked myself up, and the next speech I gave I tried to improve." And I thought about that sometimes in my life when I haven't had as much time to prepare as I would like. If you dwell on that, you have even less time to make the next thing that you do a little bit better. And so this is the ability to pick yourself up and just make the best of the situation and try not to let it happen again. And I have received so much from biographies and autobiographies of that nature that I continue to read them.

SMITH: Do you think in many years to come you may be tempted to ever write your autobiography?

NELSON: I doubt that I'll have much time to do that because in the years to come — as I've mentioned, my husband is a state court judge — when we both retire, we probably plan to end up either in Africa or in India, two favorite places of ours. As Baha'is, there are no Baha'i missionaries, but Baha'is go and live in a place and make whatever contribution they can. And the skills of the Western administrator are very important.

And, for instance, there are 400 Baha'i schools in India, ranging from vocational schools to academic schools. Well, we see ourselves as probably that will be our next career as we move off the courts and move on to something new.

SMITH: Well that's unusual and very interesting. Considering your tremendous workload and your stature, what is your very present family life like?

NELSON: My present family life is really quite easy because our own children, age twenty-six and twenty-nine Frank has just moved back home to go to law school and is just about to graduate, and he was anxious to get out of home at age nineteen. Since he's moved back home, he appreciates everything so much. He doesn't have to buy paper towels and toilet paper. He has dinner on the table. And all the rest of the children, including my

daughter and my three nieces who have lived with us off and on during their lives, are all out having lives of their own. Just about five weeks ago we moved my mother-in-law, who is eighty-seven, home to live with us. She'd had a couple of strokes, and she has been living with us since October, and she has grown ten years younger. She now is baking every day, arranges flowers, works in the garden, and is a joy to have around. So basically our lifestyle has eased up considerably.

When the children were younger, and young female lawyers often ask me, who are raising young families, and my advice to them is, spend as much time at home as you possibly can, particularly the first five years. I think if you can afford to, and there are some people who can't afford to, and therefore, I think child care becomes very important. But for me, if my children were sick I stayed home. And if I were going to lose my job, I would lose my job. The family was always, and still is, the most important thing in my own life. And, as I mentioned, we had our children travel with us. We'd often borrow money to do that, but we knew we could pay the money back. This was an important family experience.

But now my husband is at home. I thought when I came on the Court, we'd be taking these nice long, month-long vacations. Somehow, we seem to get involved in one project after another, but it's a fairly easy family life. But anyone who says, "Ah, when they're babies they're so much easier, and then they grow up, they'll move out of the home." Once a parent, you're always a parent; and you find that your ties with your family are still the most important of your life.

SMITH: Well, thank you very much, Judge Nelson. I know that everyone will appreciate this opportunity to look in and see you, the individual, the woman, the very important person in the community, the world community —

NELSON: May I say in turn that you are a marvelous interviewer, and it has been a pleasure and really a privilege to be able to sit and talk with you. I'd like to interview you about your life.

SMITH: Thank you so much.

NELSON: You're so welcome.

ARTICLES

HOW A CALIFORNIA SETTLER UNSETTLED THE PROSLAVERY LEGISLATURE OF ANTEBELLUM LOUISIANA

ALEXANDRA HAVRYLYSHYN*

INTRODUCTION

Slavery in the antebellum American South depended upon a set of laws designed to enslave and exploit individuals on the basis of their race, while protecting the owners of human property. A long line of literature has established this.¹ One might expect that those at the bottom of the hierarchy — enslaved women and girls of African descent — would have no hope of contesting their status. Recent literature demonstrates that there were in fact legal pathways to freedom.²

This paper was awarded first place in the California Supreme Court Historical Society's 2018 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

* JD, PhD, 2018, University of California Berkeley School of Law.

¹ Derrick Bell, *Race, Racism, and American Law* (New York: Aspen Publishers, 2004); Eugene Genovese, *Roll, Jordan, Roll: The World the Slaves Made* (New York: Pantheon Books, 1974); Ulrich Bonnell Phillips, *American Negro Slavery: A Survey of the Supply, Employment and Control of Negro Labor as Determined by the Plantation Regime* (Baton Rouge: Louisiana State University Press, 1966); Thomas Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill: The University of North Carolina Press, 1996); Kenneth Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (New York: Vintage Books, 1989).

² Rosemary Brana-Shute and Randy Sparks, *Paths to Freedom: Manumission in the Atlantic World* (Columbia: University of South Carolina Press, 2009); Alejandro de

This article uncovers the little-known history of Judge John McHenry, a trial judge at the First District Court of New Orleans. During his time on the bench in Louisiana, McHenry interpreted proslavery laws so as to favor liberty for certain enslaved individuals. Relying on McHenry's personal and legal papers (preserved at the University of California, Berkeley's Bancroft Library), this article argues that a commitment to the rule of law, rather than a clear commitment to ending slavery, ultimately explains McHenry's unpopular opinions. In a context of heightened sectional tension over the legality of slavery, McHenry departed Louisiana for California, where he was called upon to help frame the state's first constitution.

A young upstart, McHenry's judicial appointment had been contentious. Applying the fundamental legal principle against retroactivity of the laws, McHenry found in favor of freedom for Arsène. A flurry of free soil suits followed in his court. McHenry continued to find in favor of freedom for eleven petitioners. These were all women and girls: Arsène, Sally, Milky, Fanny, Tabé, Aimée, Lucille, Aurore, Souri, Hélène, and Eulalie.³ With the

la Fuente and Ariela Gross, *Becoming Black, Becoming Free: The Law of Race and Freedom in Cuba, Louisiana, and Virginia, 1500–1860* (New York: Cambridge University Press, forthcoming 2019); Kelly Kennington, *In the Shadow of Dred Scott: St. Louis Freedom Suits and the Legal Culture of Slavery in Antebellum America* (Athens: University of Georgia Press, 2017); Judith Schafer, *Becoming Free, Remaining Free: Manumission and Enslavement in New Orleans, 1846–1862* (Baton Rouge: Louisiana State University, 2003); Rebecca Scott and Jean Hébrard, *Freedom Papers: An Atlantic Odyssey in the Age of Emancipation* (Cambridge: Harvard University Press, 2012); Anne Twitty, *Before Dred Scott: Slavery and Legal Culture in the American Confluence* (New York: Cambridge University Press, 2016); Lea VanderVelde, *Redemption Songs: Suing for Freedom before Dred Scott* (New York: Oxford University Press, 2015).

³ Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1846–1847), *New Orleans City Archives* [hereafter NOCA] VSA 290; Sally v. Varney, No. 906 (1st D. Ct. New Orleans 1847), NOCA VSA 290; Milky v. Millaudon, No. 1201 (1st D. Ct. New Orleans 1847), NOCA VSA 290; Fanny v. Poincy, No. 1421 (1st D. Ct. New Orleans 1847–1848), NOCA VSA 290; Tabé v. Vidal, No. 1584 (1st D. Ct. New Orleans 1847), NOCA VSA 290; Aimée v. Pluché, No. 1650 (1st D. Ct. New Orleans 1847–1848), NOCA VSA 290; Lucille v. Maspereau, No. 1692 (1847–1848), NOCA VSA 290; Aurore v. Décuir, No. 1919 (1st D. Ct. New Orleans 1848), NOCA VSA 290; Souri v. Vincent, No. 2660 (1st D. Ct. New Orleans 1850), NOCA VSA 290; Hélène v. Blineau, No. 4126 (1st D. Ct. New Orleans 1849–1850), NOCA VSA 290; Eulalie v. Blanc, No. 4904 (1st D. Ct. New Orleans), NOCA VSA 290. The remaining three are: Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), NOCA VSA 290 (dismissed); Sarah v. Guillaume, No. 1898 (1st D. Ct. New Orleans 1848), NOCA VSA 290 (no extant disposition); Malotte v. Hackett, No. 2712

exception of Eulalie who had been to England, all of these women and girls had traveled to France.

Mary's was a test case and signifies a judicial-legislative divide in antebellum Louisiana on the question of slave transit. McHenry's departure for California in 1850 coincided with the end of the flurry of free soil suits in New Orleans. McHenry's civilian legal training under the Louisiana founding jurist François-Xavier Martin explains McHenry's reverence for the laws of sovereign nations, including France. His prior experience as a criminal defense attorney, as well as his patriarchal values, also help explain why he sided with particular enslaved women and girls. An examination of his complicated and evolving politics of slavery show that although most of his holdings resulted in freedom for individual petitioners, his opinions should not be interpreted as categorically anti-slavery. A commitment to the rule of law rather than a commitment to ending slavery explains his opinions.

LEGISLATIVE PROTECTION FOR THE RIGHTS OF SLAVE OWNERS (1846)

In 1845, the First Judicial Court of Louisiana granted Josephine freedom on the grounds that her mistress, the Widow Poultney, had willingly moved to and established residence in Pennsylvania, a state whose constitution did not recognize slavery.⁴ Approximately one year later, attorneys on either side filed briefs at the Supreme Court of Louisiana.⁵ This delay on the part of both attorneys provided ample opportunity for the public and the legislature to discuss the legal question of whether a slave freed in another territory would still be recognized as free upon return to Louisiana.

While the supreme court was deliberating, the legislature passed an act aiming to settle the legal question. Passage of the act signifies a power struggle between the legislative and judicial branches of the same slave

(1st D. Ct. New Orleans), *NOCA* VSA 290 (no extant disposition). Schafer posits that in *Sarah v. Guillaume* (1848), the enslaved petitioner was sold as a slave out of state as the legal decision was pending. Schafer, *Becoming Free, Remaining Free*, 23.

⁴ Josephine v. Poultney, No. 5935, 1 La. Ann. 329 (1846), *Historic Archives of the Supreme Court of Louisiana* [hereafter *HASCL*]. A. M. Buchanan decided this case at the first instance.

⁵ Josephine v. Poultney, No. 5935, 1 La. Ann. 329 (1846), *HASCL*, pp. 1220–21.

state. On May 30, 1846, the Senate and the House of Representatives of the State of Louisiana convened in General Assembly to pass an act “to protect the rights of slave holders in the State of Louisiana.”⁶ In choosing this title, the members of Louisiana’s legislative body unabashedly announced that the law’s role was not to abolish or erode slavery but to entrench further the rights of slave owners. The legislature ruled that “no slave shall be entitled to his or her freedom, under the pretence that he or she has been, with or without the consent of his or her owner, in a country where slavery does not exist, or in any of the States where slavery is prohibited.”⁷ Governor Isaac Johnson, House Speaker David Randall, and Senate President Trassimon Landry, all members of the Democratic party, signed their names to this law.⁸

The language of the act reads as a reaction to successful free soil petitions in previous years. His “or her” was not common linguistic usage in the nineteenth century legal world. “His” implicitly encompassed both men and women. But here the legislature found the need to emphasize that this law would apply to enslaved men and women alike. This indicates that the act was a direct reaction to free soil petitions, which tended to be brought by women and girls rather than men.

The Supreme Court of Louisiana (under the leadership of Justice François-Xavier Martin) had already held in favor of women and girls such as Joséphine and Priscilla because they had touched the free soil of France.⁹ Legal professionals at the time suspected that the legislature passed its act in reaction to successful free soil petitions. For instance, Jean-Charles David requested that Jules Remit, who had been a member of the legislature in 1846 and allegedly played a leading role in the passage of this act, appear before the First District Court of New Orleans to

⁶ “An Act to Protect the Rights of Slave Holders in the State of Louisiana,” 30 May 1846, Louisiana Acts, 163.

⁷ “An Act to Protect the Rights of Slave Holders in the State of Louisiana,” 163.

⁸ “An Act to Protect the Rights of Slave Holders in the State of Louisiana,” 163.

⁹ *Marie-Louise v. Marot*, No. 2914, 9 La. 473 (1836), *HASCL*; *Smith v. Smith*, No. 3314, 13 La. 441 (1839), *HASCL*. These cases built on the precedent of *Lunsford v. Coquil-lon*, 2 Mart. (n.s.) 401, and *Louis v. Cabarrus*, 7 La. 170 (both cases where the slave had traveled to Ohio, whose constitution outlawed slavery).

explain which free soil suit had prompted him to write this law.¹⁰ Historians since have likewise understood this act as a direct reaction to successful free soil suits.¹¹

Yet almost one month after the legislature passed its act, Chief Justice George Eustis handed down a contrary opinion on Josephine's freedom suit. He affirmed the lower court's decision to declare the plaintiff Josephine free, and condemned the defendant Widow Poultney to pay costs in both courts. He rested his opinion on several different legal grounds. First, Article 9 of the Constitution of Pennsylvania abolished slavery and declared slaves brought into the state and remaining there six months to be free. It also declared slaves brought by persons intending to reside there to be free immediately. Widow Poultney fell into both categories, because she had earlier testified that it was her intent to establish residence in Pennsylvania, and because she remained there for at least two years. Eustis reasoned that the laws of Pennsylvania had operated upon both the personal condition of the slave Josephine and the ownership rights of the mistress Poultney when they acquired residence in Louisiana.¹² Eustis also relied on three earlier cases decided by the Supreme Court of Louisiana under the leadership of Justice Martin: *Lunsford v. Coquillon* (1824), *Louis v. Cabarrus* (1834), and *Smith v. Smith* (1839).¹³ Together, these cases had established the legal rule that once a slave's personal condition was fixed (that is, had switched from slave to free), that former slave could no longer be reduced

¹⁰ Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290.

¹¹ Judith Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana* (Baton Rouge: Louisiana State University Press, 1994), 264, 277–79; Schafer, *Becoming Free, Remaining Free*, 22. Schafer writes that a witness in Mary Guesnard's case testified that "he had authored the Act of 1846 as a result of hearing of the case of Arsène." However, I do not see this in the record. Rather, David asked Jules Remit whether the Act was a reaction to Arsène's case, but this timing does not make sense. Arsène did not even submit her habeas corpus petition to the First District Court of New Orleans until 24 October 1846, five months after the Act of 1846 had been passed into law. *Arsène v. Pineguy*, No. 395 (1st D. Ct. New Orleans 1846), *NOCA VSA* 290. Thus, I use this primary source only to show that lawyers suspected the law was passed in reaction to a freedom suit, but not to Arsène's suit specifically.

¹² Josephine v. Poultney, No. 5935, 1 La. Ann. 329 (1846), *HASCL*.

¹³ *Louis v. Cabarrus*, 7 La. 170; *Lunsford v. Coquillon*, 2 Mart. (n.s.) 401; *Smith v. Smith*, No. 3314, 13 La. 441 (1839), *HASCL*.

to an enslaved condition.¹⁴ I discuss below the possible reasons why Justice Martin had ruled in this way.

The French consul in New Orleans, Aimé Roger, noticed a judicial-legislative divide when he reported to the Ministry of Foreign Affairs in Paris on the Act of 1846. Although he had earlier “had the honor” of reporting that the Supreme Court of Louisiana had consecrated the free soil principle, he now remarked that the Louisiana legislature, mostly made up of slave owners, had created a law with the intention of putting an end to successful freedom litigation.¹⁵ He noted, “tribunals loyal to their precedent have not yet applied this law.”¹⁶

JUDGE JOHN MCHENRY

Judge John McHenry was at the head of one of these tribunals loyal to precedent, the First District Court of New Orleans. Little is written about McHenry in existing literature, perhaps because his personal and legal papers are found not in Louisiana but in California, where he migrated before the Civil War.

In December 1846, the same governor who had signed the Act to Protect the Rights of Slave Holders in the State of Louisiana offered John McHenry the office of judge of the First District Court of New Orleans. McHenry bragged to his then-fiancée Ellen Josephine Metcalfe that the position was “regarded as being one of the highest Judicial Stations in the State.”¹⁷ In 1846, a new system of courts replaced the first state system which had been in place since Louisiana’s accession to the Union as a state



JOHN MCHENRY, C. 1845.

*Courtesy The Bancroft Library,
University of California, BANC PIC, K,
Keith M-POR Box.*

¹⁴ *Josephine v. Poultney*, No. 5935, 1 La. Ann. 329 (1846), *HASCL*.

¹⁵ “Correspondence politique des consuls, Etats-Unis,” 10 December 1848, *Ministère des Affaires étrangères* [hereafter *MAE*]-Paris 16CPC/2, fol. 150.

¹⁶ “Correspondence politique des consuls, Etats-Unis,” fol. 150.

¹⁷ “Letter, John McHenry to Ellen Josephine Metcalfe McHenry,” 17 December 1846, Keith-McHenry-Pond Family Papers, The Bancroft Library, MSS C-B 595 [hereafter *KMPFP*], Box 15.

in 1813. Under the second state system, which would continue in place until 1880, New Orleans had a system of numbered district courts. Each of the courts exercised geographic jurisdiction over the entire parish of Orleans, which included New Orleans and immediate surrounding areas.¹⁸ In theory, each court was to adjudicate different subject matter jurisdiction. The First District Court predominantly ruled on criminal matters, as McHenry's letters confirm.¹⁹ The Second District Court oversaw probate; the Third, family matters; the Fourth and Fifth, all remaining general civil law matters.²⁰ Given that the parish of Orleans was one of forty-eight parishes in the state, there is reason to believe that McHenry's statement to his fiancée was something of an exaggeration.²¹ However, it is true that New Orleans was the most important commercial center and the site of the state's supreme court sessions.²²

Whether or not the position of First District Court judge was indeed "one of the highest" in the state, it was certainly a move up for McHenry. Thirty-seven years old at the time, McHenry had been practicing law as a licensed attorney in New Orleans since at least 1834.²³ Brimming with ambition at the age of twenty-eight, McHenry wrote to President Martin Van Buren inquiring about his application for the vacant judgeship in the U.S. District Court for the District of Louisiana.²⁴ This was not McHenry's first personal connection to a United States president. In his childhood, he lived next door to General Andrew Jackson's Tennessee plantation, called

¹⁸ A parish is an administrative area that is roughly the equivalent of a county.

¹⁹ "Letter, John McHenry to Ellen Josephine Metcalfe McHenry," 17 December 1846; "A Brief Explanation of the Orleans Parish Civil & Criminal Court System, 1804–1926," New Orleans Public Library, City Archives, Special Collections, accessed March 1, 2018, <http://nutrias.org/~nopl/inv/courtsystem.htm>.

²⁰ "A Brief Explanation of the Orleans Parish Civil & Criminal Court System, 1804–1926."

²¹ "Louisiana," 1840–1845, LRC, Tulane University, C4-D3-F7 (showing forty-eight counties).

²² Schafer, *Becoming Free, Remaining Free*, xviii.

²³ "Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith," n.d., KMPFP, Box 14; "New Orleans City Directory," 1834, NOCA; "Letter, John M. Peltore to John McHenry," 10 February 1835, John McHenry Legal Papers Portfolio, BANC MSS C-B 308.

²⁴ "A Copy of a Letter to the President," 16 September 1838, KMPFP, Box 14.

the Hermitage. Jackson referred to his friendship with McHenry as “long and tried.”²⁵ All this suggests that McHenry was socially well-connected.

Despite these connections, or perhaps because of them, McHenry’s appointment to the bench was far from smooth. He described the “harassing perplexities” of his judicial nomination process.²⁶ Governor Johnson formally sent his nomination to the state senate on January 15, 1846. Some insisted he was too young for the post, while others smeared his reputation in ways McHenry did not disclose to his then-fiancée Ellen, who as the daughter of a plantation-owning physician and scholar of Classics came from a family with considerable prestige.²⁷ In fact, he worried much about how the words of his detractors would affect his marriage prospects with Ellen. Ultimately, the legislators deemed McHenry fit for the post, a “cavalier sans reproche.”²⁸ By unanimous vote, they affirmed him for judicial office.²⁹

McHenry’s contentious appointment should be understood in a broader political context. In the nineteenth century, the judiciary was under attack as the undemocratic branch of a representative government. A debate raged over whether judges should be accountable to the people directly through popular elections, or indirectly through election or appointment by the state legislature.³⁰ Louisiana had chosen the latter for the municipal judges of New Orleans, denying them life tenure and temporally limiting their terms.³¹ This meant that McHenry was directly accountable to the legislature, most of

²⁵ “Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith,” n.d., KMPFP, Box 14.

²⁶ “Letter, John McHenry to Ellen Josephine Metcalfe McHenry,” 11 February 1846, KMPFP, Box 15 (where McHenry describes his nomination difficulties); “Miscellany,” n.d., KMPFP, Box 16 (on Ellen’s father: a physician who had been a scholar of Classics and who owned a plantation).

²⁷ “Letter, Mrs. John McHenry to John McHenry,” 6 January 1847, KMPFP, Box 15.

²⁸ “Letter, Mrs. John McHenry to John McHenry,” 6 January 1847, KMPFP, Box 15.

²⁹ “Letter, Mrs. John McHenry to John McHenry.”

³⁰ Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 131.

³¹ “Letter, John McHenry to Ellen Josephine Metcalfe McHenry,” 11 February 1846, BANC MSS C-B 595, Box 15;

Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith,” n.d., KMPFP, Box 14.

whose members owned slaves. There was no structural incentive for him to rush to the aid of society's most oppressed: enslaved women and girls.³²

Arsène: An Interpretation in Favor of Liberty

The case of Arsène (otherwise known as Cora) set off a flurry of freedom suits between 1846 to 1850 in the First District Court of New Orleans. Jean-Charles David, the same attorney who had successfully represented Josephine at the First Judicial District Court of Louisiana in 1845, represented Arsène at the First District Court of New Orleans in 1846–47. (The First Judicial District Court of Louisiana was part of the first state system of courts, which was overhauled in 1846. It should not be confused with the First District Court of New Orleans).³³ In the petition David wrote for her, Arsène admitted that she had been the slave of the defendant Louis-Aimé Pineguy, but claimed that “she had become free by being taken by her master to the Kingdom of France.”³⁴ She alleged that the defendant still held her as a slave, and thus applied for a writ of habeas corpus.³⁵

Arsène's case came before the First District Court of New Orleans in November 1846. McHenry's predecessor, Isaac T. Preston, reasoned that Arsène's habeas corpus petition was “substantially a suit for freedom by a person actually in slavery.”³⁶ Therefore, a writ of habeas corpus was “not the proper remedy in this case.”³⁷ David had cited the case of *Lucien Colly v. Charles Kock* to justify submitting a habeas corpus petition on behalf of an enslaved person who usually would have no legal standing. However, Preston had determined based on his own research that Lucien Colly, who had previously been a slave, “was a free man when the imprisonment occurred.”³⁸ In order to apply for a writ of habeas corpus, the petitioner “must at all events, have been in the actual enjoyment of his [*sic*] freedom

³² “Correspondence politique des consuls, Etats-Unis,” 10 December 1848, MAE-Paris 16CPC/2, fol. 150.

³³ “A Brief Explanation of the Orleans Parish Civil & Criminal Court System, 1804–1926.”

³⁴ *Arsène v. Pineguy*, No. 395 (1st D. Ct. New Orleans 1846), NOCA VSA 290.

³⁵ *Arsène v. Pineguy*, No. 395.

³⁶ *Arsène v. Pineguy*, No. 395.

³⁷ *Arsène v. Pineguy*, No. 395.

³⁸ *Arsène v. Pineguy*, No. 395.

before the illegal detention or imprisonment of which she complains.”³⁹ This switch between male and female pronouns appears in the original source, again demonstrating the prevalence of freedom petitioners who were women and girls, not men and boys. Arsène’s enslaved status disabled her from applying for a writ of habeas corpus. However, Judge Preston did not leave Arsène without a remedy. Instead, he opined that “the application ought to be dismissed, leaving the plaintiff the right to sue for her freedom in a direct action.”⁴⁰

Shortly after Judge Preston penned these words, the court adjourned for winter holidays. In January 1847, McHenry replaced Preston.⁴¹ Thus, when attorney David submitted a new claim on behalf of Arsène, this time as a direct lawsuit against her alleged master, the newly-appointed Judge John McHenry decided the case.⁴² Not only was this one of McHenry’s first decisions on the bench, it addressed a contentious social and political issue. In the period 1836–1861, the legality of slavery became an increasingly political issue throughout the United States. This political context further complicated legal questions of slave transit to free jurisdictions.⁴³

McHenry explained that under Louisiana law, an enslaved person “remains in the condition of a slave until her freedom is established by law.”⁴⁴ While courts were deciding a petitioner’s lawful status, the presumption weighed in favor of slavery, not freedom. During this time, a petitioner would be “incapable of making any contracts but such as relate to her own emancipation.”⁴⁵ As support for this opinion, McHenry cited the *Civil Code of Louisiana*, Article 174.⁴⁶ This provision established Arsène’s legal cause

³⁹ Arsène v. Pineguy, No. 395.

⁴⁰ Arsène v. Pineguy, No. 395.

⁴¹ “Letter, John McHenry to Ellen Josephine Metcalfe McHenry,” 11 February 1846, KMPFP, Box 15.

⁴² Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1846–1847), NOCA VSA 290.

⁴³ Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981), 16.

⁴⁴ Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1846–1847), NOCA VSA 290.

⁴⁵ Arsène v. Pineguy, No. 434.

⁴⁶ Edward Livingston, Pierre Derbigny, and Louis Moreau Lislet, eds., *Civil Code of the State of Louisiana* (New Orleans: Printed by J. C. de St. Romes, 1825), 52–53 (reading, “The slave is incapable of making any kind of contract, except those which relate to his own emancipation,” and in French, “L’esclave est incapable de toute espèce de contrats, sauf ceux qui ont pour objet son affranchissement.”).

of action. To contest her enslavement, and only to contest her enslavement, Arsène could temporarily act as a free person with legal standing in civil matters. Thus, freedom suits fell in the area of civil law, not criminal law. That David initially submitted Arsène's claim as a habeas corpus petition, and not as a freedom suit, explains why a civil matter ended up in a court that largely exercised jurisdiction over criminal matters.

McHenry formulated the legal issue as such: Should the First District Court of New Orleans establish Arsène's freedom on the basis that her master had taken her "to the Kingdom of France, where neither slavery nor involuntary servitude exists?"⁴⁷ For McHenry, several cases recently decided by the Supreme Court of Louisiana "settled" the following principle:

The operation of the laws of France upon the personal condition of the Plaintiff and the right of the Defendant by a residence of the parties in France, released the Plaintiff from the dominion which the Defendant had over her person as a slave in Louisiana.⁴⁸

As support, McHenry cited *Lunsford v. Coquillon* (1824) and *Marie-Louise v. Marot* (1836), but not *Josephine v. Poultney* (1846).⁴⁹

In deciding the contentious political issue of whether a slave owner's trip abroad would jeopardize his property rights, McHenry applied a fundamental legal principle: no retroactive application of the laws unless otherwise specified by statute. As support, McHenry cited Article 8 of the *Civil Code of Louisiana*, which read that "a law can prescribe only for the future: it can have no retrospective operation, nor can it impair the obligation of contracts."⁵⁰ One factor in interpreting legal codes is the order in which articles are presented. In a code totaling 3,522 articles, the provision against retroactivity is clearly fundamental to all the other rules that follow.

Arsène traveled to France in 1836, and returned to Louisiana about two years later. Legislators did not approve The Act Protecting the Rights of Slave Holders until May 30, 1846. McHenry reasoned, "Its enactment, therefore, cannot affect in the slightest degree, or change the rights accruing to

⁴⁷ Arsène v. Pineguy, No. 434 (1st D. Ct. New Orleans 1846–1847), NOCA VSA 290.

⁴⁸ Arsène v. Pineguy, No. 434.

⁴⁹ Lunsford v. Coquillon, 2 Mart. (n.s.) 401.

⁵⁰ Livingston, Derbigny, and Moreau Lislet, *Civil Code of the State of Louisiana*, 4–5 (in French, "La loi ne dispose que pour l'avenir; elle ne peut avoir d'effet rétroactif, ni altérer les obligations contenues dans les contrats").

the Plaintiff by her residence in France. A law can prescribe only for the future: It can have no retrospective operation.”⁵¹ Although McHenry’s decision in effect freed one slave from the dominion of her master, it did not necessarily rest on an anti-slavery argument. Rather, McHenry’s decision relied on a rule of law argument, averse to the retroactive application of laws. This would not only be illegal but also inherently unjust.

McHenry thus had reason to expect that the Supreme Court of Louisiana would affirm his decision, which indeed it did about six months later. Chief Justice Eustis, along with Associate Justices P.A. Rost, George R. King, and Thomas Slidell rejected the defendant’s argument that in order to gain freedom through residence in France, Arsène should have to prove that her master had acquired domicile there. Even though Pineguy’s absence from Louisiana was “but temporary,” and he had never lost his original residence in Louisiana, Arsène could sue for her freedom.⁵² The justices exemplified respect for another fundamental legal principle — national sovereignty — when they reasoned, “we cannot expect that foreign nations will consent to the suspension of the operation of their fundamental laws as to persons voluntarily sojourning within their jurisdiction for such a length of time.”⁵³

By setting aside the sojourn/transit distinction that was so crucial in freedom suits elsewhere in the United States at this time, the Supreme Court of Louisiana departed from the general trend of Anglo-American jurisdictions.⁵⁴ The Supreme Court of Louisiana’s deference to the fundamental laws of foreign nations contrasts sharply with Chief Justice Roger B. Taney’s opinion in *United States v. Garonne* ten years earlier that the French free soil principle was “not material to the decision” of whether the French ships *Garonne* and *Lafortune* had violated the 1808 and 1818 federal statutes prohibiting the importation of slaves when they allowed Widow Marie Antoinette Rillieux Smith to bring her domestic servant Priscilla

⁵¹ *Arsène v. Pineguy*, No. 434 (1st D. Ct. New Orleans 1846–1847), NOCA VSA 290.

⁵² *Arsène v. Pineguy*, No. 459, 2 La. Ann. 620 (1847), HASCL.

⁵³ *Arsène v. Pineguy*, No. 459, 2 La. Ann. 620 (1847), HASCL.

⁵⁴ See, e.g., *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772); and Mark Steiner’s discussion in *An Honest Calling: The Law Practice of Abraham Lincoln* (DeKalb: Northern Illinois University Press, 2006) of *Bryant v. Matson* (1847), a free soil case argued in an Illinois county court.

back to New Orleans as a slave.⁵⁵ For Taney, the deciding factor in these kinds of cases was whether the slave owner intended to establish permanent residence in a jurisdiction whose laws forbade slavery, or was only temporarily passing through.⁵⁶ In contrast, the Supreme Court of Louisiana had held one year earlier that slaves touching the soil of France experienced “immediate emancipation.”⁵⁷ That the Supreme Court of Louisiana affirmed McHenry’s decision in favor of Arsène demonstrates a local legal culture that ran counter to the prevailing legal opinion handed down by the Supreme Court of the United States.

A Flurry of Freedom Suits Follows

The Supreme Court of Louisiana’s affirmation of McHenry’s reasoning in Arsène’s case helps explain why, in cases with similar fact patterns, McHenry simply held in favor of the enslaved petitioner without issuing a detailed account of his reasoning in these decisions.⁵⁸ With a busy case load, it sufficed to write something like:

[F]or the reasons given in the case of Arsène alias Cora c.w. vs. Louis Pigneguy No. 434, It is therefore ordered, adjudged and decreed that the plaintiff be released from the bonds of slavery, and be deemed free, and it is further ordered that the defendant pay costs of suit.⁵⁹

In keeping with the Supreme Court’s ruling in Arsène’s case, which corrected McHenry for not granting Arsène back wages, McHenry usually

⁵⁵ *United States v. Garonne*, 36 U.S. 73.

⁵⁶ *United States v. Garonne*, 36 U.S. at 77.

⁵⁷ *Louise v. Marot*, 9 La. at 473 (1836).

⁵⁸ *Sally v. Varney*, No. 906 (1st D. Ct. New Orleans 1847), *NOCA VSA* 290; *Fanny v. Poincy*, No. 1421 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290; *Tabé v. Vidal*, No. 1584 (1st D. Ct. New Orleans 1847), *NOCA VSA* 290; *Aimée v. Pluché*, No. 1650 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290; *Lucille v. Maspereau*, No. 1692 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290; *Aurore v. Décuir*, No. 1919 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290; *Souri v. Vincent*, No. 2660 (1st D. Ct. New Orleans 1850), *NOCA VSA* 290; *Hélène v. Blineau*, No. 4126 (1st D. Ct. New Orleans 1850), *NOCA VSA* 290; *Eulalie v. Blanc*, No. 4904 (1st D. Ct. New Orleans 1850), *NOCA VSA* 290. I do not see a record of McHenry’s holding in Fanny’s case, but the sheriff’s order refers to a judgment McHenry issued on May 25, 1848 in favor of Fanny.

⁵⁹ *Hélène v. Blineau*, No. 4126 (1st D. Ct. New Orleans 1850), *NOCA VSA* 290.

also granted a successful plaintiff back wages from the date the suit was initiated, to the conclusion of the suit.⁶⁰

However, the precedent set in Arsène's case was narrow: only slaves who had been to France before May 30, 1846, could benefit from it.⁶¹ This may explain why attorney David generally represented clients who had been to France before this time. Indeed, all but one of the fourteen freedom petitions that McHenry heard in the First District Court of New Orleans involved plaintiffs who had arrived in a free soil jurisdiction before the passage of the Act Protecting the Rights of Slave Holders.⁶² Certain plaintiffs, such as Sally, Lucille, and Hélène, may have returned to Louisiana as late as 1847.⁶³ The deciding factor was not when a plaintiff left free soil, but when they first touched free soil.

MARY: A TEST CASE

Unlike Arsène, Mary had traveled to France after the passage of the Act of May 30, 1846.⁶⁴ Mary's case is particularly well-documented, both in American and in French archives. Once Mary returned to New Orleans, not one but two free men of color rushed to Mary's aid to help her legally contest her re-enslavement. Her case reveals how a freedom suit mobilized a community.

Attorney David would certainly have understood this case for what it meant legally: an opportunity to test the limits of how far the courts would stretch after the passage of the Act of 1846. At the time, David had successfully petitioned for freedom on behalf of five former slaves (Arsène, Sally, Milky, Fanny, and Tabé) in Judge McHenry's court.⁶⁵ Like many of

⁶⁰ *Arsène v. Pineguy*, No. 459, 2 La. Ann. 620 (1847), *HASCL*. See also, e.g., *Souri v. Vincent*, No. 2660 (1st D. Ct. New Orleans 1850), *NOCA VSA* 290.

⁶¹ *Arsène v. Pineguy*, No. 434 (1st D. Ct. New Orleans 1846–1847), *NOCA VSA* 290; *Arsène v. Pineguy*, No. 459, 2 La. Ann. 620 (1847), *HASCL* (affirming McHenry's ruling against the retroactive application of the Act of 1846).

⁶² An Act to Protect the Rights of Slave Holders in the State of Louisiana, 30 May 1846, Louisiana Acts, 163.

⁶³ *Sally v. Varney*, No. 906 (1st D. Ct. New Orleans 1847), *NOCA VSA* 290; *Lucille v. Maspereau*, No. 1692 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290; *Hélène v. Blineau*, No. 4126 (1st D. Ct. New Orleans 1850), *NOCA VSA* 290.

⁶⁴ *Couvent v. Guesnard*, No. 1063, 5 La. Ann. 696 (1850), *HASCL*.

⁶⁵ *Arsène v. Pineguy*, No. 434 (1st D. Ct. New Orleans 1847), *NOCA VSA* 290; *Sally v. Varney*, No. 906 (1st D. Ct. New Orleans 1847), *NOCA VSA* 290; *Milky v. Millaudon*,

these plaintiffs, Mary had sailed to France with her mistress, who was in poor health. Desperate to escape seasonal disease in the semi-tropical city of New Orleans, Jeanne-Louise Emma De Larsille took the enslaved Mary with her to attend to her during the transatlantic voyage.⁶⁶ Mary was about eighteen years old at the time.⁶⁷ In Paris, De Larsille, who was the daughter of a prominent lawyer, recorded with a notary her intent to send Mary back to New Orleans to be sold as a slave.⁶⁸

Upon Mary's return, the free man of color Bernard Couvent immediately requested that the First District Court recognize him as Mary's ad hoc tutor (or legal guardian) so that he could petition for her freedom.⁶⁹ A clerk of the court granted the request on 7 December 1847.⁷⁰ The petition that David drew up demanded Mary's freedom, back wages in the amount of \$12 per month, and the costs of suit. No doubt recognizing a similar fact pattern to Arsène's, McHenry ordered that, for the reasons on record, "the petitioner Mary c.w. be restored to her liberty and that the defendant pay costs of suit."⁷¹

However, there is no date on this ruling. The court must not have enforced its ruling because, as early as 17 January 1848, Couvent initiated a second suit on Mary's behalf. Here, the argument in the petition was stronger. As in preceding freedom petitions, David argued that the court should recognize Mary as free "because the slavery [*sic*] is not tolerated in France, and being once free she can not fall again in slavery by her involuntary

No. 1201 (1st D. Ct. New Orleans 1847), NOCA VSA 290; Fanny v. Poincy, No. 1421 (1st D. Ct. New Orleans 1848), NOCA VSA 290; Tabé v. Vidal, No. 1584 (1st D. Ct. New Orleans 1847), NOCA VSA 290.

⁶⁶ Couvent v. Guesnard, No. 1786 (1st D. Ct. New Orleans 1848), NOCA VSA 290.

⁶⁷ "Sale, Emmeline Baylé, Widow of William Hurd Masson, to Emma Delarzille," 23 July 1840, *New Orleans Notarial Archives* [hereafter NONA], Notary Louis Thimelet Caire, vol. 77a, act no. 462.

⁶⁸ "Pouvoir, Jean-Louis de Larsille, avocat et appliquant au juge," 9 June 1812, AN-Paris MC/ET/XII/821, Notary Pierre Lienard. "Sale, Jeanne-Louise Emma De Larsille, to Charles Lamarque," 23 May 1851, NONA, Notary Achille Chiapella, vol. 23, act no. 467 (reproducing a power of attorney notarized by the Parisian notary Cyprien Saint-Hubert Thomassin on 23 November 1847).

⁶⁹ On tutorship, see p. 78 et seq. in Livingston, Derbigny, and Moreau Lislet, *Civil Code of the State of Louisiana*.

⁷⁰ Couvent v. Lemoine, No. 1634 (1st D. Ct. New Orleans 1848), NOCA VSA 290. Since Mr. and Mrs. Guesnard were still in Paris, Couvent sued their agent, Pierre Lemoine.

⁷¹ Couvent v. Lemoine, No. 1634 (1st D. Ct. New Orleans 1848), NOCA VSA 290.

return from France to New Orleans.”⁷² David added that notwithstanding the Act of 1846, Mary was free. He argued that the act was unconstitutional because it impaired the “contract of freedom obtained by the said Mary c.w. in France.”⁷³ He further asserted that the Act of 1846, which had no effect in France, could not “render slave a person who has been freed in France.”⁷⁴ David did not cite a specific article or clause of the United States Constitution, perhaps preferring to refer to a vague principle. Preceding petitions had not addressed the constitutionality of the Act of 1846. Of course, there had been no need to do so, because it had been established that the act could not apply to people who had been to France before May 30, 1846.

In between Couvent’s two petitions, a free man of color named Robert Rogers hired David to submit to the same court a different argument on Mary’s behalf. Rogers first attested that he was the godfather of Mary, a claim that demonstrates the importance of the church as a forum for legal networking.⁷⁵ Rogers’s signature on the petition attests to his literacy, another factor that enhanced access to justice.⁷⁶ In this petition, David argued that when Mrs. Jeanne Louise Emma De Larsille and her husband Dr. William Guesnard sent Mary, who had been freed by her presence in France, back to New Orleans, they violated the Act of 1830, which forbade freed slaves from re-entering Louisiana.⁷⁷ Any violator of this law was liable to pay \$1,000.⁷⁸

By passing the Act of 1830, Louisiana legislators had sought to limit the growth of Louisiana’s already sizable free black population.⁷⁹ Here a free person of color cleverly exploited a law initially designed to oppress. Rogers and David clearly hoped that the court would recognize Mary to be free on the basis of the French free soil principle. Under the Act of 1830, they could then sue Mr. and Mrs. Guesnard in a civil lawsuit, or they could ask

⁷² *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), NOCA VSA 290.

⁷³ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), NOCA VSA 290.

⁷⁴ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), NOCA VSA 290.

⁷⁵ *Rogers v. Guesnard*, No. 2362 (1st D. Ct. New Orleans 1848–1849), NOCA VSA 290.

⁷⁶ *Rogers v. Guesnard*, No. 2362 (1st D. Ct. New Orleans 1848–1849), NOCA VSA 290.

⁷⁷ *Rogers v. Guesnard*, No. 2362 (1st D. Ct. New Orleans 1848–1849), NOCA VSA 290.

⁷⁸ “An Act to Prevent Free Persons of Color from Entering into this State, and for Other Purposes,” 16 March 1830, Louisiana Acts, 1830, pp. 90–96.

⁷⁹ Finkelman, *An Imperfect Union*, 211; Schafer, *Becoming Free, Remaining Free*, 6–7.

the district attorney or attorney general to initiate a criminal prosecution against the Guesnards for bringing a free person of color into the state. In the case of a civil suit, it is possible that Mary would have been paid \$1,000. At the time, \$1,000 would have been more than enough to purchase an enslaved girl like Mary. De Larsille had originally bought Mary, her mother, and her brother for \$1,200 in 1840.⁸⁰

McHenry did not issue an order in Mary's case until May 29, 1848.⁸¹ Unlike cases where the plaintiff had been to France before May 30, 1846, it no longer sufficed to hold summarily that, for the reasons in *Arsène v. Pineguy* (1847), Mary was free.⁸² So, despite his busy case load, McHenry wrote a detailed opinion on the distinctions between Mary's case and the preceding freedom petitions. His pace was deliberate; his tone extremely reluctant.

McHenry first asked whether the laws of France had operated upon Mary so as to produce an immediate emancipation. He held that of course they did. After reviewing cases such as *Marie-Louise v. Marot* (1836) and *Arsène v. Pineguy* (1847),⁸³ McHenry declared, "it is therefore certain that according to the jurisprudence of Louisiana, as settled by her highest tribunals, the minor Mary c.w. is entitled to her freedom."⁸⁴ Notably, McHenry added the modifier, "as settled by her highest tribunals" so as to underline that this was the state of the law according to the best opinion of the state's courts, although not according to the legislature of Louisiana.⁸⁵

The defendant's lawyer protested that De Larsille had brought Mary to France after 1846, and had therefore acted under the authority of Act of 1846, which protected her property claim in Mary. McHenry's answer was clear:

This court feels no hesitation in declaring if the plaintiff by the operation of laws of France upon her personal condition did become

⁸⁰ "Sale, Emmeline Baylé, Widow of William Hurd Masson, to Emma Delarzille," 23 July 1840, *NONA*, Notary Louis Thimelet Caire, vol. 77a, act no. 462.

⁸¹ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290.

⁸² *Arsène v. Pineguy*, No. 434 (1st D. Ct. New Orleans 1847), *NOCA VSA* 290.

⁸³ *Marie-Louise v. Marot*, No. 2914, 9 La. 473 (1836), *HASCL*; *Arsène v. Pineguy*, No. 434 (1st D. Ct. New Orleans 1847), *NOCA VSA* 290.

⁸⁴ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290.

⁸⁵ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290.

free for one moment, then it was neither in the power of her former owner or the legislature of Louisiana to reduce her again to slavery, and any law passed with such a design, is against the plain and obvious principles of common right and common reason and is null and void.⁸⁶

However, he continued, if by its act the legislature had intended to take away from the courts their power to decide such cases, it was within their scope of power to do so.⁸⁷ After all, the legislature had established McHenry's court only two years prior.⁸⁸ The Act of 1846, which "denie[d] the right to a person who has once been in a state of slavery to stand in judgment for his or her freedom," clearly "inhibit[ed] the courts of this State from passing upon the merits of such claims."⁸⁹ Where McHenry had clearly been willing to recognize the legal personhood of those slaves who had been to France before 1846, now he felt "constrained" and "compelled" to dismiss the case on the grounds that his court had no authority to pass upon the merits of Mary's claim.⁹⁰

Although functionally this ended Mary's claim to freedom in the First District Court, McHenry did not stop there. Rather, he pontificated on the question raised in Robert Rogers's petition. Could the Act of 1830, which prohibited free people of color from entering the state of Louisiana, help Mary? Having become free in France, but subsequently returned into Louisiana, could Mary (through civil action) or could the state (on her behalf) criminally prosecute the person who had brought her back into Louisiana? Again, McHenry expressed extreme reluctance, observing, "the plaintiff was brought to this state in contravention of this provision of our law, and cannot be legally retained in bondage, but the court under the circumstances can do nothing more than dismiss her claim."⁹¹

⁸⁶ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290.

⁸⁷ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290.

⁸⁸ "A Brief Explanation of the Orleans Parish Civil & Criminal Court System, 1804–1926."

⁸⁹ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290.

⁹⁰ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290.

⁹¹ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290.

In his opinion on Mary's case, McHenry employed a rhetorical device that Robert Cover calls "the judicial can't."⁹² The anti-slavery judges Cover examines in his study knew that the results they reached were morally indefensible, but they wished their readers to understand the sense in which they had been compelled to reach it.⁹³ This is closely tied to another strategy that nineteenth century anti-slavery judges used when they felt compelled in their professional role to apply a law that conflicted with their personal morality: they ascribed responsibility elsewhere.⁹⁴ Judges such as Joseph Story, who were publicly anti-slavery but conceived of the fugitive slave clause as an indispensable element in the formation of the Union, would portray themselves as helpless to change the laws.⁹⁵ Under the doctrine of separation of powers, they reasoned, it was up to the people through their legislators to overturn unjust laws.⁹⁶ Likewise, McHenry portrayed himself as constrained by a legislature that had passed a clearly unjust law.⁹⁷

However, it should not be assumed that McHenry believed the law to be unjust because he was categorically opposed to slavery. McHenry's personal and legal papers, which I examine below, reveal that his attitude toward slavery was much more complicated than this.

After McHenry handed down his decision in Mary's case, David continued to take on freedom petitions, but only on behalf of slaves who had been to France before the passage of the law on May 30, 1846. Between 1848 and 1850, McHenry held in favor of freedom for six more petitioners: Aimée, Lucille, Aurore, Souri, Hélène, and Eulalie.⁹⁸ Unlike Mary, all of these women and girls had first touched free soil before 1846. At the conclusion of Mary's case, David knew exactly where the limits of the law lay.

⁹² Cover, *Justice Accused*, 119.

⁹³ Cover, 119.

⁹⁴ Cover, 236.

⁹⁵ Cover, 236–43; *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

⁹⁶ Cover, *Justice Accused*, 236.

⁹⁷ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), NOCA VSA 290.

⁹⁸ *Aimée v. Pluché*, No. 1650 (1st D. Ct. New Orleans 1848), NOCA VSA 290; *Lucille v. Maspereau*, No. 1692 (1st D. Ct. New Orleans 1848), NOCA VSA 290; *Aurore v. Décuir*, No. 1919 (1st D. Ct. New Orleans 1848), NOCA VSA 290; *Souri v. Vincent*, No. 2660 (1st D. Ct. New Orleans 1850), NOCA VSA 290; *Hélène v. Blineau*, No. 4126 (1st D. Ct. New Orleans 1850), NOCA VSA 290; *Eulalie v. Blanc*, No. 4904 (1st D. Ct. New Orleans 1850), NOCA VSA 290.

Mary's Appeal at the Supreme Court of Louisiana

Mary's legal auxiliaries — her tutor, her godfather, and her attorney — did not give up. They appealed to the Supreme Court of Louisiana. There, however, Chief Justice Eustis affirmed McHenry's judgment to dismiss Mary's case.⁹⁹ By the time Eustis handed down his decision in November 1850, McHenry had already departed New Orleans for California. Eustis explained that in cases of slaves traveling to a country or state where slavery does not exist, since the passage of the Act of 1846, the legislation would be "imperative."¹⁰⁰ Unlike McHenry who deliberated at length before he came to his decision to dismiss Mary's case and condemned the legislation as being "against plain and obvious principles of common right and common reason," Eustis easily deferred to the legislature without any indication of moral qualms.¹⁰¹ He asserted, "there can be no question as to the legislative power to regulate the condition of this class of persons within its jurisdiction."¹⁰² As support for this assertion, he cited several cases from Mississippi.¹⁰³ Jurisprudence handed down by the supreme court of another state was merely persuasive authority; it did not control the Supreme Court of Louisiana. The tightening of restrictions on pathways to freedom was now creeping in from the legislature to the courts.¹⁰⁴

Eustis explained, "The statute merely enacts and establishes as law the rule laid down by Lord Stowell, in the case of the *Slave, Grace*, determined in the High Court of Admiralty of England."¹⁰⁵ Eustis had cited the case of the *Slave, Grace* before in *dicta*.¹⁰⁶ But here it functioned to help him reach his legal decision. The slave Grace James had accompanied her mistress Mrs. Allan from Antigua to England in 1822, resided with her there one

⁹⁹ *Couvent v. Guesnard*, No. 1063, 5 La. Ann. 696 (1850), *HASCL*; *Conant [sic] v. Guesnard*, 5 La. Ann. 696; *Rogers v. Guesnard*, No. 1507, Unreported case (1850), *HASCL*.

¹⁰⁰ *Conant [sic] v. Guesnard*, 5 La. Ann. 696 (1850).

¹⁰¹ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290.

¹⁰² *Conant [sic] v. Guesnard*, 5 La. Ann. at 697.

¹⁰³ These are *Hinds v. Brazeale*, 2 Howard's Miss. Rep. 837, and *Vick v. McDaniel*, 3 Howard's Miss. Rep. 337, cited in *Conant [sic] v. Guesnard*, 5 La. Ann. at 697.

¹⁰⁴ Paul Finkelman argues in his comparative study that Louisiana was more liberal than Mississippi and Missouri on questions of slave transit: Finkelman, *An Imperfect Union*, 216.

¹⁰⁵ *Conant [sic] v. Guesnard*, 5 La. Ann. at 696.

¹⁰⁶ *Josephine v. Poultney*, 1 La. Ann. 329 (1846); *Eugénie v. Preval*, 2 La. Ann. 180 (1847).

year, and had then voluntarily returned with her to Antigua in 1823.¹⁰⁷ With the support of abolitionists in both Antigua and England, the crown prosecuted Mrs. Allan for seizure.¹⁰⁸ For Lord William Scott Stowell of the High Court of Admiralty of England, the legal question became whether, upon return to Antigua, Grace returned to her original state of involuntary servitude.¹⁰⁹ He held that she did.¹¹⁰ *Somerset* had established long before that, so long as slaves resided on English soil, their masters had no authority over them.¹¹¹ No one could force them to return to a place where slavery existed, and they could submit habeas corpus petitions if anyone tried.¹¹² However, *Somerset* had left unanswered the question whether, upon return to a slave jurisdiction, slaves could initiate legal suits.¹¹³ Did they have the legal standing to do so as free persons?¹¹⁴ Stowell held that they did not, because the freedom they temporarily enjoyed while residing in England, “totally expired when that residence ceased.”¹¹⁵

Stowell presented several rationalizations for this opinion. First, slavery was good for the economy of the British Empire.¹¹⁶ Second, the growth of a free black population was “highly dangerous” to the security of that empire.¹¹⁷ Finally, like McHenry, Eustis, and the antebellum anti-slavery judges that Cover investigates, Stowell placed responsibility elsewhere: on the legislature.¹¹⁸ But where McHenry had clearly done so with a heavy heart, Eustis and Stowell asserted the principle of legislative deference confidently. Stowell declared, “it is a known and universal rule in the interpretation of laws, that that sense is to be put on those laws which is the

¹⁰⁷ *The Slave, Grace*, 2 Hagg. 94 (High Ct. Admiralty 1827).

¹⁰⁸ Stephen Waddams, “The Case of Grace James (1827),” *Texas Wesleyan Law Review* 13 (2007 2006): 783–94.

¹⁰⁹ *The Slave, Grace*, 2 Hagg. at 94.

¹¹⁰ *The Slave, Grace*, 2 Hagg. at 94.

¹¹¹ *Somerset v. Stewart*, 98 Eng. Rep.

¹¹² *Somerset v. Stewart*, 98 Eng. Rep. 499; reaffirmed in *The Slave, Grace*, 2 Hagg. at 106; 117.

¹¹³ *Somerset v. Stewart*, 98 Eng. Rep. 499; reaffirmed in *The Slave, Grace*, 2 Hagg. at 110.

¹¹⁴ *The Slave, Grace*, 2 Hagg. at 110.

¹¹⁵ *The Slave, Grace*, 2 Hagg. at 101.

¹¹⁶ *The Slave, Grace*, 2 Hagg. at 115.

¹¹⁷ *The Slave, Grace*, 2 Hagg. at 116.

¹¹⁸ Cover, *Justice Accused*, 236.

sense affixed to them by the legislature.”¹¹⁹ When Stowell examined the laws of Antigua, he found that they had “uniformly resisted the notion that a freedom gained in England continues with return to the colonies.”¹²⁰ Of course, this contrasted sharply with the legal culture of Louisiana in the 1820s and 1830s, which emphasized “immediate emancipation,”¹²¹ that “once perfected, was irrevocable.”¹²²

Although Stowell’s decision was met with public opposition in England, where abolitionism was growing, his reasoning continued to grow in popularity among judges in the United States, particularly in the years preceding the Civil War.¹²³ This coincides with a broader trend of antebellum courts explicitly renouncing the principle articulated in *Marie-Louise v. Marot* (1836), that jurists should always interpret the law so as to favor liberty.¹²⁴ Where in *Marot* the Supreme Court of Louisiana had deferred to French laws so as to favor liberty, here in *Couvent* the court deferred to English law so as to restrict liberty.

With the stroke of a pen, Chief Justice Eustis deployed violence.¹²⁵ As I discuss below, Eustis would later side with the Confederates during the Civil War. Although law is often understood as a nonviolent solution to social disputes, this is a striking example of what Robert Cover calls the violence of the word.¹²⁶ Mary’s life changed dramatically after this. Six months after Eustis penned these words, Mr. and Mrs. Guesnard, who were still in Paris, arranged for their agent Pierre Lemoine to sell Mary to the professional slave broker Charles Lamarque, Jr. for \$450.¹²⁷ Eight days later, Lamarque sold her for \$740. That Lamarque made a profit of \$290 in just over one week demonstrates that the Guesnards gladly rid themselves

¹¹⁹ *The Slave, Grace*, 2 Hagg. at 125.

¹²⁰ *The Slave, Grace*, 2 Hagg. at 124.

¹²¹ *Louise v. Marot*, 9 La. at 476. See also *Lunsford v. Coquillon*, 2 Mart. (n.s.) 401; *Louis v. Cabarrus*, 7 La. 170; *Smith v. Smith*, 13 La. 441 (1839); Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 220–88.

¹²² Art. 189 in Livingston, Derbigny, and Moreau Lislet, *Civil Code of the State of Louisiana*, 29.

¹²³ Waddams, “The Case of Grace James (1827).”

¹²⁴ *Louise v. Marot*, 9 La. 473; Cover, *Justice Accused*, 62; 96–99.

¹²⁵ Robert Cover, “Violence and the Word,” *Yale Law Journal* 95 (1986): 1601–30.

¹²⁶ Cover.

¹²⁷ “Sale, Jeanne-Louise Emma De Larsille, to Charles Lamarque,” 23 May 1851, *NONA*, Notary Achille Chiappella, vol. 23, act no. 467.

of Mary at a lesser amount than they could have sold her for. Mary was sold “fully guaranteed against the vices and maladies prescribed by law and free from all incumbrance in the name of said Seller.”¹²⁸ That Mary had traveled to France where slavery was not tolerated, was no longer an encumbrance to slave owners under the laws of Louisiana.

The switch from deference to French law, to deference to English law, carried with it other restrictions: not only for slaves, but also for women. In *Smith v. Preval*, the court asked whether the slave owner Rosalba Preval (who had left Louisiana for France in May 1830 with her slave Eugénie) would be subject to the laws of France or to the laws of Louisiana. Once in France, Preval had married Adolphe Faure, an officer in the French army. She later returned to New Orleans, but Eugénie followed only in 1838. Eustis concluded that Preval had agreed to subject herself to the laws of France by taking up residence and domicile there.¹²⁹

From Eugénie’s point of view, this would have been a successful outcome. However, this was a restrictive precedent. Although it resulted in freedom for the individual slave in this case, not all slaves traveling to France would find themselves in the lucky situation that their mistresses would marry French men, thereby explicitly indicating that they had subjected themselves to French laws. More than establishing or protecting the rights of slaves, the reasoning restricted the rights of women to own property. *Smith v. Preval* (1847) therefore demonstrates tightening limitations on white women’s rights to own separate property — a right that became especially precarious if they established residence in foreign nations.

A Judicial–Legislative Divide

Mary’s case signifies a judicial–legislative divide. In it, McHenry confidently declared that “according to the jurisprudence of Louisiana, *as settled by her highest tribunals* [emphasis added], the minor Mary c.w. is entitled to her freedom.”¹³⁰ He then excoriated the Louisiana legislature for taking away from Mary her right to sue in Louisiana courts, a power grab that was “against plain and obvious principles of common right and common

¹²⁸ “Sale, Charles Lamarque Jr to Casimir Villeneuve,” 31 May 1851, *NONA*, Notary Achille Chiapella, vol. 23, act 493.

¹²⁹ *Smith v. Preval*, 2 La. Ann. 180.

¹³⁰ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), *NOCA VSA* 290.

reason,” and should be “null and void.”¹³¹ Schafer describes the state supreme court as “clearly reluctant” and “obviously disgruntled,” but this confuses the supreme court decision with that of McHenry in the district court.¹³² There is a major difference in the tone of the two opinions. Although McHenry at the district court was clearly reluctant to rule against Mary, Eustis at the supreme court exhibited no hesitation in deferring to the legislature.

Legislative opposition to McHenry was evident from the very beginning of his ascent to the bench. His fiancée Ellen wrote to him,

Had your enemies succeeded in their nefarious designs, and defeated your appointment, they could not have changed you [*sic*] principles or upright integrity of purpose The kind heart, the cultivated and upright principles, which I believe you, dearest, to possess, are not dependant [*sic*] on the whims and caprices of Governors or Legislators.¹³³

Clearly, Ellen admired McHenry for an unwavering commitment to principles of justice, just as she derided legislators for their whims and caprices.

In contrast to judicial rulings protecting the manumission rights of slaves, the Act of 1846 narrowed lawful pathways to freedom. This fits into a broader context of hardening laws on slavery. For instance, in 1830 freed slaves were to be sent out of Louisiana; by 1857 all emancipations were prohibited.¹³⁴ By the eve of the Civil War, Louisiana was no longer the relative liberator of individual slaves it had once been.¹³⁵

Still, we should not put McHenry on the extreme opposite of the pro/anti-slavery political spectrum. In Louisiana, legislators and jurists alike

¹³¹ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), NOCA VSA 290.

¹³² Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 277–79.

¹³³ “Letter, Ellen McHenry to John McHenry,” 28 February 1847, KMPFP, Box 14.

¹³⁴ “An Act to Prevent Free Persons of Color from Entering into this State, and for Other Purposes,” 16 March 1830, Louisiana Acts, 1830, pp. 90–96. “An Act to Prohibit the Emancipation of Slaves,” Act of 6 March 1857, Louisiana Acts, p. 55. For a precise overview of all the relevant laws, see “Laws Governing Slavery and Manumission” in Schafer, *Becoming Free, Remaining Free*, 1–14. For a comprehensive chronology, see Vernon Palmer, *Through the Codes Darkly: Slave Law and Civil Law in Louisiana* (Clark, N.J.: The Lawbook Exchange, 2012).

¹³⁵ Finkelman, *An Imperfect Union*, 216; Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 288.

endorsed slavery. Where legislators sought to preserve the institution through stricter and stricter laws, however, jurists like John McHenry and Christian Roselius effectively preserved the institution by safeguarding outlets for some. Perhaps they reasoned that this would make the institution more durable in the long-run.¹³⁶

McHENRY DEPARTS FOR CALIFORNIA

The last freedom suit McHenry decided was *Eulalie v. Blanc* (1850). Since Eulalie had touched free soil before 1846, this was an easy decision with the same stock reference to “the reasons delivered in the case of *Cora alias Arsène vs. L.A. Pigneguy*.”¹³⁷ By this time, McHenry had made enemies in Louisiana. He wrote to his wife, “the order of arrest issued against me, after a little contest I succeeded in having it set aside, to the great discomfiture of some of my enemies.”¹³⁸ It is unclear whether the reason for his arrest had anything to do with his judicial decisions. It is possible that the order for his arrest stemmed from creditors, as McHenry explains in the next sentence, “I have settled with Messrs Maunsel White & Co. and with nearly all, to whom I am in any manner indebted, but I am without money.”¹³⁹

On 26 June, McHenry still resided in New Orleans, but by 22 July, he was on a boat to San Francisco.¹⁴⁰ He sought both fame and fortune in California. Already in California, McHenry’s father-in-law observed,

As to the question of Mr. McHenry being made Chief Justice, in case he comes to California, I can only say, that I think he is one of those go ahead sort of men, who are most apt to become Chiefs in whatever business they engage in, but everything in California depends on chance, and no one can tell today what tomorrow will bring forth.¹⁴¹

¹³⁶ Frank Tannenbaum, *Slave and Citizen* (Boston: Beacon Press, 1992); Alejandro de la Fuente, “Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited,” *Law and History Review* 22, no. 2 (2004): 339.

¹³⁷ *Eulalie v. Blanc*, No. 4904 (1st D. Ct. New Orleans 1850), NOCA VSA 290.

¹³⁸ “Letter, John McHenry to Ellen McHenry,” 15 June 1850, KMPFP, Box 15.

¹³⁹ “Letter, John McHenry to Ellen McHenry,” 15 June 1850, KMPFP, Box 15.

¹⁴⁰ “Letter, Ellen McHenry to John McHenry,” 26 June 1850, KMPFP, Box 14; “Letter, John McHenry to Ellen McHenry,” 22 July 1850, KMPFP, Box 15.

¹⁴¹ “Letter, Asa Baldwin Metcalfe to Ellen Metcalfe McHenry,” 30 December 1849, KMPFP, Box 16.

In California, McHenry's worldly fortune gradually increased. A venture in the importation of prefabricated housing undertaken with James Van Ness and a Mr. Rutherford yielded disappointing results, leaving him with a net profit of \$500 on an original investment of \$6,700.¹⁴² In August 1850, he abandoned his friendship and business partnership with Rutherford, and instead posted a sign outside a rented office in San Francisco where he could begin practicing law.¹⁴³ By the end of September, he had already earned \$700 and was able to rent a room at San Francisco's most luxurious hotel, the St. Francis.¹⁴⁴ This contrasts favorably to his days as a young judge in New Orleans, when he warned his fiancée, "I am without fortune, yet I hope to be able to provide for you."¹⁴⁵

Once in California, McHenry was reportedly called upon to help frame the constitution of the new state.¹⁴⁶ His dream of becoming Chief Justice of the Supreme Court of California never did come to fruition. He practiced in the areas of commercial law, estate planning, probate, property law, and tax law, property law — clearly a career shift away from criminal law.¹⁴⁷ In 1868, McHenry retired from the practice of law, selling thousands of his legal books at public auction.¹⁴⁸ However, he maintained social ties with esteemed figures of the San Francisco legal scene, such as Judge Serranus Clinton Hastings, founder of the Hastings College of the Law.¹⁴⁹

Upon his death, even "men who differed widely from him in politics and policies" eulogized him.¹⁵⁰ Judge C. T. Botts proclaimed,

¹⁴² "Letters, John McHenry to Ellen McHenry," 22 July 1850, 31 August 1850, KMPFP, Box 15.

¹⁴³ "Letter, John McHenry to Ellen McHenry," 31 August 1850, KMPFP, Box 15.

¹⁴⁴ "Letter, John McHenry to Ellen McHenry," 29 September 1850, KMPFP, Box 15.

¹⁴⁵ "Letter, John McHenry to Ellen McHenry," 24 February 1847, KMPFP, Box 15.

¹⁴⁶ "Biographical sketch by Judge C. T. Botts, addressing the U.S. Circuit Court on McHenry's death," 1880, KMPFP, Box 14. Although McHenry's name does not appear as a signatory to the Constitution of California (1849), C. T. Botts's does, so it is mildly credible that Botts had consulted with McHenry informally, but it must have been before McHenry's arrival in California.

¹⁴⁷ "Receipts," 1846–1877, John McHenry Legal Papers, Box 1, BANC MSS C-B 308.

¹⁴⁸ "John McHenry — papers re: his law library," n.d., KMPFP, Box 14.

¹⁴⁹ "Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith," n.d., KMPFP, Box 14; "McHenry Family — Invitations," KMPFP, Box 14.

¹⁵⁰ "Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith," n.d., KMPFP, Box 14.

He possessed a vigorous and highly cultivated intellect, and he pursued the cause he espouses (which to his mind, at least, was always the cause of justice) with an earnestness, a zeal, and an ardour seldom equaled, and never, in my opinion, surpassed.¹⁵¹

Rev. Dr. William Scott, who had fled Louisiana during the Civil War and declared that, “Jefferson Davis was no more a traitor than George Washington,” officiated at McHenry’s funeral.¹⁵² McHenry is buried at Mountain-view Cemetery in Oakland, California.

Liza: The End of a Flurry of Free Soil Suits

After McHenry’s departure, attorney Jean-Charles David submitted a new freedom petition to the First District Court on behalf of the slave Liza. Liza’s claim would have been successful in McHenry’s court. Liza had traveled to France well before 1846, in 1820 or 1821. However, McHenry’s successor John C. Larue quickly rejected the claim that Liza “became free by setting her foot on French soil.”¹⁵³ In a sharp departure from previous cases, he stated that the key question was whether the slaveowner had intended to establish domicile in the nation where slavery did not exist. He found that Liza’s owner at the time had gone to France with a specific purpose: not to establish residence, but to pick up his wife and relations there. He did not linger in France any longer than was absolutely necessary to accomplish this purpose. Larue reasoned that “as Louisiana was not at that time a French colony,” he could not even “acknowledge” the laws of France on the subject of slavery.¹⁵⁴ Instead, Larue turned to the case of the *Slave, Grace* to support his assertion that “the mere fact of her having been there, [would not] work such a permanent change in her status.”¹⁵⁵ Larue also cited *Commonwealth v. Aves* (1836) and *Strader v. Graham* (1850) as support for the general principle that “the laws regulating the status of the

¹⁵¹ “Biographical sketch by Judge C. T. Botts, addressing the U.S. Circuit Court on McHenry’s death,” 1880, KMPFP, Box 14.

¹⁵² “Dr. Scott, of California, Rev. Dr. Scott,” 18 October 1861, *The New York Times*; “Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith,” n.d., KMPFP, Box 14.

¹⁵³ *Liza v. Puisant*, No. 5632 (1st D. Ct. New Orleans 1851), NOCA VSA 290.

¹⁵⁴ *Liza v. Puisant*, No. 5632 (1st D. Ct. New Orleans 1851), NOCA VSA 290.

¹⁵⁵ *Liza v. Puisant*, No. 5632 (1st D. Ct. New Orleans 1851), NOCA VSA 290.

individual are confined to the territory over which they are operative, and the laws of France should have no more effect in emancipating a slave in Louisiana.”¹⁵⁶

David and his client would no doubt have been surprised at the outcome of this case: Liza’s was a stock claim. But upon appeal, the Supreme Court of Louisiana affirmed Larue’s decision. Writing for the court, Associate Justice Pierre Adolphe Rost affirmed Larue’s emphasis on the length of the master’s stay, as well as Larue’s reliance on Anglo-American jurisprudence.¹⁵⁷ In a concurring opinion, Chief Justice Eustis stated his reasons for departing from *Marie-Louise v. Marot* (1836) and related cases, which had established the principle of immediate emancipation.¹⁵⁸ He explicitly blamed Chief Justice François-Xavier Martin for faulty reasoning in *Smith v. Smith* (1839).¹⁵⁹ Although Eustis would have reached the same decision in favor of Priscilla’s freedom, it was not because the laws of France were at all relevant, but merely because Mrs. Smith had no intention of returning to Louisiana, where slavery was recognized.¹⁶⁰

A major turning point in the Supreme Court of Louisiana’s jurisprudence on slavery, Liza’s case was the first time the court had applied the Act of 1846 retroactively.¹⁶¹ The case also signifies a growing harmonization of Louisiana jurisprudence with the Supreme Court of the United States.¹⁶² No longer did the court adhere to another nation’s legal principle (which of course, it had no obligation to follow). Instead, the court looked to the binding authority of the Supreme Court of the United States that it had previously disregarded in *Smith v. Smith* (1839) and to persuasive authority from the English common law state of Massachusetts.¹⁶³

¹⁵⁶ *Liza v. Puisant*, No. 5632 (1st D. Ct. New Orleans 1851), *NOCA VSA* 290; *Commonwealth v. Aves*, 35 Mass. 193 (1836); *Strader v. Graham*, 51 U.S. 82 (1850).

¹⁵⁷ *Liza v. Puisant*, 7 La. Ann. at 81.

¹⁵⁸ *Liza v. Puisant*, 7 La. Ann. at 80; *Louise v. Marot*, 9 La. at 473.

¹⁵⁹ *Liza v. Puisant*, 7 La. Ann. at 82; *Smith v. Smith*, 13 La. at 441.

¹⁶⁰ *Liza v. Puisant*, 7 La. Ann. at 82.

¹⁶¹ Helen Catterall, *Judicial Cases Concerning American Slavery and the Negro* (Washington, D.C.: Carnegie Institution of Washington, 1926), vol. 3, 389–91; Finkelman, *An Imperfect Union*, 212–14; Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 277–88; Schafer, *Becoming Free, Remaining Free*, 27–28.

¹⁶² Schafer, *Slavery, the Civil Law, and the Supreme Court of Louisiana*, 287; Schafer, *Becoming Free, Remaining Free*, 28.

¹⁶³ *Smith v. Smith*, 13 La. at 441; *Commonwealth v. Aves*, 35 Mass. 193.

Eustis's opinion in this case has been described as a nearly inexplicable departure from his previous opinions.¹⁶⁴ Indeed, Eustis engaged in "judicial cheating" typical of other antebellum judges on questions relating to slavery.¹⁶⁵ The emphasis on the length of the master's stay was a sharp departure from the immediate emancipation precedent, but Eustis cast his opinion here as consistent with his previous opinions in *Josephine v. Poultney* (1846), *Arsène v. Pineguy* (1847), and *Smith v. Preval* (1847).¹⁶⁶ In fact, it was not. It was consistent with Anglo-American jurisprudence from other jurisdictions but not with the court's own line of reasoning.

McHenry's departure from the bench adds another layer of explanation. Although of course Eustis was never bound by McHenry's opinions, McHenry's receptiveness to freedom petitions led to circumstances in which a community could mobilize to push freedom petitions through the courts. McHenry's precise articulation of the Supreme Court of Louisiana's principle of immediate, irrevocable emancipation, and his refusal to apply the Act of 1846 retroactively, would have been difficult to overturn with professional integrity.¹⁶⁷ But when a new first-instance judge presented Eustis with different reasoning, based on Anglo-American common law rather than French and international law, Eustis seized the opportunity to affirm a new set of rules on slavery and freedom. In addition to symbolizing a harmonization with the Supreme Court of the United States, in other words, Eustis's decision signified a growing Anglicization of Louisiana law. This is part of a general trend in Louisiana legal history.¹⁶⁸ But of course complete Anglicization was never achieved, because Louisiana to this day is a mixed civil law–common law jurisdiction.

¹⁶⁴ Finkelman, *An Imperfect Union*, 213.

¹⁶⁵ Cover, *Justice Accused*, 6.

¹⁶⁶ *Liza v. Puissant*, 7 La. Ann. at 82; *Arsene v. Pigneguy*, 2 La. Ann. 620 (1847); *Josephine v. Poultney*, 1 La. Ann. at 329; *Eugénie v. Preval*, 2 La. Ann. at 180.

¹⁶⁷ *Arsène v. Pineguy*, No. 434 (1st D. Ct. New Orleans 1847), NOCA VSA 290.

¹⁶⁸ For the classic clash of cultures thesis, see George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* (Cambridge: Harvard University Press, 1975); Judith Schafer and Warren Billings, *An Uncommon Experience: Law and Judicial Institutions in Louisiana, 1803–2003* (Lafayette: University of Southwestern Louisiana, 1997), 6; For revisions which seek to see Louisiana as more than "exotic or curiously amusing," see Mark Fernandez, *From Chaos to Continuity: The Evolution of Louisiana's Judicial System, 1712–1862* (Baton Rouge: Louisiana State University Press, 2001).

After this blow, David took no more free soil suits to the First District Court. A sparse number of freedom petitions made it to the First, Third, Fourth, and Fifth District Courts after this time, but different attorneys represented the claimants.¹⁶⁹

EXPLAINING MCHENRY'S OPINIONS

McHenry's Civilian Legal Training

In McHenry's opinions, the laws of France stood superior to both the individual rights of Louisiana property owners and to the power of the Louisiana legislature.¹⁷⁰ Why was McHenry particularly influenced by the laws of France? McHenry's last name does not suggest any personal connection to French culture. However, he received his legal training under the personal tutorship of François-Xavier Martin, at whose home he lived while studying law.¹⁷¹ Martin is today remembered as a founding jurist of Louisiana who helped synchronize the state's many legal cultures.¹⁷² His cosmopolitan life experience helps explain why he was particularly well suited for this task. Born in 1762 in Marseille to an established Provençal family, Martin learned Latin and studied Classics early in life. At about the age of eighteen, he moved to the French colony of Martinique to join his uncle on a business venture. The venture failed

¹⁶⁹ *Louisa v. Giggo*, No. 6020 (1st D. Ct. New Orleans 1851), NOCA VSA 290 (represented by R. C. Me. Alpanse); *Haynes v. Fornoals*, No. 7091 (1st D. Ct. New Orleans 1852), NOCA VSA 290; *Ajoie v. De Marigny*, No. 10,443 (4th D. Ct. New Orleans 1856), NOCA VSA 290 (represented by Lewis Duvigneaud (Durigneaud)); *Paine v. Lambeth*, No. 2884 (5th D. Ct. New Orleans 1857), NOCA VSA 290; *Barclay v. Sewell*, No. 4622, 12 La. Ann. 262 (1857), HASCL (represented by Christian Roselius, on appeal from the Second District Court of New Orleans). For the case of Lucy Brown (1853), see Schafer, *Becoming Free, Remaining Free*, 29.

¹⁷⁰ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), NOCA VSA 290.

¹⁷¹ "Biographical Sketches of John McHenry, Written by Ellen McHenry and Mary McHenry Keith," n.d., KMPFP, Box 14.

¹⁷² Glenn Conrad, *A Dictionary of Louisiana Biography* (New Orleans: Louisiana Historical Association, 1988), 1:551; Fernandez, *From Chaos to Continuity*; Janice Shull, "François-Xavier Martin," in *Encyclopedia of Louisiana*, ed. David Johnson (Louisiana Endowment for the Humanities, November 4, 2014), <http://www.knowlouisiana.org/entry/francois-xavier-martin>.

and Martin left Martinique destitute. He migrated to North Carolina, where he opened a printing press.¹⁷³

Martin later studied law under the tutorship of Abner Nash and William Gaston.¹⁷⁴ In 1832, Gaston delivered an address to the graduating students of the University of North Carolina, urging them to take action against slavery. In 1833, Gaston was appointed to the Supreme Court of North Carolina.¹⁷⁵ Alfred Brophy argues that Gaston's jurisprudence signifies an "alternative vision of slavery" within Thomas Ruffin's own time and place.¹⁷⁶ Martin's course of study under Gaston helps explain why he, too, wrote decisions which limited the power of slave owners.

Martin's training in a common law jurisdiction, along with his fluency in French made him an attractive judicial candidate for the Territory of Orleans, a post to which President James Madison appointed him in 1809. He sat on the court for thirty years, through Louisiana's transition to statehood. Between 1836 and 1846, he served as the presiding judge of the court. He developed a clear expertise on the conflict of laws, otherwise known as choice of laws. This was an issue that arose perhaps more often in Louisiana than any other state because of its status as a mixed common-civil law jurisdiction. Upon his death, Martin was recognized as the eminent jurist whose decisions "threw great light upon the subject" of conflict of laws.¹⁷⁷

In American history, choice of law questions frequently arose in disputes concerning slaves.¹⁷⁸ It has been argued that "courts were the principal forums in which societal values concerning slavery were expressed."¹⁷⁹ There were two situations where conflict of laws questions typically arose within the context of slavery: 1) a slave owner had spent time in a jurisdiction

¹⁷³ Bullard, Henry Adams, "A Discourse on the Life, Character, and Writings of the Hon. François Xavier-Martin," in *Historical Collections of Louisiana*, ed. Benjamin Franklin French, vol. 2 (New York: Wiley and Putnam, 1846), 3–40.

¹⁷⁴ Bullard, Henry Adams; Janice Shull, "Francois-Xavier Martin."

¹⁷⁵ Alfred Brophy, *University, Court, and Slave: Pro-Slavery Thought in Southern Colleges and Courts, and the Coming of Civil War* (New York: Oxford University Press, 2016), 206.

¹⁷⁶ Brophy, 206.

¹⁷⁷ Bullard, Henry Adams, "A Discourse on the Life, Character, and Writings of the Hon. François Xavier-Martin," 29.

¹⁷⁸ Note, "American Slavery and the Conflict of Laws," *Columbia Law Review* 71 (1971): 75.

¹⁷⁹ Note, 75.

where slavery was not legal and the slave brought a freedom suit; 2) a slave owner had willingly manumitted a slave in a free state, for some reason the promise had not been carried out, and the former slave brought suit to enforce that manumission.¹⁸⁰ In the antebellum United States, the authoritative source on choice of laws tended to be Joseph Story's *Commentaries on the Conflict of Laws* (1834).¹⁸¹ In this treatise, Story directly addressed the question of slave transit, concluding that slaves traveling to free territory were subject to the laws of that territory and therefore enjoyed freedom while there.¹⁸² He implied that this freedom, however, was merely temporary: a "parenthesis," much as it had been for Lord Stowell in the case of the *Slave, Grace*.¹⁸³

Although the Louisiana Supreme Court eventually adopted this line of jurisprudence, Martin was well read in alternative approaches. In continental Europe, the experience of the Holy Roman Empire provided guidance for conflict of law questions. The jurisprudence that had developed during the period of the Holy Roman Empire conceived of divine law and natural law as superior, universally applicable legal sources. Under natural law, slavery was abhorrent. Roman law (particularly as codified in *Justinian's Institutes*) provided judges with persuasive authority. The law of nations came next on the hierarchy. Finally, judges could look to municipal, national, and state law. As a result, natural law could negate municipal laws on slavery.¹⁸⁴ But in the Anglo-American legal tradition, "concepts of 'natural law' and 'law of nations' were weak weapons with which to attack the institution [of slavery]."¹⁸⁵

McHenry studied with Martin before opening his own law practice in New Orleans in 1834.¹⁸⁶ McHenry's law library reflects his legal training under this leading civilian. Although McHenry sold most of the thousands of volumes in his law library in 1868, a catalogue of a remnant of his library reveals a significant representation of books on civil and international law,

¹⁸⁰ Note, 75.

¹⁸¹ Note, 76.

¹⁸² Chapter 4, Section 96 in Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (Boston: Hilliard, Gray, and Company, 1834), 92–93.

¹⁸³ Chapter 4, Section 106 in Story, 98–99; *The Slave, Grace*, 2 Hagg. at 131.

¹⁸⁴ Note, "American Slavery and the Conflict of Laws," 80–85.

¹⁸⁵ Note, 87.

¹⁸⁶ "New Orleans City Directory," 1834, NOCA.

such as the *Code Napoleon or French Civil Code* (New York: 1841), the *Institutes of Justinian* (1841), and Henry Wheaton's *Elements of International Law* (Philadelphia: 1836).¹⁸⁷

The slave transit cases for which Martin wrote the opinion, such as *Lunsford v. Coquillon* (1824), *Louis v. Cabarrus* (1834), and *Smith v. Smith* (1839), defer not only to the laws of slavery in France, but also in other American states.¹⁸⁸ Compared to judges deciding slave transit cases in other states, Martin took the comity of nations to another level. For Martin, respecting the laws of other jurisdictions was more than a mere courtesy: it was the solemn obligation of any jurisdiction participating in a smoothly functioning system of interstate or international law.¹⁸⁹ Martin also sat on the court when Chief Justice Mathews decided *Marie-Louise v. Marot* (1836), the case that established the obligation of Louisiana courts to recognize a slave's "immediate emancipation" upon touching free soil.¹⁹⁰

During Martin's judicial tenure, the Supreme Court of Louisiana embraced a distinct jurisprudence on slave transit that contrasted sharply with the more restrictive laws of Anglo-American jurisdictions.¹⁹¹ As Lord Stowell observed in the case of the *Slave, Grace* (1827), "France did not therefore do as [England] had done, put their liberty, as it were, in a sort of parenthesis."¹⁹² In Martin's Supreme Court of Louisiana, the freedom that slaves had experienced in France would not be treated as temporary or fleeting, but as permanent and irrevocable.¹⁹³ Judge McHenry's training under Martin contextualizes his special deference to the laws of France.

Like McHenry, Martin's opinions on race-related questions suggest that his decisions in favor of freedom claimants was dictated more by his rule of law commitments — in his case to international law — than to aiding slaves. In *Adelle v. Beauregard* (1810), the court distinguished between "persons of color," who "may have descended from Indians on both sides,

¹⁸⁷ "John McHenry — papers re: his law library," n.d., KMPFP, Box 14.

¹⁸⁸ *Lunsford v. Coquillon*, 2 Mart. (n.s.) 401; *Louis v. Cabarrus*, 7 La. 170; *Smith v. Smith*, 13 La. 441.

¹⁸⁹ Finkelman, *An Imperfect Union*, 209.

¹⁹⁰ *Louise v. Marot*, 9 La. at 476.

¹⁹¹ See, e.g., *Commonwealth v. Aves*, 35 Mass. 193; *Prigg v. Pennsylvania*, 41 U.S. 539.

¹⁹² *The Slave, Grace*, 2 Hagg. at 131.

¹⁹³ Art. 189 in Livingston, Derbigny, and Moreau Lislet, *Civil Code of the State of Louisiana*.

from a white parent, or mulatto parent,” and persons of purely African descent.¹⁹⁴ The court in this case presumed persons of color to be free — a principle that many Southerners at the time derided as too liberal, and scholars today interpret as progressive.¹⁹⁵ But this is an incomplete interpretation, for it was accompanied by the presumption that persons judged to be purely of African descent — that is, persons with a darker complexion — were presumed to be slaves. The court further hardened this racial dividing line when it reasoned in *Miller v. Belmonti* (1845), “Slavery itself is an exception to the condition of the great mass of mankind, and except as to Africans in the slave-holding States, the presumption is in favor of freedom.”¹⁹⁶ The principle of *in favorem libertatis* has deep roots in both Roman law and canon law.¹⁹⁷ Martin authored neither *Adelle* nor *Miller*, but sat on the court when these cases were decided.

Martin’s decisions in race and slavery cases may have impelled the Louisiana legislature to search for a way to be rid of him. Shortly after the controversial *Miller v. Belmonti* decision in 1845, Louisiana legislators adopted a new constitution. The legislature dissolved the court, reinstituting it almost immediately without Martin as a member. Always a man who had lived to work, he now had little to live for and died shortly thereafter.¹⁹⁸ Nevertheless, there are other possible explanations for Martin’s ouster. His management style was both idiosyncratic and inefficient. He insisted upon meeting litigants in person at a time when appellate courts were moving away from this tradition. This may have led to a better emotional understanding of the dispute, and is also understandable when we consider that Martin was functionally blind from at least 1836.¹⁹⁹ However, along with

¹⁹⁴ *Adelle v. Beauregard*, 1 Mart. (o.s.) 183 (1810).

¹⁹⁵ John Bailey, *The Lost German Slave Girl: The Extraordinary True Story of Sally Miller and Her Fight for Freedom in Old New Orleans* (New York: Atlantic Monthly Press, 2005); Carol Wilson, *The Two Lives of Sally Miller: A Case of Mistaken Racial Identity in Antebellum New Orleans* (New Brunswick: Rutgers University Press, 2007).

¹⁹⁶ *Miller v. Belmonti*, 11 Rob. 339 (1845). For a critical interpretation of the decision focusing on how Sally Miller won her freedom by successfully performing the trope of white womanhood in court, see Ariela Gross, “Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South,” *Yale Law Journal* 108, no. 1 (1998): 166–71.

¹⁹⁷ Finkelman, *An Imperfect Union*, 187–90.

¹⁹⁸ Janice Shull, “Francois-Xavier Martin.”

¹⁹⁹ Janice Shull.

the financial crisis of 1837, Martin's insistence upon trial-style deliberations led to a hopeless backlog of cases. In 1839, every judge except Martin abandoned the court. Four others were eventually recruited, but with the exception of Henry Bullard who had studied at Harvard School of Law, they were not among the top lawyers in the state.²⁰⁰

Whatever the reasons for Martin's ouster, both his and McHenry's departures from the Louisiana legal scene signify a growing Anglicization of Louisiana legal culture, which coincided with a closure of pathways to freedom. It was the newly reconstituted court that reversed Martin's decisions honoring the freedom of French soil, first in *Couvent v. Guesnard* (1850) and then in *Liza v. Puissant* (1852).²⁰¹ Unlike Martin, the new presiding justice of the court, George Eustis, was Boston-born, Harvard-educated, and sided with the Confederacy during the Civil War.²⁰² Eustis had served as associate justice on the court between 1838 and 1839, but he abandoned Martin's court in 1839.²⁰³ When the legislature disbanded Martin's court, they reappointed Eustis, this time as chief justice, in May 1846.²⁰⁴ Eustis could now proceed unfettered to overturn the French free soil precedent while embracing Anglo-American precedents such as the case of the *Slave, Grace* (1827).²⁰⁵ Eustis thus brought Louisiana into line with neighboring Southern common law states. Other historical works on the Louisiana slave transit cases have not linked the restrictive turn in Louisiana jurisprudence to the departures of either Martin or his student McHenry.²⁰⁶ Both deserve a place in explanations of the course of Louisiana law.

Criminality, Honor, and Masculinity

McHenry's opinions are best appreciated in the broader context of his professional life. Before he was appointed judge of the First District Court of New Orleans, McHenry practiced criminal defense. For example, Frances Mitchell hired McHenry to defend her son, who had been charged with

²⁰⁰ Bailey, *The Lost German Slave Girl*, 201.

²⁰¹ Conant [sic] v. Guesnard, 5 La. Ann. at 696; Liza v. Puissant, 7 La. Ann. at 80.

²⁰² Conrad, *A Dictionary of Louisiana Biography*.

²⁰³ Conrad; Bailey, *The Lost German Slave Girl*, 201.

²⁰⁴ Conrad, *A Dictionary of Louisiana Biography*.

²⁰⁵ The *Slave, Grace*, 2 Hagg. 94.

²⁰⁶ See, e.g., Cover, *Justice Accused*, 96–97; Finkelman, *An Imperfect Union*, 216.

manslaughter by a New Orleans court in 1846.²⁰⁷ McHenry's professional experience representing alleged criminals further explains why he ruled the way he did in so many freedom suits. Representing an alleged criminal requires empathizing with some of society's most marginalized people. Branded by the state as deviants, convicted criminals were cut off from social ties in ways that undermine their personhood.²⁰⁸ They experienced a form of the social death that Orlando Patterson argues is the hallmark of slavery.²⁰⁹

That McHenry shared the values of a patriarchal society helps explain why certain wealthy French planters beseeched him to stay rather than leave for California in 1850. When he warned, "I might have to decide against you again," they responded, "No matter, we need a man like you on the Bench."²¹⁰ Early in his judicial career, McHenry decided

a case of some importance, and one which excited considerable interest at the time A beautiful woman who had been horse-whipped in the streets by an individual sufficiently prominent to employ as his counsel Pierre Soulé, at that time a leading member of the Bar and of the State Legislature, and afterwards a United States senator from Louisiana.²¹¹

This was the case of *State v. Carter, alias Manly*.²¹² The fact that McHenry's court heard this prosecution at all is remarkable. In North Carolina, Judge Thomas Ruffin had already held that the state had no power to charge John Mann with a crime when he maimed the slave he was renting, named Lydia. Because slaves were considered property, not persons, the only recourse for

²⁰⁷ "Agreement, Frances Mitchell and John McHenry," 23 September 1846, KMPFP, Box 14.

²⁰⁸ On crime as behavior that the state labels as "abnormal" such that the unaccused behave "normally," see Émile Durkheim, "The Normality of Crime," in *Classic Readings in Sociology*, ed. Eve Howard (Belmont, CA: Thomson Higher Education, 2007). On prisons as total institutions that strip inmates of personhood, see Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Chicago: Aldine Publishing Company, 1962).

²⁰⁹ Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge: Harvard University Press, 1982), 13.

²¹⁰ "Biographical sketch by his daughter, Mary McHenry Keith," n.d., KMPFP, Box 14.

²¹¹ "Obituary — John McHenry," 17 November 1880, *The Daily Examiner*, KMPFP, Box 17.

²¹² "City Intelligence," 17 March 1848, *The Daily Picayune*.

Lydia's owner, Elizabeth Jones, was a civil suit against Mann for property damage.²¹³ However, in Louisiana, "a beautiful woman" garnered public attention as a sympathetic human victim.²¹⁴ Although the *Examiner* mentions neither this woman's race nor personal status, it seems likely that the victim of a horsewhipping would have been a slave. The description of the woman as beautiful suggests that like many cases in the antebellum South, this one played into tropes of tragic octoroons.²¹⁵ They were portrayed as almost "purely" white, suffering tragic fates because of their African blood.²¹⁶ That McHenry heard the case at all suggests that unlike Ruffin, he believed a master's power over his slave should be limited, but not dismantled, by the state.

The gendered aspect of this criminal case also raises the question of whether McHenry would have decided the freedom suits differently if they had been brought by plaintiffs who were men or boys. Perhaps when David and the community of free people of color handpicked certain litigants, they were playing into Southern notions of masculinity and honor. McHenry believed it was the solemn duty of men to protect women and children. In 1864, he bemoaned the fact that women and children had been left behind on Southern plantations without protection from the crimes of war.²¹⁷ According to his daughter who secretly attended the University of California, Hastings School of Law, from 1879–1882, McHenry

had no sympathy whatsoever with the then revolutionary idea that a woman had a right to think of a career outside of a home and babies [He] believed, that no woman's brain is capable of understanding the intricacies of law.²¹⁸

²¹³ *State v. Mann*, 13 N.C. 263 (1829).

²¹⁴ "Obituary — John McHenry," 17 November 1880, *The Daily Examiner*, KMPFP, Box 17.

²¹⁵ See, e.g., Hezekiah Hosmer, *Adela, the Octoroon* (Columbus: Follett, Foster, 1860); J. H. Ingraham, *The Quadroone, Or, St. Michael's Day* (New York: Harper, 1841).

²¹⁶ For the best critical analyses, see Gross, "Litigating Whiteness;" Ariela Gross, *What Blood Won't Tell: A History of Race on Trial in America* (Cambridge: Harvard University Press, 2008); James Kinney, *Amalgamation!: Race, Sex, and Rhetoric in the Nineteenth-Century American Novel* (Westport, Conn.: Greenwood Press, 1985).

²¹⁷ "John McHenry, speech, made in Sonoma," 1864, KMPFP, Box 17.

²¹⁸ "Hastings College of the Law, University of California," 1882, KMPFP, Carton 4; "Widow of Artist is Suffrage Pioneer Determination Sharpened by Defeat," 16 March 1925, *San Francisco Examiner*, KMPFP, Carton 14.

Like other African-American female litigants throughout the antebellum South, the successful female claimants in McHenry's court may have had status deserving of protection, but they did not necessarily have rights.²¹⁹

McHenry's Complicated Politics of Slavery

At first glance, the language in McHenry's opinions in Arsène's and Mary's cases might lead one to believe that he had abolitionist tendencies. Indeed, McHenry does not appear as a buyer or seller of human property in New Orleans between the years 1838 and 1850.²²⁰ The conveyance books are meticulously archived, and this absence contrasts with other white men of McHenry's status and time period. Even the plaintiffs' attorney, David, bought and sold humans for profit.

Although New Orleans records suggest that McHenry personally abstained from buying and selling human beings, sources held in California, where McHenry died, tell a different story. In 1842, McHenry's mother wrote a letter informing him that "Weaver and Cason has [*sic*] filed a bill in the chancery court against you for the balance of the money you are behind with them for the purchase of three negroes."²²¹ The balance was \$700, and the sheriff had seized the two children until McHenry would pay his debt.²²² Also in the 1840s, McHenry informed his new bride Ellen that he had instructed a certain Louis to pack up their room and pick up his mail from the post.²²³ In the 1850s, he instructed his wife to bring a "faithful servant" to aid her along the voyage from New Orleans to San Francisco.²²⁴ These letters fail to prove that McHenry, like so many legal professionals of his day, lived in New Orleans while managing a plantation from afar. Nonetheless, he participated in the trade in human property.²²⁵

²¹⁹ Laura Edwards, "Status without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth century U.S. South," *American Historical Review* 112, no. 2 (2007).

²²⁰ Vendor-Vendee Records, NONA Conveyance Books Index 38–51.

²²¹ "Letter, Elizabeth McHenry to John McHenry, 12 May 1841," KMPFP, Box 14.

²²² "Letter, Elizabeth McHenry to John McHenry, 12 May 1841."

²²³ "Letters, John McHenry to Ellen McHenry," n.d.; 14 June 1847, KMPFP, Box 15.

²²⁴ "Letters, John McHenry to Ellen McHenry," 1 January 1851, KMPFP, Box 15.

²²⁵ On legal professionals who owned and managed plantations, see Ariela Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*

Still, McHenry does not seem to have conceived of himself as a slave owner, referring not to his slaves but to “Louis” and his “servant.”²²⁶ Likely, in Louisiana he lacked the means to purchase a great number of slaves. Only in California could McHenry aspire to a lifestyle like that of a well-to-do Southern planter. A human interest piece written more than fifty years after McHenry’s death describes the “slaves” that McHenry employed on his 160-acre property, Rancho Temescal, for \$90 a month.²²⁷ The quotation marks around the word “slaves” appears in the original, indicating that these were not truly slaves. But like many laborers in multiracial California, McHenry’s laborers evade simple classification as either slave or free. More likely, they experienced degrees of unfreedom.²²⁸

Later in life, McHenry’s personal and political views on slavery solidified. Whereas in the 1840s McHenry’s attitudes toward slavery might be described as ambiguous, by the midst of the Civil War he had developed much sharper opinions. Speaking to members of the California Democratic Party on the eve of the 1864 election, McHenry condemned the “fanatical, fratricidal war” that had been waged “to free the Negro and subjugate the South.”²²⁹ The war for McHenry was not about states’ rights, with little to do with slavery.²³⁰ McHenry denounced Abraham

(Princeton: Princeton University Press, 2000), 27–30. On the prevalence of absentee landlordism, see Ulrich Bonnell Phillips, *American Negro Slavery: A Survey of the Supply, Employment and Control of Negro Labor as Determined by the Plantation Regime* (Baton Rouge: Louisiana State University Press, 1966), 50; 62; 91; 251; 340–41.

²²⁶ “Letters, John McHenry to Ellen McHenry,” n.d.; 14 June 1847, KMPFP, Box 15; “Letters, John McHenry to Ellen McHenry,” 1 Jan. 1851, KMPFP, Box 15.

²²⁷ E.G. Fitzhamon, “The Streets of San Francisco: Taylor, No. 11,” 14 April 1929, *San Francisco Chronicle*, in KMPFP, Box 14, “McHenry Miscellany” Folder.

²²⁸ Stacey Smith, “Remaking Slavery in a Free State: Masters and Slaves in Gold Rush California,” *Pacific Historical Review* 80, no. 1 (2011): 28–63 (discussing the landmark case *Stovall v. Archy*; Stacey Smith, *Freedom’s Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (Chapel Hill: University of North Carolina Press, 2013) (on degrees of unfreedom in California). See also *In Re Perkins*, 2 Cal. 424 (1852).

²²⁹ “John McHenry, speech, made in Sonoma,” 1864, KMPFP, Box 17. For the 1864 election, see David Long, *The Jewel of Liberty: Abraham Lincoln’s Re-Election and the End of Slavery* (Mechanicsburg, PA: Stackpole Books, 1994); John Waugh, *Reelecting Lincoln: The Battle for the 1864 Presidency* (New York: Crown Publishers, 1997).

²³⁰ This explanation is put forward by William A. Dunning and his students. William Archibald Dunning, *Essays on the Civil War and Reconstruction*. (Gloucester,

Lincoln as a tyrant and a despot. He predicted that “the Washington Abolition tyrant” would go down in the annals of history alongside Charles, the Duke of Burgundy, and other “wretches who have disgraced mankind.”²³¹

McHenry’s positions were not uncommon among Northern Democrats. In 1864, war-wary “Peace Democrats” readied themselves for negotiations to allow the Confederacy to be a separate American nation.²³² *The Lincoln Catechism*, a satirical piece published in New York similarly reaveals perception of Lincoln as an anti-slavery tyrant. It read, “III. By whom hath the Constitution been made obsolete? By Abraham Africanus

Mass.: P. Smith, 1898); William Archibald Dunning, *Reconstruction, Political and Economic, 1865–1877* (New York: Harper & Bros., 1907). In *The Irrepressible Conflict, 1850–1865* (New York: Macmillan Co., 1934), Arthur Cole argues that social and economic differences between the North and South inevitably led to the Civil War. In so doing, members of the Dunning School downplayed or completely evaded the political significance of slavery. In “Lincoln’s Election an Immediate Menace to Slavery in the States?,” *The American Historical Review* 36, no. 4 (1931): 766, Cole asserts that “slavery was scarcely the crux of the sectional issue.” See also Charles Beard and Mary Ritter Beard, *The Rise of American Civilization*, (New York: The Macmillan Company, 1933). In Nathaniel Wright Stephenson, “California and the Compromise of 1850,” *Pacific Historical Review* 4, no. 2 (1935): 115, Beard is quoted as saying that slavery hardly deserves a footnote in the history of the Civil War. As Laura Edwards explains in *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015), 181, the Dunning School was marked by a “clear support for white supremacy.” Revisionists of the 1930s–1940s instead focused on political factors, portraying Civil War era politicians as a blundering generation who had failed to compromise on compromisable issues, thereby leading to a needless, tragic loss of human life. See, e.g., Avery Craven, *The Repressible Conflict, 1830–1861* (Baton Rouge: Louisiana State University Press, 1939); James Randall, *Lincoln, the President*. (New York: Dodd, Mead, 1945); David Potter, *The Impending Crisis, 1848–1861* (New York: Harper & Row, 1976); David Potter, *The South and the Sectional Conflict* (Baton Rouge: Louisiana State University Press, 1968). Only beginning in the 1940s and picking up during the Civil Rights era of the 1960s did historians begin to focus on the moral issues of slavery and abolition as a cause of the Civil War. See, e.g., Allan Nevins, *The Emergence of Lincoln* (New York, 1950); Martin Duberman, *The Antislavery Vanguard: New Essays on the Abolitionists* (Princeton: Princeton University Press, 1965).

²³¹ “John McHenry, speech, made in Sonoma,” 1864, KMPFP, Box 17.

²³² Charles Flood, 1864: *Lincoln at the Gates of History* (New York: Simon & Schuster, 2009); Part III, “Slavery and the Crisis of American Democracy,” in Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: Norton, 2005).

the First,” and “XVI. What is the meaning of the word ‘traitor?’ One who is a stickler for the Constitution and the laws.”²³³

McHenry’s references to the “implacable and hellish spirit of Abolitionism,” and the misguided “Abolition preachers [who] still continue to deliver political harangues” bear a striking contrast to his opinion in *Couvent v. Guesnard* (1848), where he had condemned the Louisiana legislature for taking away from Mary the right to sue for her freedom.²³⁴ However, McHenry’s 1864 speech is not irreconcilable with his earlier judicial opinions on freedom suits. First, creating one legal exception (manumission) solidifies the rule (enslavement for those perceived to be of exclusively African descent). Furthermore, in both his 1864 speech and his judicial opinions nearly two decades prior, McHenry’s stated logic depends not on his personal or political views of slavery, but upon the rule of law. In this way, he is similar to the judges at the center of Lucy Salyer’s *Laws Harsh as Tigers*, whom she describes as “captives of law.”²³⁵ Between 1891 and 1905, federal and circuit court judges in San Francisco often decided cases in favor of Chinese petitioners regardless of their personal or political views on immigration. Even Judge William Morrow, who had been a vocal proponent of the Chinese Exclusion Act (1882) during his time as a legislator, felt bound once he became a judge to honor certain sacred principles of Anglo-American law, such as habeas corpus and evidentiary standards. He thus allowed the Chinese to access courtrooms and indeed often ruled in their favor.²³⁶ Like McHenry, these judges’ “respect for institutional obligations trumped other personal and political loyalties.”²³⁷

In 1848, McHenry had criticized the Louisiana legislature for deviously rejecting the laws of France, thereby reducing Mary again to slavery.²³⁸ In 1864, he accused Lincoln of violating the “principles and theory of the

²³³ *The Lincoln Catechism Wherein the Eccentricities & Beauties of Despotism Are Fully Set Forth: A Guide to the Presidential Election of 1864*. (New York: J. F. Feeks, 1864), 3–5. Library of Congress CTRG237336-B.

²³⁴ *Ibid.*; *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), NOCA VSA 290.

²³⁵ Salyer, *Laws Harsh as Tigers*, 69.

²³⁶ Salyer, 72.

²³⁷ Salyer, 70.

²³⁸ *Couvent v. Guesnard*, No. 1786 (1st D. Ct. New Orleans 1848), NOCA VSA 290.

law of war, derived from Grotius, Pufendorf, Francesco Vittoria, and other Christian writers upon the subject.”²³⁹ Well-read in the subject, McHenry owned copies of Hugo Grotius’s *De Jure Belli et Pacis*, as well as Emer de Vattel’s *The Law of Nations*.²⁴⁰ He described the pillage, rape, and other high crimes of war that had been committed upon women and children, only to go unpunished by the federal government. He also condemned what he saw as “the Abolition program for the overthrow of the Constitution.”²⁴¹ Nevertheless, there is room in the logic of McHenry’s speech for the South eventually to abolish slavery. Gradual abolition of slavery through popular referendum or through constitutional amendment would likely have been acceptable to him, but in his view, “forcible abolition” should not be contemplated for a moment.²⁴²

McHenry’s virulent language toward Lincoln contrasts with his fellow jurist Christian Roselius’s eulogy of Lincoln.²⁴³ There is evidence that McHenry and Roselius shared collegial respect: McHenry owned a copy of Gustavus Schmidt’s *Civil Law of Spain and Mexico* (New Orleans: 1851), dedicated to Christian Roselius.²⁴⁴ McHenry and Roselius both saw the institution of slavery as integral to Southern livelihood. Clearly, however, their political views differed drastically: McHenry was a California Democrat who condemned Lincoln as a despot, while Roselius was a Southern Republican who eulogized Lincoln as a magnanimous leader.

McHenry’s legal views on slavery are not to be explained easily by his political alignment with the Democratic party.²⁴⁵ Indeed, given the complicated sectional politics of slavery, there is no simple correlation of party affiliation with pro- or anti-slavery opinions. Although most Abolitionists voted Republican, and “anti-slavery formed no small part of Republican ideology,” many Republicans opposed slavery simply because slavery

²³⁹ “John McHenry, speech, made in Sonoma,” 1864, KMPFP, Box 17.

²⁴⁰ “John McHenry — papers re: his law library,” n.d., KMPFP, Box 14.

²⁴¹ “John McHenry, speech, made in Sonoma,” 1864, KMPFP, Box 17.

²⁴² “John McHenry, speech, made in Sonoma.”

²⁴³ Christian Roselius and J. S. Whitaker, *Louisiana’s Tribute to the Memory of Abraham Lincoln, President of the United States* (New Orleans: Picayune Office Job Print, 1865), 25.

²⁴⁴ “John McHenry — papers re: his law library,” n.d., KMPFP, Box 14.

²⁴⁵ “John McHenry, speech, made in Sonoma,” 1864, KMPFP, Box 17.

threatened the Union.²⁴⁶ As the French consul to New Orleans observed of the American political scene in 1848, the true dividing line was North-South, and both parties lacked a coherent policy on slavery. The consul explained to the French Minister of Foreign Affairs, “Whether among the Whigs and Democrats here, I only see partisans of slavery, and in the Northern states Abolitionism has as many apologists in one party as the other.”²⁴⁷ Likewise, in Louisiana Abolitionists had reason to fear for their lives and safety.²⁴⁸

The seeming incompatibility of McHenry’s views on slavery with his judicial opinions demonstrates that successful freedom petitioners did not need the judges deciding their cases to be personally or politically opposed to slavery. After all, creating an exception to the rule merely solidifies the rule. Petitioners operated in a legal system constructed with the purpose of keeping the institution of slavery intact. Legislators designed manumission laws so as to make the power of the master even more absolute.²⁴⁹ Nevertheless, the master’s law had, built into it, openings that certain individuals could exploit. As Alejandro de la Fuente and Ariela Gross argue, based on their comparative study of manumission in Louisiana, Virginia, and Cuba from the sixteenth to the nineteenth centuries, even if those openings were small in number, they gradually became a very real threat to the authority of the master class.²⁵⁰

CONCLUSION

On 30 May 1846, the Legislature of Louisiana passed a statute constraining the ability of enslaved people from that day forward to seek liberty on the basis of having traveled to places such as France, where slavery was

²⁴⁶ Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War* (Oxford–New York: Oxford University Press, 1995), 303; 304; 309.

²⁴⁷ “Correspondence politique des consuls, Etats-Unis,” 6 July 1848, MAE-Paris 16CPC/2, fol. 93.

²⁴⁸ “Correspondence politique des consuls, Etats-Unis,” 6 July 1848, MAE-Paris 16CPC/2, fol. 97.

²⁴⁹ Patterson, *Slavery and Social Death*, 209–39.

²⁵⁰ Alejandro de la Fuente and Ariela Gross, *Becoming Black, Becoming Free: The Law of Race and Freedom in Cuba, Louisiana, and Virginia, 1500–1860* (New York: Cambridge University Press, forthcoming 2020).

illegal. This legislation was clearly a reaction to cases the Supreme Court of Louisiana had decided in favor of individual liberty from the 1820s to the 1840s. Even after the passage of the Act of 1846, however, enslaved people continued to submit freedom petitions to local courts on the basis of having touched free soil. Judge John McHenry of the First District Court of New Orleans continued not only to hear these petitions but also interpret the laws so as to favor individual liberty.

In a state with a legislature dominated by slave owners, McHenry's appointment to the bench was contentious. In the first freedom suit he decided, McHenry demonstrated his commitment to the fundamental principle prohibiting retroactive application of the laws. Although the legislature had clearly sought to put an end to successful free soil cases, McHenry concluded in favor of Arsène's freedom. A flurry of freedom suits followed. Because Mary had been to France after the passage of the act, her case presented an opportunity for her lawyer to test the limits of judicial interpretation in favor of liberty. With a heavy heart, McHenry declared there was nothing his court could do to help her. The legislature had stripped him of his power to pass on the merits of her claim. The gulf between local and appeal courts widened. While local courts sought to maintain pathways to freedom for individual slaves, a recomposed Supreme Court sided with a pro-slave owner legislature.

At a time when the issue of slavery increasingly polarized the nation, McHenry departed not only the bench but also Louisiana. His departure adds an explanatory layer to Liza's case, a major turning point in the history of freedom litigation in Louisiana, symbolizing both the growing Anglicization of law in Louisiana and the end of the *in favorem libertatis* principle. Personal and legal papers held in California, where McHenry died, further elucidate McHenry's opinions. McHenry's apprenticeship under the civilian jurist François-Xavier Martin, who himself trained under the anti-slavery William Gaston and wrote several opinions limiting the power of slave owners, goes a long way toward explaining why McHenry decided free soil cases in favor of individual liberty, despite clear legislative intent to shut off pathways to freedom. Additionally, McHenry shared the values of a patriarchal society where honorable men like him bore the responsibility of protecting women, children, and even slaves. A favorable ruling in his court was no doubt welcomed by the once-enslaved

petitioners. But it would be too simplistic to categorize him as anti-slavery. McHenry's politics on slavery, especially around the time of the Civil War, were complicated. Furthermore, by creating exceptions for some, McHenry implicitly condoned the legal system that was slavery.

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RIGHT OF PUBLICITY IN THE ERA OF CELEBRITY:

A Conceptual Exploration of the California Right of Publicity, as Expanded in White v. Samsung Electronics, in Today's World of Celebrity Glorification and Imitation

SARAH ALBERSTEIN*

I. INTRODUCTION/BACKGROUND

Today's American adults spend more time interfacing with media than ever before.¹ An average American adult spends more than eleven hours per day interacting with media, with just shy of four hours spent on a computer, tablet, or smartphone.² Young adults between the ages of eighteen and thirty-four spend 43 percent of their time digitally consuming media.³ Today, over 78 percent of the U.S. population has at least one social networking profile, and a substantial portion of media consumed by

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¹ Quentin Fottrell, *People Spend Most of Their Waking Hours Staring at Screens*, MARKET WATCH (Aug. 4, 2018, 5:09 PM ET), <https://www.marketwatch.com/story/people-are-spending-most-of-their-waking-hours-staring-at-screens-2018-08-01>.

² *Id.*

³ *Time Flies: U.S. Adults Now Spend Nearly Half a Day Interacting with Media*, NIELSEN (July 31, 2018), <https://www.nielsen.com/us/en/insights/news/2018/time-flies-us-adults-now-spend-nearly-half-a-day-interacting-with-media.print.html>.

adults and young adults is social media, averaging about forty-five minutes per day spent on social networking for adults eighteen years old and older.⁴

Bred from this uptick in media consumption and broadening social networks is the rise of celebrity and social media influencers. Celebrities like Beyoncé, Ariana Grande, and Kylie Jenner, each with several million followers on popular social media platforms like Instagram and Twitter, have maximized social media to interact with fans and boost their personal brand.⁵ Unlike celebrities with a preexisting fan base, other individuals, dubbed ‘social media influencers,’ have taken to social media to create and capitalize on a purely digital personal brand that gradually expands to the level of celebrity.⁶ Much like their title suggests, social media influencers, and celebrities alike, are paid to influence their audience.⁷ This can take the form of sponsored posts, advertisements, brand outreach, and general partnerships with businesses all intended to capitalize on the growing popularity of the celebrity or influencer themselves in addition to their particular brand or image.⁸

However, studies have shown that the influence of social media influencers and celebrities has more than a commercial impact. A study by the YMCA interviewed over 1,000 individuals between the ages of eleven and sixteen, finding that 58 percent identified celebrities, and 52 percent identified social media, as the source of their body image expectations.⁹ Moreover, 62 percent of fifteen- to sixteen-year-olds, and 43 percent of eleven- to twelve-year-olds, identified individuals on social media as a source of

⁴ *Id.*

⁵ Karla Rodriguez, *The Most Influential Celebrities on Social Media*, US MAGAZINE (Oct. 20, 2017), <https://www.usmagazine.com/celebrity-news/pictures/the-most-influential-celebrities-on-social-media/ariana-grande-2>.

⁶ The Digital Marketing Institute defines ‘social media influencers’ as “a user who has established credibility in a specific industry, has access to a huge audience and can persuade others to act based on their recommendations.” Carla Rivera, *9 of the Biggest Social Media Influencers on Instagram*, DIGITAL MARKETING INSTITUTE, <https://digitalmarketinginstitute.com/en-us/blog/9-of-the-biggest-social-media-influencers-on-instagram> (last visited Apr. 21, 2019).

⁷ *Id.*

⁸ *Id.*

⁹ *Young People Face Great Expectations to Look Perfect*, YMCA (Jul. 23, 2018), <https://www.ymca.org.uk/latest-news/young-people-face-great-expectations-to-look-perfect>.

pressure about their physical appearance.¹⁰ A second study published in the *Journal of Social Media and Society* found that body image dissatisfactions in adolescents “have largely been attributed to the frequent depictions of unrealistic body images in the mass media . . . made more pervasive in social network sites . . . such as Facebook, Twitter, or Instagram.”¹¹ The influence and pervasiveness of media has rewired youth consumer expectations of normative beauty standards to be those embodied by celebrities and influencers. Young consumers with such expectations are implicitly, and sometime explicitly, encouraged to mirror the appearance of celebrities as a means of fitting in or being accepted socially.

However, while adolescents may be seemingly more impressionable, the impact of celebrity on body image is not limited to the youth. Adults also experience body dissatisfaction spurred on by media portrayals of “unrealistic [body image] ideals.”¹² This dissatisfaction results in behavior modifications like dieting and plastic surgery. Recent studies show that around forty-five million Americans diet each year, and that around \$33 billion is spent on weight loss products in the United States each year.¹³ Internationally, there has been growing use of anabolic steroids and in 2014, over twenty million cosmetic procedures were performed worldwide.¹⁴ In this way, adult consumers of media also feel a pressure to adapt their appearance to normative beauty standards set by celebrities and influencers.

In fact, some individuals go so far as to utilize plastic surgery to attempt to imitate the appearance of celebrities and influencers they see in media.¹⁵ Celebrity imitation plastic surgery has become a pervasive trend,

¹⁰ *Id.*

¹¹ Shirley S. Ho et al., *Social Network Sites, Friends, and Celebrities: The Roles of Social Comparison and Celebrity Involvement in Adolescents' Body Image Dissatisfaction*, 1 SOCIAL MEDIA + SOCIETY 11, 1 (2016), <https://journals.sagepub.com/doi/pdf/10.1177/2056305116664216>.

¹² SARAH GROGAN, *BODY IMAGE: UNDERSTANDING BODY DISSATISFACTION IN MEN, WOMEN AND CHILDREN* xi (3d ed. 2017).

¹³ *Id.* at xi.

¹⁴ *Id.* at xi.

¹⁵ For example, Jennifer Pamplona spent over \$500,000 on around thirty plastic surgeries to resemble Kim Kardashian; Celebrity impersonator, Miki Jay, spent over \$16,000 to look more like Michael Jackson; Celebrity impersonator Donna Marie Trego spent \$60,000 to look more like Lady Gaga; and social media influencer, Justin Jedlica underwent over 300 cosmetic procedures to resemble a Ken doll. Elizabeth

with potential patients often making requests to look like a specific celebrity or to model particular bodily attributes after celebrity body parts.¹⁶ Moreover, individuals who undergo plastic surgery to resemble particular celebrities often do so to further their careers in the arts and entertainment industry, wherein they are able to capitalize on their imitation of a particular celebrity's image.¹⁷ This trend of celebrity imitation surgeries exists alongside the long-standing trend of celebrity imitation within the arts and entertainment industries, with some individuals making as much as \$438,000 per year to impersonate celebrities.¹⁸ As a result, there is a considerable financial incentive to receive imitation surgeries or capitalize on one's natural resemblance to a particular celebrity and subsequently commercialize and market that resemblance.

This celebrity imitation market may seem to have a limited impact, reflecting only the singular, autonomous choice of a specific individual. However, legislation and jurisprudence surrounding the right of publicity suggests that receiving plastic surgery or commercializing one's resemblance to a particular celebrity may be a legal liability, and that claims brought by celebrities against celebrity imitation surgery recipients and celebrity look-alikes to preserve exclusivity over the celebrity's image may be meritorious.

The ability to assert exclusivity over a celebrity's image has risen in tandem with the rise of social media and the marketability of celebrity image and branding. This assertion of rights was bolstered by the Ninth

Narins, *What Happens when People Stop Wanting to Look like Kardashians?*, COSMOPOLITAN MAGAZINE (Nov. 16, 2018), <https://www.cosmopolitan.com/health-fitness/a23323882/plastic-surgery-trends-kardashian>; *Plastic Surgery to Look like a Celebrity — What's That About?*, DR. TIM R. LOVE M.D. FACTS BLOG, <https://drtimlove.com/blog/plastic-surgery-to-look-like-a-celebrity-whats-that-about> (last visited April 21, 2019); William Buckingham, *This Lot Spent £250,000 to "Look" like Celebrities*, THE SUN (Apr. 5, 2016, 8:46 PM), <https://www.thesun.co.uk/archives/news/245819/this-lot-spent-250000-to-look-like-celebrities>.

¹⁶ *Celebrity Plastic Surgery: 8 People Who Have Had Extreme Operations to Look like Their Favorite Stars*, HUFFPOST (Dec. 6, 2017), https://www.huffingtonpost.com/2013/10/24/celebrity-plastic-surgery_n_4151715.html.

¹⁷ *Id.*

¹⁸ Claire Gordon, *This Woman Has Raked in Nearly \$500K by Impersonating Britney Spears*, BUSINESS INSIDER (Jan. 22, 2013, 6:09 PM), <https://www.businessinsider.com/huge-earnings-for-celebrity-look-alikes-2012-12>.

Circuit's broad recognition of the right of publicity in *White v. Samsung Electronics*. The court in *White v. Samsung Electronics* reasoned that such a broad publicity right would fuel investment in celebrity image promotion while simultaneously protecting the investment itself.

However, this reasoning has generated a paradox wherein the very promotion of celebrity which undergirds unhealthy body image and incentivizes subsequent unhealthy body modification simultaneously limits the copying of a celebrity's image through the enforcement of a celebrity's right of publicity. In other words, the promotion of celebrity protected by the *Samsung* right of publicity simultaneously incentivizes and bars individuals from coopting a celebrity's image. This article explores this paradox, and other downstream consequences of the *White v. Samsung Electronics* construction of the right of publicity, starting with a discussion of the right of publicity and its expansion in *White v. Samsung Electronics* and then applying this broad right to the current celebrity image market supercharged by the ever-increasing consumption of media.

A. RIGHT OF PUBLICITY

The right of publicity arose out of a recognition of commercial exploitation of celebrities that accompanied technological advances in photography, movies, and radio in the 19th century.¹⁹ As technology advanced, the methods and means of unauthorized uses of celebrities' images became more accessible and prevalent.²⁰ While resistant at first, courts eventually acknowledged the prevalence of these unauthorized uses and the accompanying inability of celebrities to control the commercial use of their image.²¹ Gradually, the courts formed a common law right of publicity generally defined as the right to control commercial uses of one's identity.²²

Some of the justifications for right-of-publicity legislation are analogous to other intellectual property rights, including the prevention of

¹⁹ Reshma Amin, *A Comparative Analysis of California's Right of Publicity and the United Kingdom's Approach to the Protection of Celebrities: Where Are They Better Protected?*, 1 CASE W. RES. J.L. TECH. & INTERNET 93, 97 (2010).

²⁰ *Id.* at 99.

²¹ *Id.* at 99.

²² Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited Apr. 21, 2019).

unjust rewards.²³ However, the right of publicity is a stand-alone intellectual property right with its own justifications independent of other intellectual property rights, like trademark or copyright.

One of the primary justifications for right of publicity is a recognition of the time and effort it takes to cultivate a personal brand and image that can be marketed and profited from.²⁴ Essentially, “a famous person who has ‘long and laboriously nurtured the fruit of publicity values’ should benefit from those values herself . . . [S]ince the celebrity spends time, money, and energy in developing a commercially lucrative persona, that persona is the fruit of the celebrity’s labor and entitles her to its rewards.”²⁵ Advertisers who appropriate celebrity personas are often conceptualized as having impermissibly reaped what the celebrity has sown.²⁶ The idea is that it would be unfair for a business to profit from the efforts a celebrity has put into their own image and brand, without crediting or compensating that celebrity.²⁷

A second justification for the right of publicity is an economic incentive justification which “holds that protection of the celebrity’s economic interest in her identity fosters creativity . . . [in that] assurance that the celebrity will be able to gain from what she produces will encourage artistic creation that enriches our culture.”²⁸ In other words, without exclusivity over her image, a celebrity will be discouraged from further artistic creation that fosters popular cultural enrichment.

A final related justification for the right of publicity is protecting celebrities’ creative and commercial control over the brand they built for themselves, and maintaining celebrities’ abilities to choose whether and how to be commercialized at all.²⁹ This justification operates on the premise that celebrities “should have exclusive control of [their] right of publicity

²³ *Id.*

²⁴ *Id.*

²⁵ Sudakshina Sen, *Fluency of the Flesh: Perils of an Expanding Right of Publicity*, 59 ALB. L. REV. 739, 740 (1995).

²⁶ *Id.*

²⁷ Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited Apr. 21, 2019).

²⁸ Sen, *Fluency of the Flesh* at 740.

²⁹ Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHT OF PUBLICITY, <http://rightofpublicity.com/brief-history-of-rop> (last visited Apr. 21, 2019).

in order to protect consumers from possible misrepresentation, deception and false advertising.”³⁰ Thus, not only should a celebrity have exclusivity over her appearance itself but also over whether and how she chooses to commercialize that appearance. As the U.S. Sixth Circuit Court of Appeals noted in their 1982 decision in *Carson v. Here’s Johnny Portable Toilets*, an oft-cited right of publicity case, “[t]he right of publicity has developed to protect the commercial interest of celebrities and their identities. The theory of the right is that a celebrity’s identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorized commercial exploitation of that identity.”³¹

B. CALIFORNIA STATUTORY AND COMMON LAW RIGHT OF PUBLICITY³²

In California, there is both a statutory and common law right of publicity, though the statutory right of publicity is less expansive than its common law counterpart. The common law right of publicity bars appropriation of a celebrity’s name, likeness, voice, signature, identity, and persona, whereas the statutory right of publicity is limited to name, likeness, voice, and signature.³³

Moreover, the common law right of publicity does not have an intent requirement, as the statutory right of publicity does.³⁴ Mistaken or inadvertent appropriation of a celebrity’s identity, name, or likeness does not provide a

³⁰ Sudakshina Sen, *Fluency of the Flesh: Perils of an Expanding right of publicity*, 59 ALB. L. REV. 739, 741 (1995).

³¹ *Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831, 835 (6th Cir. 1983).

³² This paper is limited to a discussion of California’s right of publicity. This is because (1) there is no federal or uniform right of publicity statute, so it is impracticable and unnecessary for the aims of the paper to consider all fifty states’ iterations of right of publicity legislation; (2) the central focus of the paper is on celebrities and social media influencers, of which there is a large concentration in California; and (3) the case this paper jumps off from, *White v. Samsung Electronics*, was a claim brought in California. This paper is also limited in scope to the common law right of publicity, rather than the statutory right of publicity because the common law right is much broader and grants celebrities the leeway which this paper seeks to argue against.

³³ Reshma Amin, *A Comparative Analysis of California’s Right of Publicity and the United Kingdom’s Approach to the Protection of Celebrities: Where are they Better Protected?*, 1 CASE W. RES. J.L. TECH. & INTERNET 93, 103 (2010).

³⁴ *Id.* at 103.

valid defense against a common law right of publicity claim.³⁵ Finally, the common law right of publicity is ambiguous in regard to whether it requires the appropriation to be commercial. The “common law [right of publicity] stipulates that appropriation of one’s identity is actionable if it is done ‘commercially, or otherwise,’” but the courts have not yet defined which appropriations may fall under the category of ‘otherwise.’³⁶ Much like the justifications for the right of publicity outside of California, the justification for such a broad common law right of publicity in California is that celebrities depend on their image, and their ability to maintain exclusivity over that image to make a living, and thus should receive expansive protection over the commercial and creative interests undergirding that image.³⁷

However, this broad protection over celebrities’ commercial and creative interests which spurred the inclusion of identity and persona in the California common law right of publicity was not established until the Ninth Circuit’s 1992 decision in *White v. Samsung Electronics*. The court’s decision in *White v. Samsung Electronics* broadened a celebrity’s right of publicity beyond name and likeness, granting celebrities exclusivity as to their general appearance. This exclusivity generates a meritorious legal channel through which celebrities may be able to police the appearance of individuals who profit from their resemblance to a particular celebrity.

II. *WHITE v. SAMSUNG ELECTRONICS*

In 1992, Vanna White of the popular TV game show *Wheel of Fortune*, sued Samsung Electronics under California Civil Code Sec. 3344, California common law right of publicity, and the Lanham Act over a series of Samsung advertisements.³⁸ The advertisements were set in the twenty-first century, and featured a futuristic version of a contemporaneous piece of popular culture and a Samsung product.³⁹ The ad at the center of White’s suit, referred to internally as the ‘Vanna White Ad,’ featured a robot

³⁵ *Id.* at 104.

³⁶ Under the California common law right of publicity, the second factor a plaintiff must prove in a right of publicity claim is “the appropriation of the plaintiff’s name or likeness to the defendant’s advantage, commercially or otherwise” *Id.* at 104.

³⁷ *Id.* at 104.

³⁸ *White v. Samsung Electronics*, 971 F.2d 1395, 1396–97 (1992).

³⁹ *Id.* at 1396.

dressed in a wig, gown, and jewelry intended to resemble White.⁴⁰ The robot, mimicking White's famous pose and stance, was situated next to a Wheel of Fortune set with the caption "'Longest-running game show. 2012 A.D.'"⁴¹

In her suit, White claimed that Samsung Electronics intentionally used a robot resembling White, and did so without paying White and without White's permission.⁴² The district court found for Samsung Electronics, rejecting each of White's claims under both California Code, California common law, and the Lanham Act.⁴³ On appeal, the Ninth Circuit court affirmed in part and reversed in part, finding that White's common law right of publicity was violated and that White was able to provide a genuine issue of material fact pertaining to her Lanham Act claim.^{44,45}

A. WHITE'S COMMON LAW RIGHT OF PUBLICITY CLAIM

In California, prior to *White v. Samsung Electronics*, a successful suit under the common law right of publicity required proof of four elements: "(1) Defendant's use of Plaintiff's identity; (2) the appropriation of Plaintiff's *name or likeness* to Defendant's advantage; (3) lack of consent; and (4) resulting injury" (emphasis added).⁴⁶ Regarding White's claim under the California common law right of publicity, both the district court and Ninth Circuit

⁴⁰ *Id.* at 1396.

⁴¹ *Id.* at 1396.

⁴² *Id.* at 1396.

⁴³ *Id.* at 1396–97.

⁴⁴ While White was able to move forward with her Lanham Act claim, this paper focuses on her right-of-publicity claim. White's Lanham Act claim is mentioned here for narrative consistency, not as a point of analysis.

⁴⁵ Section 3344 of the California Code states that "[a]ny person who knowingly uses another's name, voice, signature, photograph, or *likeness*, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling . . . without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof" (emphasis added). The district court found that Samsung's robot did not constitute White's "likeness" for the purposes of satisfying Sec. 3344, and this was affirmed on appeal by the Ninth Circuit court. *White v. Samsung Electronics*, 971 F.2d 1395, 1397 (1992).

⁴⁶ *California Right of Publicity Law*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/california-right-publicity-law> (last visited Apr. 21, 2019).

court held that White failed to prove that Samsung appropriated White's "name or likeness to [Samsung's] advantage."⁴⁷

However, the Ninth Circuit splintered from the district court noting for the first time that "the right of publicity is not limited to the appropriation of name or likeness."⁴⁸ The Ninth Circuit instead took a stance that broadened the right of publicity to include "means of appropriation other than name or likeness."⁴⁹ The Court reasoned that "[a]lthough [Samsung] avoided the most obvious means of appropriating [White's identity], each of their actions directly implicated the commercial interests which the right of publicity is designed to protect."⁵⁰ In other words, despite not fitting neatly within a traditional right-of-publicity claim, the Court felt that White's commercial interests were usurped in a way that was intended to be, and ought to explicitly be, protected by the right of publicity.

By finding for White in her right-of-publicity claim despite finding that Samsung did not appropriate her name or likeness, the Court shifted focus away from the mechanism by which celebrity identity is appropriated, and instead focused on the existence of the appropriation itself.⁵¹ Thus, the Court broadened the common law right of publicity to *general* appropriation of *identity*, rather than limiting the right to just name or likeness.^{52,53}

The Court justified this finding by emphasizing that White's fame, along with the fame garnered by celebrities in general, is the product of immense effort and, thus, control of the exploitation and commercialization of this fame ought to be in the hands of the celebrity herself.⁵⁴ In doing so, the Court broadened, prioritized, and concretized celebrities' property

⁴⁷ *White v. Samsung Electronics*, 971 F.2d 1395, 1397 (9th Cir. 1992).

⁴⁸ *Id.* at 1398.

⁴⁹ *Id.* at 1398.

⁵⁰ *Id.* at 1398.

⁵¹ *Id.* at 1399.

⁵² Ultimately, the case was remanded, and a jury awarded White approximately \$400,000 in damages. *Id.* at 1399.

⁵³ For ease, I will be referring to the right of publicity as it existed before *White v. Samsung Electronics* as the "pre-Samsung" right of publicity, and to the right of publicity as it existed after *White v. Samsung Electronics* as the "post-Samsung" right of publicity." The pre-Samsung right of publicity is limited to name and likeness, whereas the post-Samsung right of publicity includes name, likeness, voice, signature, identity, and persona.

⁵⁴ *White v. Samsung Electronics*, 971 F.2d 1399, 1397 (9th Cir. 1992).

rights over their image and brand such that their image and brand can be more readily protected, promoted, and commercialized.

B. CRITICISMS OF *WHITE v. SAMSUNG ELECTRONICS*

There has been palpable backlash due to the expansion of the right of publicity by the majority in *White v. Samsung Electronics*, including dissents by Judge Alarcon in the Ninth Circuit and by Judge Kozinski in response to a petition for a rehearing en banc. Both of these dissents provide arguments for limiting the post-*Samsung* right of publicity that have been mirrored and expanded by attorneys, lobbyists, and legal scholars alike.

i. Judge Alarcon's Dissent in White v. Samsung Electronics

In *White v. Samsung Electronics*, Judge Alarcon (“Alarcon”) dissented from the majority opinion regarding White’s right-of-publicity claim, relying primarily on statutory interpretation and lack of precedence to support his conclusion. Alarcon points out that the California Legislature had the opportunity to codify the conclusion the majority ultimately reached, but chose not to.⁵⁵ Twenty-four years after Dean Prosser posited that the right of publicity may be expanded beyond the appropriation of just name and likeness in a law review article that the majority subsequently relied on in their decision, the California Legislature amended the statutory right of publicity to include someone’s voice or signature, in addition to name or likeness.⁵⁶ Alarcon concludes via *inclusion unius est exclusion alterius*, that if the California Legislature had intended to broaden the right of publicity to include a cause of action for the appropriation of another person’s identity then they would have done so at the time of amendment.⁵⁷

Additionally, Alarcon posits that while the majority claims that case law has borne out that the right of publicity is not limited to name or likeness, in fact, “the courts of California have never found an infringement on the right of publicity without the use of plaintiff’s name or likeness.”⁵⁸ Alarcon points out that even in their own opinion, the majority relied on

⁵⁵ *Id.* at 1403.

⁵⁶ *Id.* at 1403–4.

⁵⁷ *Id.* at 1404.

⁵⁸ *Id.* at 1403.

precedents that did not “include appropriation of identity by means other than name or likeness” as the majority eventually does.⁵⁹ In other words, the Court in *White v. Samsung Electronics* created a new right of publicity with no statutory or precedential basis.

Moreover, Alarcon distinguishes the cases cited by the majority in that White was appropriated by a robot whereas in the cases cited by the majority, the “advertisement affirmatively represented that the person depicted therein was the plaintiff.”⁶⁰ Alarcon interprets the appropriation targeted by the right of publicity to mean that a juror would believe that the manifestation of the appropriation is the celebrity *herself* (or the celebrity’s voice, name, etc.).⁶¹ In White’s case, Alarcon states, “[n]o reasonable juror could confuse a metal robot with Vanna White” and thus, her identity could not have been sufficiently appropriated as required by the right of publicity.⁶²

Finally, Alarcon distinguishes White’s *identity* from the *role* she plays, stating that “those things that Vanna White claims identify her are not unique to her . . . [and are], instead attributes of the *role* she plays . . . [which] do not constitute a representation of Vanna White.”⁶³ Alarcon takes the stance that the alleged appropriation is not of Vanna White, nor her specific identity, but an amalgamation of characteristics that many different individuals could embody, “especially in Southern California,” like blonde hair or a slim figure.⁶⁴ Alarcon posits that being famous for playing a particular role while embodying a set of characteristics is not sufficient to grant an individual a proprietary interest in that role. The majority by doing so effectively granted her, and celebrities like her, commercial exclusivity over the simultaneous presence of each of the characteristics she embodies.

Under Alarcon’s conception of the right of publicity, celebrities would be unable to prevent plastic surgery look-alikes from embodying the characteristics of the celebrity and their brand simply because a look-alike is representing a celebrity’s *role*, even if the look-alike is perceived as the

⁵⁹ *Id.* at 1403.

⁶⁰ *Id.* at 1404–5.

⁶¹ *Id.* at 1404.

⁶² *Id.* at 1404.

⁶³ *Id.* at 1404.

⁶⁴ *Id.* at 1405.

celebrity herself. This conclusion depends on the distinction between identity and role. However, in the case of celebrity imitation, there may not be a clear role to play or imitate in the first place.

Vanna White's role was the hostess of *Wheel of Fortune*. In this role, she appeared in similar garb, poses, and demeanors each time she was on the show. But celebrity look-alikes and plastic surgery imitators are not limiting their imitation to a role; they are intentionally reworking their bodies to imitate the identity of the celebrities themselves, independent of any role the celebrity may or may not play. It would seem then that Alarcon's role-versus-identity analysis could not neatly apply to individuals who receive plastic surgery to imitate celebrities, or individuals who capitalize on their coincidental resemblance to a particular celebrity, in a way that would protect them from celebrity suit.

ii. Kozinski's "*Separate Views*"

However, even without a readily identifiable distinction between role and identity, protection available for celebrities guarding their brands and image under the right of publicity should not be unlimited. In 1993, Judge Kozinski's ("Kozinski") dissent accompanying the rejection of a petition for a rehearing en banc provides a strong policy argument for placing limits on the protections received by Vanna White and utilized by other celebrities since.⁶⁵

One of the primary justifications for intellectual property is to incentivize creativity, innovation, and the exchange of ideas.⁶⁶ However, this protection must be balanced. Each incoming creator, inventor, and innovator depends on the innovations of the individuals who came before them. "All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy."⁶⁷

The overprotection of the intellectual property rights inherent within these innovations can stifle the creative process by thwarting the additive nature of innovation. Kozinski categorizes the majority opinion in *White v. Samsung Electronics* squarely within this stifling overprotection. Under the majority's opinion, Kozinski states, "it's now a tort for advertisers to remind

⁶⁵ *White v. Samsung Electronics*, 989 F.2d 1512, 1512 (Cal. Ct. App. 9th Cir. 1993).

⁶⁶ *Id.* at 1513.

⁶⁷ *Id.* at 1515.

the public of a celebrity. Not to use a celebrity's name, voice, signature, or likeness; not to imply the celebrity endorses a product; but simply to evoke a celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow."⁶⁸

Kozinski laments the new right of publicity created by the majority as erasing the balance between public interest and the interests of the celebrity. He posits that the post-*Samsung* right of publicity strikes the wrong balance between exclusivity granted to the owner of the right and the maintenance of the public domain that undergirds all intellectual property law.⁶⁹ By favoring, and in fact expanding, White's right of publicity, the Court created a new proprietary interest which is too favorable to the celebrity and leaves too little for the public.

Kozinski takes into consideration individuals among the public who may be prevented from creating their own image and brand for fear that it too closely resembles a particular celebrity. "Future Vanna Whites might not get the chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own," and in this way the public will be robbed of parody, mockery, and the ability to model oneself according to trends in appearance incidentally embodied by celebrities.⁷⁰ Granting Vanna White exclusivity over her persona simultaneously grants White "absolute rights to control the conduct of others, unlimited by the idea-expression dichotomy or by the fair use doctrine."⁷¹

C. DO CELEBRITIES HAVE THE RIGHT TO EXCLUDE PEOPLE FROM LOOKING LIKE THEM UNDER THE BROAD *WHITE v. SAMSUNG ELECTRONICS* CONSTRUCTION OF THE RIGHT OF PUBLICITY?

These dissents provided compelling contemporaneous arguments against broadening the right of publicity from legal, political, and innovative perspective. Still, in spite of the vehement dissent and backlash following the *White v. Samsung Electronics* decision, the broad post-*Samsung* right of publicity continues to thrive today.

⁶⁸ *Id.* at 1514.

⁶⁹ *Id.* at 1516.

⁷⁰ *Id.* at 1516–17.

⁷¹ *Id.* at 1517.

i. The Right of Exclusivity

The Court in *White v. Samsung Electronics* found that White's right of publicity was violated in spite of the fact that neither her likeness nor name was appropriated because the Court deemed White's overall identity and general appearance to be subsumed within the right of publicity. Individuals who receive plastic surgery to look like celebrities are undoubtedly co-opting the desired celebrity's appearance, and career celebrity look-alikes are undoubtedly capitalizing on their resemblance to a particular celebrity in an analogous way. Thus, under the broad conception of right of publicity defined in *White v. Samsung*, whether the appropriation is via imitation plastic surgery or via birthright, both the look-alike and the plastic surgery recipient are appropriating the general identity of the celebrity. However, this is different from a robot, an image, a mask, or a costume. This particular appropriation comprises fundamental, physical characteristics embodied by a human being.

However, if the right of publicity as construed in *White v. Samsung Electronics* is intended to ensure that celebrities have control over the marketability of their cultivated brand, then it would seem that celebrities would have the ability to prevent celebrity look-alikes, individuals who have effectively co-opted the celebrity's image, from appearing in advertisements like the Samsung commercial or otherwise commercializing their resemblance.

In keeping with the holding of *White v. Samsung Electronics*, the right of publicity grants celebrities exclusivity over their appearance and image and thus a claim against any imitations of the celebrity's image, regardless of whether the imitation is embodied by a robot, a human being, or anything in between. Moreover, the current construction of the right of publicity grants a celebrity, just as it did White, a legal right of action to assert that exclusivity over their image.

ii. Kardashian v. The Gap

In fact, celebrities are already using the post-*Samsung* right of publicity as a mechanism for policing an individual's resemblance in order to maintain and protect exclusivity over the celebrity's image.⁷² In 2011, celebrity

⁷² Kim Kardashian is not the only celebrity who has sued over appropriation of identity under the post-*Samsung* right of publicity. In July 2014, Lindsay Lohan sued the

Kim Kardashian sued The Gap and Old Navy over a commercial which starred a Canadian actress resembling Kim Kardashian. The ripples of the *Samsung* decision can be seen in the complaint wherein Kardashian contextualizes her right of publicity as stemming from her status as “an internationally known celebrity . . . and pop culture icon . . . [who] has attained an extraordinary level of popularity and fame in the United States and around the world, and . . . is highly sought after to endorse commercial products and services using her name, likeness, *identity and persona*” (emphasis added).⁷³

The complaint goes on to assert that Kim Kardashian has “invested substantial time, energy, finances and entrepreneurial effort in developing her considerable professional and commercial achievements and success, as well as in developing her popularity, fame, and prominence in the public eye.”⁷⁴ This reasoning aligns with the prioritization of celebrity efforts in cultivating a brand that undergirded the opinion provided by the Court in *White v. Samsung Electronics*. More overtly, the complaint continuously uses the phrase “likeness, identity and persona” when describing the proprietary right that ought to be protected under Kim Kardashian right of publicity.⁷⁵

Thus, the language and arguments in the *Kardashian* complaint demonstrate how attorneys have embraced the post-*Samsung* right of publicity and are adjusting their arguments to embrace, and reap the benefits from, the broad post-*Samsung* right of publicity. In this way, this post-*Samsung* right of publicity has granted celebrities much broader exclusivity than before *Samsung* such that celebrities are now able to bring a claim against a company simply for employing an individual who resembles a particular

makers of *Grand Theft Auto V* for featuring a character in their video game who allegedly resembled Lohan, though this was filed under the New York statutory right of publicity. Additionally, in July 2014, Panamanian dictator Manuel Noriega filed suit against Activision Blizzard, Inc. in California for appropriating his likeness in *Call of Duty: Black Ops II*. Jennifer Williams-Alvarez, *Why Celebrities like Lindsay Lohan Are Suing Video Game Studios*, ENGADGET (Nov. 18, 2014), <https://www.engadget.com/2014/11/18/gaming-likeness-lawsuit-explainer>.

⁷³ Complaint at 5, *Kardashian v. The Gap*, No. LACV11-5960 (C.D. California filed Jul. 20, 2011).

⁷⁴ *Id.* at 3–5.

⁷⁵ *Id.* at 5.

celebrity, or against an individual who otherwise commercializes their resemblance to a particular celebrity.^{76,77}

D. SHOULD THE RIGHT OF PUBLICITY PROHIBIT, OR OTHERWISE CONTROL, CELEBRITY IMITATION VIA PLASTIC SURGERY OR LOOK-ALIKES?

Notably, however, this is not necessarily a desirable result. The right of publicity originally emerged in response to increased celebrity image appropriation spurred on by technological advancement. There still remains a legitimate desire to protect celebrities' exclusivity over their image and commercialization in the face of growing technological advances. However, in order to maintain exclusivity across modern technology, including advancements in plastic surgery and media production, which pervades almost all aspects of modern life today, the post-*Samsung* right of publicity must grant celebrities a more expansive propriety interest than the courts arguably could have anticipated when they established the right of publicity in the 19th century.

On the one hand, intellectual property rights like the right of publicity are intended to reward efforts expended on curating and marketing things like a celebrity's image, and intended to incentivize creativity and innovation. On the other hand, there are public policies in place which value a robust public domain and individual autonomy to make choices about one's own body.

i. The Paradox

The convergence of the post-*Samsung* right of publicity, the rise of media consumption, and the accompanying rise in celebrity imitation has created

⁷⁶ This claim was settled outside of court so we do not yet know how courts would interact with, and possibly limit, the post-*Samsung* right of publicity within the celebrity imitation context. Eriq Gardner, *Kim Kardashin Settles Lawsuit Over Look-Alike in Old Navy Ad (Exclusive)*, THE HOLLYWOOD REPORTER (Aug. 29, 2012, 8:30 AM), <https://www.hollywoodreporter.com/thr-esq/kim-kardashian-settles-lawsuit-look-alike-old-navy-gap-366522>.

⁷⁷ Moreover, given the aforementioned remaining ambiguity regarding whether the appropriation must necessarily be commercial in order to violate a celebrity's right of publicity, and the courts' willingness to prioritize celebrity efforts, it is possible to imagine a celebrity suing an individual for appropriating a celebrity's image in a non-commercial context.

a paradox. The post-*Samsung* right of publicity further induces an already increasing rise of celebrity because it commodifies celebrities themselves, while simultaneously revealing the courts' prioritization of, and willingness to protect, a celebrity's efforts in crafting and marketing their image. This commodification and legal prioritization further instigate the already increasing proliferation of celebrity by creating financial incentives to create a profitable celebrity brand while simultaneously creating legal protections which reduce the risk of this investment. At the same time, this commodification and subsequent proliferation of celebrity is what incentivizes individuals to imitate celebrities so that they too can profit from the growing value of a celebrity's brand. In this way, the very same right that incentivizes celebrity imitation prevents individuals from acting on that incentivization as doing so would likely violate the celebrity's exclusive right of publicity.

ii. Querying the Value of Celebrity in the Public Domain

In today's entertainment industry, a celebrity's identity itself is an investment and a commodity that is arguably worth protecting because without this protection, and subsequent investment in celebrity image, celebrities are theoretically discouraged from creating their brand and, thus, from continuing to contribute to the public domain and public media. However, this argument depends on the notion that the contribution of celebrity is a public good that ought to be incentivized in the first place. Given the impact on societal conception of body image, health, and healthy behavior, it may not be taken for granted that a celebrity's branded contribution is a public good in the same way that arts, music, or invention might be. It is worth pausing to consider whether the right of publicity is still serving to incentivize contributions to the public good or whether it is merely encouraging unhealthy behaviors and simultaneously rewarding celebrities for this.

It is also worth querying the actual degree of financial impact a violation of a celebrity's right of publicity has on a particular celebrity, especially when the violating party is a smaller actor. Today, celebrities no longer rely exclusively on a particular skill or industry and often make money from a variety of industries and sponsorships. Celebrities often profit from mass business enterprises stretching from activism, investment, music, makeup, clothing, and technology, and in each of these industries they are protected by laws outside of the right of publicity, including other intellectual

property rights.⁷⁸ Thus, a celebrity imitator's presence in the arts and entertainment industry may have a relatively small financial impact when considered within the context of a diverse celebrity investment landscape.

iii. Impact on Individual Autonomy; Penalization

Finally, the right of action created by the post-*Samsung* right of publicity has odd consequences for an individual's autonomy, financial and/or career choices, and rights over their own body. An aspiring actress who receives plastic surgery to resemble Kim Kardashian, or so happens to resemble Kardashian due to the actress' genetic makeup, becomes more marketable as Kim Kardashian, the object of the actress' imitation, grows more marketable. However, under the post-*Samsung* right of publicity, should the actress then capitalize on her growing marketability she may be penalized for allegedly appropriating Kardashian's 'likeness, image, or persona.' In this way, it becomes a legal liability for the actress to commercialize her resemblance to Kim Kardashian. Thus, an actress, or any other individual in an appearance-driven career, incurs liability simply by looking the way they do while doing their job.

This creates an anomalous penalization function of intellectual property rights wherein celebrities can use the right of publicity to police another, remote individual's appearance. Unlike other intellectual property in the form of, for example, works of art, inventions, or logos, this gives the 'owner' of the post-*Samsung* right of publicity exclusivity over their embodied appearance. Thus, the targeted liability of a post-*Samsung* right of publicity claim is not of production without a license or copying a painting, but of someone existing in their corporal form.^{79,80}

⁷⁸ Meryl Gottlieb, *15 Celebrities You Didn't Realize Own Major Business Empires*, BUSINESS INSIDER (Aug. 13, 2016, 11:08 AM), <https://www.businessinsider.com/celebrities-business-empires-2016-8#bono--elevation-partners-4>.

⁷⁹ This also potentially creates an odd licensing scheme where celebrities could theoretically license bodily attributes or license the ability to work as a look-alike. This type of licensing scheme would give celebrities a rather dystopian ability to profit from autonomous choices individuals make about their bodies and careers. This is not the focus of this paper, but is worth mentioning.

⁸⁰ Additionally, there are arguably Thirteenth Amendment considerations regarding this particular impact of the post-*Samsung* right of publicity. This, again, is not the focus of this paper but is worth mentioning.

California courts “balance interests, but usually the needs of the celebrity are given higher regard than the public and media interests at stake.”⁸¹ In following this trend of celebrity prioritization by California courts, the expansion of the right of publicity in *White v. Samsung Electronics* decidedly favors celebrities and their efforts in creating and maintaining their brands. However, in doing so, the Ninth Circuit arguably went too far, creating a downstream tension between the social deification and promotion of celebrity, the legal bar to imitating celebrities, and individual autonomy.

III. RESTRUCTURING THE RIGHT OF PUBLICITY

It is possible that the majority in *White v. Samsung Electronics* could not have foreseen how their decision would interact with the media landscape today. However, given the aforementioned paradox and anomalous penalization function, the right of publicity ought to be narrowed or adjusted to address these consequences generated by the post-*Samsung* right of publicity’s interaction with the contemporary media landscape.

A. RESTORING THE PRE-SAMSUNG RIGHT OF PUBLICITY

One alternative would be to narrow the right of publicity such that it does not include identity or persona. In other words, replace the post-*Samsung* right of publicity with the pre-*Samsung* right of publicity. This would address the concerns raised by Alarcon’s and Kozinski’s dissents in that celebrities would still be protected wherever their likeness, name, or voice was commercialized without their consent, but would strip celebrities of an exclusive proprietary interest in their overall appearance. In this way, a celebrity would still maintain exclusivity over the literal and tangible feature of their brand, thus preventing free-range, unadulterated, and unauthorized use of their likeness that the right of publicity was originally erected to protect against. But, this restoration of the pre-*Samsung* right of publicity would prevent celebrities from having such expansive exclusivity that

⁸¹ Reshma Amin, *A Comparative Analysis of California’s Right of Publicity and the United Kingdom’s Approach to the Protection of Celebrities: Where Are They Better Protected?*, 1 CASE W. RES. J.L. TECH. & INTERNET 93, 117 (2010).

they could prevent individuals from merely resembling them, or otherwise embodying particular, potentially recognizable attributes of the celebrity.

B. KEEPING THE POST-SAMSUNG RIGHT OF PUBLICITY WITH EXCEPTIONS AND CLARIFICATIONS

If courts are reluctant to revert back to the pre-*Samsung* right of publicity, another alternative would be to maintain the post-*Samsung* right of publicity but create exceptions for appropriation by human beings, rather than by robots or other inanimate objects. This would prevent celebrities from making claims of a violation of their right of publicity wherever the embodiment of the appropriation is by a human being who intentionally received plastic surgery to resemble a particular celebrity, or otherwise capitalizes on their natural resemblance to a celebrity. In this configuration of the right of publicity, celebrities will still be able to reap the benefits of exclusivity over their identity or appearance but it would prevent them from reaching beyond protection of the celebrity's identity or appearance and into the policing of other individuals' identities or appearances.

Additionally, the remaining ambiguity over whether the post-*Samsung* right of publicity is limited to only commercial appropriation ought to be addressed. In its current configuration, the post-*Samsung* right of publicity certainly creates a right of action for celebrities to police other individuals' bodies in commercial settings, and potentially does the same in non-commercial settings. The current combination of the broad post-*Samsung* right of publicity and the ambiguity over whether it applies exclusively in commercial settings has the potential to create wide-sweeping exclusivity over all combinations of attributes resembling a particular celebrity in all settings, commercial or otherwise. This is a glaring, and bordering dystopian, power granted to celebrities that extends much farther than the original intent of the right of publicity. Courts ought to clarify this ambiguity, and in doing so ought to establish that this proposed limited post-*Samsung* right of publicity only applies in commercial settings.

C. CONCLUSION

The right of publicity was originally established to protect a celebrity's investment and efforts to create and market their particular image or brand while simultaneously preventing unauthorized uses of a celebrity's likeness

in commercial settings. However, the right of publicity has evolved drastically since its inception. While the desire to protect and promote investment in celebrities and their contributions to the public is arguably still compelling today, they should not be assumed to be. Moreover, none of those concerns or justifications prioritizing celebrities' commercial exclusivity outweigh the potential power given to celebrities via the right of publicity as it exists today.

First, the current California common law right of publicity, as established in *White v. Samsung Electronics* — the post-*Samsung* right of publicity — furthers the prioritization and celebration of celebrity which contribute to unhealthy societal perceptions, norms, and behaviors. Second, the post-*Samsung* right of publicity creates a legal right of action which allows celebrities to prevent other human beings from resembling a particular celebrity, whether by plastic surgery or through natural resemblance, that is already being exploited by celebrities today. Finally, the broad post-*Samsung* right of publicity creates a paradox wherein individuals are simultaneously incentivized to participate in, and mirror, celebrity culture but are barred from doing so.

All intellectual property law must strike an appropriate balance between exclusivity and ownership, and allowing a free flow of creativity and ingenuity into the public domain. The right of publicity is subsumed within intellectual property law and is by no means an exception to this balance. The current configuration of the right of publicity strikes an inappropriate balance, disproportionately prioritizing celebrity exclusivity and ownership over the public. Whether by reversion to the pre-*Samsung* right of publicity or through clarifying and creating exceptions to the post-*Samsung* right of publicity, these consequences of the broad post-*Samsung* right of publicity are cause for concern, and should be addressed before they are taken to a potentially dystopian extreme.

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THE RIGHT OF FREE SPEECH IN PRIVATELY OWNED PREMISES:

Following up with the Robins v. Pruneyard Judgment

PARTHABI KANUNGO*

BACKGROUND AND REASONING

In the late 1970s, a group of high school students in Campbell, California sought to solicit signatures from passers-by in the central courtyard of a privately-owned shopping complex, in order to garner support for a political petition.¹ These students were asked by a security guard to leave, on the grounds that it was against the Pruneyard Shopping Center's policy to allow for any visitor to engage in a publicly expressive activity, including the circulating of petitions not directly related to the shopping center's commercial purposes.² The students went on to bring a suit against Pruneyard Shopping Center (*Robins v. Pruneyard Shopping Center*, hereafter *Pruneyard*), and the Supreme Court of California, in its 1979 judgment, held that soliciting at a shopping center for signatures for a petition to the

This paper was awarded second place in the California Supreme Court Historical Society's 2019 CSCHS Selma Moidel Smith Student Writing Competition in California Legal History.

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¹ *Pruneyard Shopping Center v. Robins*, 477 U.S. 74 (1980).

² *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979).

government is an activity protected by the free speech guarantee of the California Constitution.³

The Court's reasoning on the question of whether the California Constitution guarantees the right to gather signatures at shopping centers drew upon the wording of article 1, section 2 of the California Constitution, which, in the foremost sense, guaranteed a positive right of free speech to its citizens in addition to imposing a negative obligation upon the state not to create any such law that may restrain this liberty of speech. The Court acknowledged this distinction, as regards the First Amendment to the U.S. Constitution, which only places a negative obligation upon the U.S. Congress to make no law abridging free speech, in this regard.⁴ The majority opinion issued by Justice Newman, with support from Justices Bird, Tobriner and Mosk, cited a previous decision from the very same Court, in *Wilson v. Superior Court* (1975), where it was noted that California's state constitutional guarantee of the right of free speech and press was more definitive and inclusive than the right contained in the First Amendment to the federal constitution.⁵

The particular situation involving solicitation of signatures and distribution of leaflets by individuals in privately-owned shopping centers was first brought before the California Supreme Court in the 1970 case of *Diamond v. Bland* (*Diamond I*), where two volunteer workers for a non-profit had attempted, without success, to solicit signatures on an anti-pollution initiative in a shopping center called Inland Center, as the owner of the shopping center had refused to grant them permission for the same.⁶ The Court had affirmed this right of the plaintiff to solicit signatures and distribute leaflets in the defendant's shopping center, by classifying it as a First Amendment concern.

Two years later, the United States Supreme Court, in *Lloyd Corp. v. Tanner* (1972), decided that the owners of a shopping center, Lloyd Center in Oregon, had the right to prohibit the distribution of political handbills unrelated to the operation of the shopping center.⁷ The case involved the

³ *Id.*

⁴ See *supra* note 2.

⁵ *Wilson v. Superior Court*, 34 Cal. 3d 777 (1983).

⁶ *Diamond v. Bland*, 3 Cal. 3d 653 (1970).

⁷ *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

handing out of handbills for a protest meeting against the draft during the Vietnam War. The U.S. Supreme Court maintained that distribution of anti-war leaflets was not protected under the First Amendment, and such distribution on private property was in violation of the property rights of the owner.

In light of the *Lloyd* ruling, the defendant in *Diamond I*, the owner of Inland Center, appealed the decision to the California Supreme Court. The *Diamond II* ruling of the California Supreme Court followed, where the Court employed the *Lloyd* standard and opined that, as in *Lloyd*, the plaintiffs had alternative, effective channels to solicit these signatures, and customers and employees of the shopping center could be solicited outside of its premises in public sidewalks, parks, or streets adjacent to the center.⁸ The California Supreme Court, in its majority judgment, reversed its earlier decision in *Diamond I*, by declaring that the defendant's private property interests outweighed the plaintiff's First Amendment rights in the said matter.

It was Justice Mosk's dissenting opinion in *Diamond II* that was later referred to in the *Robins v. Pruneyard* majority judgment.⁹ Justice Mosk classified this act, by the majority bench, of surrendering the previously considered position of the Court in *Diamond I*, as a step that ignored the basic principles of the state constitution of California, and undermined the fundamental principle of federalism. One of his two primary arguments was that the declaration of rights contained within the state constitution was more embracing than the First, Ten, and Fourteenth Amendments to the federal constitution. The guarantees for every citizen to freely speak, write, and publish their statements provided under section 9 was one such relevant component, according to Justice Mosk.

In *Pruneyard*, the majority opinion, while noting the opinion reflected in this dissent of Justice Mosk, overturned the *Diamond II* judgment. This also points to the rapidly evolving nature of constitutional law to more adequately conform with the changing needs of society. In *Diamond II*, the liberty of speech clause of the California Constitution was excluded from the purview of the judgment, such an inquiry being barred by the federal

⁸ *Diamond v. Bland* 11, Cal. 3d 331 (1974).

⁹ *Id.*

and state Supremacy Clauses of the United States Constitution, as in the *Lloyd* judgment, where the Due Process Clause of the federal constitution protected the property rights of the shopping center owner.

The California Supreme Court, in *Pruneyard*, clarified that *Lloyd* was primarily a First Amendment case, and the scope of property rights of shopping center owners under the Fifth and Fourteenth Amendments, respectively, was not defined. *Lloyd*, the Court noted, when viewed in conjunction with *Hudgens* and *Eastex* did not preclude law-making in California which requires that shopping center owners permit expressive activity on their property. In *Hudgens v. National Labor Relations Board*,¹⁰ the U.S. Supreme Court, while concluding that the First Amendment did not protect picketing in a shopping center, had recognized that statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others. In *Eastex Inc. v. NLRB*, where the employees had sought to distribute a union newsletter, the U.S. Supreme Court, in its majority opinion, had upheld the *Hudgens* judgment, and acknowledged that the National Labor Relations Act could provide statutory protection for the activity involved.¹¹ The reasoning following from these two cases was incorporated into the *Robins* judgment, and the California Constitution was recognized as having the authority to accord protection to the freedom of speech of individuals in private shopping centers.

In *Pruneyard*, while a number of factors may have caused the appellants to base their claim on the free speech guarantee of the California Constitution, there is a suggestion that sometimes, dissents from judges aid litigants in their preparation for contesting similar cases in the future, which builds up a stronger possibility for a once-dissenting opinion to then become the Court's adopted reasoning within the course of a few years.¹² This trend is clearly reflective of the reversal of the *Diamond II* majority opinion in the *Pruneyard* judgment, which went to acknowledge the reasoning of Justice Mosk's dissent in *Diamond II*.

¹⁰ *Hudgens v. NLRB*, 424 U.S. 507 (1976).

¹¹ *Eastex, Inc. v. NLRB* 437 U.S. 556 (1978).

¹² Jesse W. Carter, *Dissenting Opinions*, 4 HASTINGS L.J. 118 (1953).

IMMEDIATE DEVELOPMENTS

When the defendant, Pruneyard Shopping Center, appealed before the United States Supreme Court in *Pruneyard Shopping Center v. Robins*, the highest federal court upheld the decision of the California Supreme Court. The federal Supreme Court affirmed that state constitutional provisions, as construed to permit individuals to reasonably exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited, do not violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments to the United States Constitution.

It was believed that *Pruneyard* had intensified the then-existing tension between private property ownership and freedom of speech, as it had set a precedent that might now allow each state to interpret its constitutional provisions more broadly than corresponding provisions in the federal constitution.¹³ Thus, a state could now have the authority to elevate its freedom of speech to a "preferred position," especially when in conflict with rights of private property ownership. It is, however, to be taken into account that the California Supreme Court, while deciding *Pruneyard*, chose to repeatedly emphasize that the property or privacy rights of an individual homeowner or that of a proprietor of a modest retail establishment were not under consideration. The Court stressed that some twenty-five thousand individuals congregated at the shopping center daily to avail themselves of its numerous facilities, as a consequence of advertising and the maintenance of a congenial environment. A small group of additional persons engaged in soliciting signatures for a cause in an orderly manner, therefore, does not interfere with the normal business operations of the shopping center. The United States Supreme Court also reiterated the same view, when upholding the decision of the state Supreme Court.

In *Pruneyard*, the California Supreme Court had adopted a structural reasoning methodology, by analyzing the interplay between the public's right to free speech and that of private individuals over their property, in order to derive a structure that would have been intended by the framers of

¹³ Steven D. Pidgeon, *Freedom of Speech: The Florida Implications of PruneYard Shopping Center v. Robins*, 35 U. MIAMI L. REV. 559 (1981).

the California Constitution.¹⁴ The Court was indeed quick to note that the framers of the state constitution had not adopted the free speech guarantee from the federal Bill of Rights because they wished this provision to be more embracing than the First Amendment to the Constitution.¹⁵ In forming its interpretation of the interplay between free speech and property rights, the California Supreme Court maintained that prohibiting private shopping center owners from preventing public demonstrations on their property was necessary to give the full effect to the freedom of speech and expression, as enshrined in the California Constitution.¹⁶

THE EXPANSION OF *PRUNEYARD*

In 1982, the California Court of Appeal sought to expand the purview of the *Robins* standard in a case involving gated communities. In *Laguna Publishing Company v. Golden Rain Foundation of Laguna Hills* (hereafter *Laguna* case), the Court of Appeals decided that denying the live-carrier delivery of the plaintiff's giveaway newspaper in Leisure World, a gated community, when another giveaway newspaper had been permitted to make their delivery, was in violation of the plaintiff's free speech rights under the California Constitution.¹⁷ *Laguna Publishing Company* had been denied access to Leisure World for delivering its giveaway newspaper, *Laguna News Post*, to the residents of this private, gated community. Another company, Golden West Publishing Corporation had been granted the exclusive privilege of entry into Leisure World, to deliver its giveaway type newspaper, *Leisure World News*.

The Court of Appeal interpreted the conditions of the case, in light of the *Diamond I* and *Pruneyard* standards, by affirming that, while these precedents did not provide any direct assistance, *Pruneyard* could be interpreted in a manner that made it applicable to the case at hand. Where in *Pruneyard*, the California Supreme Court had declared that the plaintiff's

¹⁴ David E. Somers III, *State Constitutional Law — Free Expression — Pruneyard Reloaded: Private Shopping Malls Cannot Restrict Protesters' Free Expression Rights*, 40 RUTGERS L.J. 1017, 1026–31 (2009).

¹⁵ *Robins v. Pruneyard Shopping Center* 23 Cal. 3d 899, 908 (1979).

¹⁶ See *supra* note 5.

¹⁷ *Laguna Publishing Company v. Golden Rain Foundation of Laguna Hills* 131 Cal. App. 3d 816 (1982).

free speech rights under the state constitution were being abridged by the private shopping center when the former is denied access to the latter's premises, the appellate court noted that the Supreme Court had not considered the phenomenon of "state action," except when discussing the *Lloyd* decision.

The "state action" doctrine contends that the United States Constitution and its provisions, most notably the First and Fourteen Amendments, apply only to state action and not to private action.¹⁸ The concept, pertaining to the situation at hand, had perhaps first been addressed in the U.S. Supreme Court case *Marsh v. Alabama*, which dealt with the distribution of religious literature by the appellant near the post office of a company town, where a single company owned the town's property, distinguishing it from a municipality.¹⁹ The U.S. Supreme Court observed that the company had opened up the township to free public access, and was therefore required to respect the statutory and constitutional rights of the public that it had invited onto its premises.

Pruneyard, as rightfully pointed out by the appellate court in *Laguna*, did not expressly address the relevance of the "state action" doctrine. The appellate court concluded from the *Pruneyard* reasoning that, because the public had been invited onto private property, their constitutional free speech rights would be deemed to remain protected, as long as these rights did not infringe on the property rights of the merchants conducting business in the private shopping center. This rationale resonated very closely with the *Marsh* conclusion. The appellate court took to heart *Pruneyard*'s passing comment that the power to regulate property was not static, but capable of expansion to meet new conditions of modern life. The appellate court, therefore, sought to redefine property rights in response to the social setting's demand that such rights be responsive to the collective needs of the society, such as health, safety, morals, and welfare. As the Court contemplated,

[T]he gated and walled community is a new phenomenon on the social scene, and, in the spirit of the foregoing pronouncement,

¹⁸ Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMM. 329, 330 (1993).

¹⁹ *Marsh v. Alabama*, 326 U.S. 501 (1946).

the ingenuity of the law will not be deterred in redressing grievances which arise, as here, from a needless and exaggerated insistence upon private property rights incident to such communities where such insistence is irrelevant in preventing any meaningful encroachment upon private property rights and results in a pointless discrimination which causes serious financial detriment to another.²⁰

The appellate court was not hesitant in describing the two key factors by which the *Laguna* situation presented a stark difference to the *Pruneyard* circumstances. Having acknowledged that the public was not generally invited into gated communities like Leisure World, as against private shopping centers like Pruneyard, the Court remarked that the residents did indeed invite a variety of vendors and service persons into the premises, from electricians and plumbers to the carriers of newspapers to which the residents had subscribed. The most relevant factor acknowledged by the Court, however, was the significant discrimination that the plaintiff was subjected to, given that *Leisure World News* had unrestricted access to the community, even though not having been subscribed to by any resident. The Court referred back to the text of the judgment in *Lloyd*:

In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner[s] of private property used *nondiscriminatorily* [emphasis added] for private purposes only. . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful *nondiscriminatory* [emphasis added] purpose.

The California District Appellate Court took a cue from this language of the *Lloyd* judgment, that if the United States Supreme Court had been asked to adjudicate on a discriminatory limitation of free speech on private property, it might have reached a different decision.

²⁰ *Laguna Publishing Co. v. Golden Rain Foundation*, 131 Cal. App. 3d 816, 839 (1982).

THE WAY FORWARD?

The expansion of *Pruneyard*, among several concerns, once again highlighted the dilemma of the horizontal effect of constitutional rights. As the market economy continues to gain greater momentum, privatization becomes a reality of the political sphere, and hardly any domestic policy issue remains untouched by disputes over the scope of private participation in government.²¹ Exactly when the action of a private actor is to be placed on the same pedestal as state action, with regard to constitutional restrictions, has not been concretely laid down. Whether imposing conventional governmental duties upon private actors is an act of social engineering, outside of the mandate of the judiciary, also remains open to debate.²² The fact remains that in *Pruneyard*, and the cases preceding it including *Diamond I*, *Lloyd*, and all the way back to *Marsh*, the circumstances involved privately-owned areas that granted unrestricted access to the public. This factor was clearly absent from the situation in *Laguna*, and the appellate court might actually have gone a step too far, in reading between the lines, as far as the *Pruneyard* standard is concerned. The problem here is not the application of the *Pruneyard* precedent to cases with identical facts, as the California Supreme Court did in its *stare decisis* judgment in *Fashion Valley Mall v. National Labor Relations Board* (2006), but in a problematic broader interpretation of the *Pruneyard* standard to include private gated communities, which are far from an area of public access, and strictly an area of private residence. While the horizontal effect of constitutional standards can be empowering for private citizens, it would also mean the absolute blurring of boundaries between state and private action, which is not a healthy judicial outcome.

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²¹ Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003).

²² Gregory C. Sisk, *Uprooting the Pruneyard*, 38 RUTGERS L.J. 1145 (2007).

GEMS FROM CALIFORNIA'S LEGAL HISTORY AT LA LAW LIBRARY

CHANNA CAJERO AND SANDRA LEVIN*

INTRODUCTION

LA Law Library, initially authorized by the state legislature and established in 1891 as the Los Angeles County Law Library, currently operates as an independent local government agency pursuant to the California Business and Professions Code.¹ For more than 125 years, the library has provided access to legal information and materials for legal professionals, government officials, the business community and the general public.² Over that time, the nature of legal resources has changed dramatically and the library has likewise evolved to serve multiple roles and functions.

Within the legal community, LA Law Library is known for its protection and preservation of rare and historical legal resources; the collection

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¹ § 6300, *et seq.*

² Cal. Bus. & Prof. Code § 6360, subd. (a) (the law library “shall be free to the judiciary, to state and county officials, to members of the State Bar and to all residents of the county”). With nearly 1,000,000 volume equivalents (print, media, microfilm and microfiche), LA Law Library is second only to the Law Library of Congress in its role as the largest public law library in the United States.

is immense and comprehensive.³ Among those striving to close the justice gap — defined by the American Bar Association and the Legal Services Corporation as “the difference between the civil legal needs of low-income Americans and the resources available to meet those needs”⁴ — LA Law Library is known for its extensive efforts to educate and assist those who cannot afford representation in using the collection to understand their legal rights and responsibilities and navigate the judicial system. The latter task is challenging, not only because self-represented individuals span a broad range of educational backgrounds, language capacities, skill levels and mental, intellectual and emotional resource sets,⁵ but also because California law is complex, obscure and ever expanding.

The following brief, general description of LA Law Library’s collection and selected exemplars from it are intended to pique the reader’s interest in the jewels and marvels of that collection, but also to demonstrate the relationship between the evolution of that collection and the evolution of the role of LA Law Library and public law libraries in general. The selections offered were chosen to illustrate at once the depth and breadth of the collection, the magnitude of the problem of providing public access to a body of materials that is simultaneously rich, diverse and often obscure, and the expansion of that problem over time as the law itself has exploded in volume and complexity.

ABOUT THE LA LAW LIBRARY COLLECTION

The Law Library strives to provide a collection that is authoritative and comprehensive and to acquire and retain resources that adhere to the standards set forth in statements from the American Library Association and

³ Gail H. Fruchtmann, “The History of the Los Angeles County Law Library,” *Law Library Journal* 84 (1992): 698.

⁴ Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*, prepared by NORC at the University of Chicago for Legal Services Corporation (Washington, D.C.: LSC, 2017), 9.

⁵ Judicial Council of California, *Handling Cases Involving Self-Represented Litigants: A Benchguide for Judicial Officers* (San Francisco: JCC, April 2019), 1-9–1-10. Natalie Anne Knowlton et al., *Cases Without Counsel: Research on Experiences of Self-Representation in U.S. Family Court* (Denver: Institute for the Advancement of the American Legal System, May 2016), <https://iaals.du.edu/publications/cases-without-counsel-research-experiences-self-representation-us-family-court> (as of September 3, 2019).

the American Association of Law Libraries.⁶ As long as print versions of the core collection of primary materials are available, LA Law Library acquires and selectively preserves print copies of these titles; if digital availability exists, the library endeavors to make these resources available to its users as well. Most subject areas, in particular subjects of special interest, expand and contract according to demand among the library's users for resources in these areas.

LA Law Library's comprehensive collection of California, federal and other domestic law is both current and historical in nature. It consists of primary law and secondary sources for United States federal, state, and territorial jurisdictions. Secondary materials include practice guides, form books, and bar association materials. As part of its commitment to serve users beyond the confines of its physical location, the library provides access to the electronic versions of U.S. legal materials via links provided in its online catalog and database subscriptions.

California Historical Materials

LA Law Library maintains a comprehensive collection of the statutes, session laws, and judicial opinions and decisions of California. The library also acquires and preserves a wide array of California, multi-jurisdictional, and subject-specific substantive treatises covering most legal subject areas in California law. LA Law Library is a selective depository for California government documents, including legislative history resources, such as Assembly and Senate journals, bills and analyses, and hearings and committee prints. LA Law Library is a depository for the California appellate courts, receiving, maintaining and, more recently, digitizing, the most complete collection of California appellate briefs in the country from 1858 to the present.⁷ The library's collection of California ballot propositions and voter

⁶ American Library Association, *Library Bill of Rights* (June 19, 1939; latest amendment, January 29, 2019), <http://www.ala.org/advocacy/intfreedom/librarybill> (as of Aug. 30, 2019). American Association of Law Libraries, *County Public Law Library Standards* (April 2015), <https://www.aallnet.org/about-us/what-we-do/policies/public-policies/county-public-law-library-standards> (as of Aug. 30, 2019).

⁷ LA Law Library also serves as a depository for the U.S. Court of Appeals for the Ninth Circuit.

ballot pamphlets, which includes materials from 1908 to the present, is likewise unique and comprehensive.⁸

Los Angeles Historical Materials

LA Law Library acquires the local codes and ordinances for numerous cities and counties in California in accordance with demand and availability. The library collects and retains Los Angeles County legal newspapers, including the *Metropolitan News-Enterprise* and the *Los Angeles Daily Journal*; this collection dates from 1945 and is maintained in hard copy through the present, and in microform from 1888 to 2013. A diverse selection of materials from local agencies and organizations has been collected since the library's founding in 1891 and includes everything from materials concerning the desegregation process by the Los Angeles School Monitoring Committee to the crime and arrest statistics of the Los Angeles County Sheriff's Department.

Rare Books

As a result of its size, scope, and development, LA Law Library has obtained rare book materials that address the establishment of the continental United States, its colonies, individual states, and territories, with a special emphasis on the early history of California law, both before and after statehood. Also found in the library's Rare Book collection are documents that record the history and development of the legal community and the practice of law in Southern California. These items include such rarities as the criminal trial transcripts of defendant David Caplan, who was convicted of helping to bomb the *Los Angeles Times* newspaper building in 1910, and the subsequent trial of legendary attorney Clarence Darrow for attempting to bribe jurors in the case of Caplan's co-defendants, the McNamara brothers; a 1922 illustrated directory of members of the Los Angeles County bench and bar published by the *Los Angeles Daily Journal* newspaper, which includes attorney Clara Shortridge Foltz, the first woman to practice law in California; and a Spanish-language edition of the first

⁸ LA Law Library participates in the California State Depository Library Program. Under the California Library Distribution Act, the library is required to keep basic legal state documents, including legislative bills, legislative committee hearings and reports, legislative journals, statutes, administrative reports, the California Code of Regulations, annual reports of state agencies, and other materials (Cal. Gov. Code § 14909).

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BENCH AND BAR OF LOS ANGELES COUNTY

without right to do so. Convicted violators of injunctions of contempt of court in later cases, L. A. Shipbuilding and Dry Docks Co. vs. Metal Trades Union before Judge Lewis R. Burke. Mr. Ferguson entered the law office of Gilman, Trask, and Co. in 1907. In June 1909 as an office boy, later studied law in their office, and in 1910 with the same firm after the death of Walter J. Trask, until 1929, when he opened offices for himself.



MORRIS M. FERGUSON

Morris M. Ferguson with offices at 714 Fay Building, the son of Isaac H. Ferguson and Mary A. Ferguson, was born in East St. Louis, Ill., June 16, 1887. After attending the common school in Ill., he finished his education at the Chicago Business Law School in 1904. He was admitted to the bar in Springfield, Ill., in 1904, came to Los Angeles the year of 1909. Mr. Ferguson is a married man and a member of East Coast 899 P. & A. M.; Court E. G. 327 Forester Security Benefit Association; Union League Club; Esperanza Chapter 187 Eastern Star; Lincoln Heights Club; Forester Club; Public School teacher in Ill. for 12 years; Police Judge at Joliet, Ill., 10 years; Assistant States Attorney in Madison, Co. Ill., two years. Professor of real property, personal property, abstracts, and real estate law for American Extension University; also a member of this faculty. Public speaker and lecturer as a four minute man speaker during the world war.



W. J. FORD

W. J. Ford was born in Oakland, California, August 2, 1872. Now maintains offices at 412 H. W. Hillman Building. He is the son of John J. and Mary E. Ford, attended the Public and High Schools, Los Angeles, also the University of California, Berkeley, was admitted to the bar October 1905, 1909. Came to Los Angeles from Oakland, April 1913. Mr. Ford is a member of U. S. War Veterans; N. S. G. W.; L. A. Athletic Club; Epileptic Club; Brewster County Club; American Bar Association; Calif. Bar Association; Benovolent Protective Order of Elks; University of California Alumni Association; Private Company H. 6th California Infantry, 1893. Secretary Senate Judicial Committee, 1907. Deputy City Prosecutor, 1907, 1908. Deputy District Attorney, 1908-1911. Chief Deputy District Attorney, 1911-1914. Counsel for People vs. McNamara; People vs. Darrow; People vs. Sebastian; People vs. Bartford; People vs. Deigan; Burton vs. Essanay Film Co.; Hennessy vs. Burley; Executor Estate Mary Egan; Walker vs. J. Gamble Carson; Executor Estate Alpha O. Carson; Donah vs. L. A. P. & Sav. Bank; Executor Estate Laura E. Hughes; Franklin vs. Irvine; Earl vs. Tutor; Earl vs. Los Angeles Record; Stevens vs. Stark (Santa Barbara Evening News); Monach vs. Pollster.



J. FRIEDLANDER

J. Friedlander, Assistant City Prosecutor, at 205 N. City Cal., is the son of Joseph Friedlander and Rose I. Friedlander. He was educated in the New York City public schools, and graduated from the N. Y. University. Was admitted to the bar in Los Angeles in January, 1912, and to practice the same year. Mr. Friedlander is a married man, coming here in 1913 from New York City. Is a member of First Fifth Lodge and Union men and lodge house act, the maintaining of quarantine by the City Health Department. Appointed Deputy Prosecutor in 1915; Chief Deputy in 1915, and Assistant City Prosecutor in 1922.



J. M. FURSE

J. M. Furse with offices at 1202 Pacific Mutual Building, the son of Adolph and Getta Crossman Furse, was born in N. York City, New York, Aug. 22, 1888. He attended the N. Y. City, Cleveland, Ohio, High School Class Preparatory, Basvian Univ., Cleveland, Ohio, and graduated July 18, 1913. Came to Los Angeles Christmas Day, 1913 from Cleveland, Ohio. Mr. Furse is a married man specializing in corporation Law Damage.



CLARA SHORTRIDGE FOLTZ

Clara Shortridge Foltz, one of the best known and most prominent women in California and in fact the first woman state, the daughter of Elias W. and Talitha Caml Shortridge, has a

suite of offices at 929 South Broadway. Her early education was with private tutors and the public schools, then two years at Hastings College of Law, University of California. She was the first woman admitted to the California bar on the Pacific Coast, the first woman deputy District Attorney in the country, the first woman member of the Board of Trustees of the State Normal School. At the Columbia Exposition in Chicago, Ill., in 1893, she was present as the representative of the California Bar. Mrs. Foltz is a widow, a member of the State Bar Association, L. A. Bar Association, Press Club. Engaged in general and criminal law, and has been successful in litigation wherever possible and the author of the prison parole system "Wax with a smile" has always been her motto. She is and organizer of numerous women's organizations throughout the state. Her judgment is sound and her counsel worth while. She was the means of obtaining chairs and stools for women clerks in the stores and elsewhere.



HERBERT PRESTON

Herbert Preston son of Arthur W. Preston and Annie S. Preston, with offices at 294 Pacific Finance Building, Los Angeles, was born in Kansas City, Mo., April 3, 1886. He attended the elementary and high schools of Kansas City, Mo., and Phoenix, Ariz., coming to Los Angeles September 1912, and graduated from the U. S. C. College of Law in 1914. He was in the bar July 22, 1914. Mr. Preston is a single man, a member of the Delta Theta Phi Nat. Law Fraternity, L. A. City Club, Union League Club, Los Angeles Athletic Club, and California Country Club. He was a Lieutenant Air Service (Aviation Section) U. S. Army during the world war, and is a member of firm of McCarthy, Nolan and Preston.



JOHN D. FREDERICKS

John D. Fredericks who now has offices 1125 Pacific Mutual Building, Los Angeles, was born in Burgettstown, Pa., Sept. 16, 1882. He is the son of Rev. James D. Fredericks and Mary Patterson. He attended the public schools of Burgettstown and Trinity Hall Military Academy, Washington, Pa., and Washington and Jefferson College, Washington, Pa. He came to Los Angeles in 1920 and was admitted to the bar in California in 1925. Mr. Fredericks married Agnes M. Blakeley in 1926, is a member of the California Club, Los Angeles County Club, Union League Club, and L. A. Athletic Club. He was District Attorney from 1927 to 1914. Directed the prosecution of many important cases during that period, including the famous "dynamite case" and the bribery cases incident thereto. Successfully handled ciled roads patent litigation as one of the attorneys for various cases and cases. Served in Spanish American War with California Infantry. Now President of L. A. Chamber of Commerce. He entered private practice January, 1915, with the firm of Fredericks and Hanna, and has been retained in a number of actions of local interest.

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(Courtesy Murillo Studio).

ODA FAULCONER

Mrs. Oda Faulconer, being the daughter of Augusta and Mary E. Hunt, maintains offices at 1215 Lower State Building. She graduated from the U. S. C. Law College and was admitted to the bar of L. A. 1923. Came to Los Angeles from Portland Ore. in 1902. Mrs. Faulconer is a widow, a member of the Friday Morning Club; Professional Women's Club; Pres. Association Club; Woman Lawyer's Club; Republican Study, L. A. Co. Federation of Business and Professional Women's Club; Co. and State Bar Assoc. and Amer. Bar Assoc. Also a member of Republican County Central Committee, and Executive Committee of Republican State Central Committee. Admitted to practice in all State and Federal courts of Calif. and the Supreme Court of U. S.



JOHN L. FLEMING

John L. Fleming has offices at 5 Van Nuys Bldg., being the son of J. P. and Mary E. Fleming, was born at Doremy, Calif. Nov. 1, 1878. Educated in the Public Schools of L. A. County, Woodbury Business College and L. A. Law School. Admitted to the bar at L. A. April 1909. Mr. Fleming is a married man; a member of Hollenbeck Blue Lodge Masons; East Gate Royal Arch Chapter; Ramona Parlor Native Sons; Past Patron Hollenbeck Chapter O. E. S.; Past Royal Patron Ramona Court Ananaph; City Club, Chamber of Commerce, and Pres. Calif. Country Club. Was Counsel for Arroyo Ditch and Water Co. cases; determining the right to the use of the waters of the San Gabriel River for irrigation purposes; acted as Judge Pro Tem in many cases. Has had appeals from decisions but no reversals by Supreme Court. His father came across the plains in a desert schooner, riding a mule from N. Carolina to California.

E. L. FOSTER
E. L. Foster with offices at 1209-10 Pacific Mutual Building was born July 8, 1871, at Brighton, Illinois. He is the son of Craville F. Foster and Mary J. Foster. Educated in the schools of Mass. and California. Was admitted to the bar of California June 1926. Mr. Foster came here Sept. 1921 from Bakerfield, Cal. He is a married man.

1922 ILLUSTRATED DIRECTORY OF MEMBERS OF THE LOS ANGELES COUNTY BENCH AND BAR PUBLISHED BY THE LOS ANGELES DAILY JOURNAL NEWSPAPER.

BOTTOM ROW: ATTORNEY CLARA SHORTRIDGE FOLTZ, THE FIRST WOMAN TO PRACTICE LAW IN CALIFORNIA.

California session laws of 1850–1851, the preface of which explains that the translation was ordered by the secretary of state, due to the lack of distribution of certain laws in Spanish, and that the translator was to be paid an amount not to exceed fifty cents per page.⁹ The library's Rare Book Room is climate controlled and, in keeping with its California location, the shelving is designed to prevent books from falling in case of an earthquake.¹⁰

EXEMPLARS

California Codes Annotated, 1872

California's statutes were first codified in 1872, and the first annotated versions of the codes were published the same year. The codes originally included four titles: Civil Code, Code of Civil Procedure, Political Code, and Penal Code. Annotations were provided by Creed Haymond and John C. Burch of the California Code Commission and included cross-references to other code sections, case notes, and historical background, providing historical insight into the intent and purpose of the laws as adopted. For example, this 1872 note for Penal Code section 714 on hearings for persons charged with making criminal threats can be found in the original annotations:

These proceedings are provided for securing a more perfect respect for the law than their mere existence carries to the person upon whom they are intended to operate. Every one [sic] is presumed to know the law, but in many instances, as a matter of fact, the existence of the law is unknown. By these proceedings, therefore, an actual breach of the law may be prevented where an ignorant violation would be punished.

In the nearly 150 years since their original publication, the California codes have grown to include twenty-nine titles, including Education, Labor, Harbors and Navigation, Streets and Highways, and Water.

The contrast between Haymond and Burch's annotated version of 1872 and the annotated codes of today is a striking illustration of the expansion

⁹ *Leyes del Estado de California* (20 vols., 1850–1878), vol. 1 (Sacramento: Impresor del Estado, 1851), v.

¹⁰ Fruchtman, 700.

of California law. While the 1872 version included only seven volumes and requires only about one foot of shelf space to house, *Deering's California Codes Annotated* currently runs to over 200 volumes at nearly 35 feet of shelf space, and *West's Annotated California Codes* is more than 400 volumes, spanning over 55 feet of shelf space.

Interestingly, despite frequent code revisions, some sections have remained unchanged since 1872, such as Civil Code section 3821 on damages: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor [sic] in money, which is called damages." Meanwhile, hundreds, if not



TODAY, *WEST'S ANNOTATED CALIFORNIA CODES* (ON SHELVES AT LEFT) INCLUDES MORE THAN 400 VOLUMES, SPANNING OVER 55 FEET OF SHELF SPACE, WHILE THE 1872 VERSION OF THE CALIFORNIA ANNOTATED CODES (ON SINGLE SHELF AT RIGHT) INCLUDES ONLY 7 VOLUMES, REQUIRING ONLY ABOUT ONE FOOT OF SPACE.

thousands, of additional laws have been added, including such things as the California Public Records Act, the California Environmental Quality Act and, most recently, the California Consumer Privacy Act of 2018 (AB 375), which will go into effect January 1, 2020 and provides Californians with greater control over the personal information they share with businesses.

- The original, annotated 1872 California Codes, and over 1,000 subsequent annotated and unannotated editions of California's twenty-nine code titles, are available at LA Law Library.¹¹
- *The Civil Code of the State of California* (2 vols.), *The Code of Civil Procedure of the State of California* (2 vols.), *The Penal Code of California* (1 vol.), *The Political Code of the State of California* (2 vols.; annotated by Creed Haymond and John C. Burch, 1st ed., 1872).

Municipal Code of the City of Los Angeles, Replaced Pages, 1955–Present

The Los Angeles Municipal Code was enacted by Ordinance No. 77,000, codifying all penal and regulatory ordinances, and went into effect November 12, 1936. Then and today, it is compiled and codified under the direction of the Los Angeles city attorney.¹² The first edition of the code covered nine subjects: zoning, business regulations, health and sanitation, public welfare and morals, public safety, public works, public utilities and transportation, traffic, and building regulations. Today, it covers twice as many subjects, including chapters on rent control, airports, water conservation, and environmental protection. Over the years, the format of the text and even the shape and size of printed volumes have changed according to the technologies and needs of researchers at the time, evolving from smaller, bulky volumes published in the 1950s that could be shelved in a standard bookcase to larger letter size pages more suitable for faxing and copying in 2002. Digitized versions are not archived by the publisher,

¹¹ LA Law Library retains all superseded volumes of *Deering's California Codes Annotated* and *West's Annotated California Codes*, as well as annual desktop editions for selected California code titles.

¹² Official City of Los Angeles Municipal Code: Ordinance No. 77,000: Effective November 12, 1936 As Amended Through June 30, 2019 / Compiled, Edited and Published Under the Direction of Michael N. Feuer, City Attorney.

making access to superseded code sections sometimes difficult to obtain, even for relatively recent dates.¹³

Fortunately, LA Law Library maintains a treasure trove of historical research materials relating to the Los Angeles Municipal Code. The collection includes complete print sets of the first through the sixth (current) editions, chronicling the expansion of the code from a single 2.5 x 10.5-inch volume in 1936 to a six-volume 1.5-foot x 11.5-inch set today. Since 1955, the code has been published in loose-leaf format, which requires that every time a fresh set of revised pages is released by the publisher, superseded pages must be removed from the loose-leaf binders and replaced with new pages. Most subscribers of this set would typically discard those out-of-date pages; the library has retained and organized them numerically and chronologically for ongoing public access.

This unique collection amounts to thousands of historical pages from the various editions of the Los Angeles Municipal Code, enabling researchers to reconstruct the code as it existed at any particular point in time from 1955 to the present. Today, the library's collection of replaced loose-leaf pages alone fills over eighty volumes and counting.

The library's archival collection also includes compiled ordinances and resolutions of the City of Los Angeles prior to the establishment of the Municipal Code, the oldest of which dates from 1855, five years after the city's incorporation.

- *Municipal Code of the City of Los Angeles* (3rd ed., 1955–1970, 4 vols., accompanied by superseded releases for 1955–1969, 9 vols.).
- *Los Angeles Municipal Code* (4th ed., 1970–1988, revised pages retained and bound in section number order, 25 vols., and release number order, 16 vols.).
- *Los Angeles Municipal Code* (5th ed., 1989–2001, replaced pages filed in release number order, 47 vols.).
- *Los Angeles Municipal Code* (6th ed., 2002–present, replaced pages filed in release number order, 34 vols.).

¹³ Official City of Los Angeles Municipal Code (June 30, 2019), https://www.amlegal.com/codes/client/los-angeles_ca (as of September 3, 2019).

Opinions of the Attorney General of California, 1899–Present

An opinion of the California attorney general can be requested on any question of law by California government officials. While these advisory opinions of the California attorney general can provide both persuasive authority and historical insight, older issuances can be challenging to locate. More modern opinions from 1982 to the present are available on the California attorney general's website, and opinions from 1943 forward are available in printed book format at various libraries. Prior to 1943, though, opinions were issued individually, in an original series from 1899 to 1936, followed by the "New Series" for the years 1936 to 1943. These early opinions are not available online or in commercially printed sets; fortunately, they are available on microfilm and in the collection compiled by LA Law Library librarians from 1930 to 1943.

A 1940 opinion by Attorney General Earl Warren on the proper filing fee to be paid by candidates for the office of Judge of the Superior Court illustrates the advisory, as opposed to primary, nature of these opinions:

While I know of no decision upon the question, it is my opinion that the filing fee should be one per cent [sic] of the annual salary to be received by the successful candidate, i.e., in this case \$55. . . . While this office has never rendered an official opinion on the subject, this opinion has been expressed unofficially on several occasions in the past.¹⁴

Notwithstanding the advisory nature of the opinions, they range in length, detail and depth. An attorney general's stated opinion can be perfunctory, as in the opinion by Ulysses S. Webb in 1930 on the civil rights of probationers, the entirety of which reads:

A person released on probation would not be sentenced to state prison, and it is therefore my opinion that there would be no suspension of civil rights.¹⁵

Others run to the more extensive or even expansive, such as the opinion of April 26, 2019 by Attorney General Xavier Becerra, which runs to seventeen pages with ninety-seven footnotes on whether a mayor of a municipality

¹⁴ Op. NS2761.

¹⁵ Op. 7272.

may serve as a member of the board of directors of the local fire protection district.¹⁶

LA Law Library's local print collection is bound in opinion number order while the library's collection of opinions on microfilm is organized by date. Both are available for use by patrons.

- *Opinions* (nos. 1–11,000, Jan. 18, 1899–Oct. 1936; New Series nos. 1–4708, Oct. 1936–Aug. 1943; 1899–1936, microfilm, 42 reels, 16 mm).
- *Opinions* (vols. 1–12 suppl., nos. 7153–10994, June 1930–Oct. 1936; New Series vols. 13–29, nos. 1–5024, Oct. 1936–Aug. 1943, issued individually in mimeograph format by the Office of the Attorney General and compiled by LA Law Library, 1936–1943, 43 vols.).
- *Opinions* (bound volumes kept up to date by official advance sheets, 1943–present, 105 vols., with indexes).

OPINIONS OF THE LOS ANGELES SUPERIOR COURT APPELLATE DEPARTMENT/DIVISION

The published opinions of the California Supreme Court and Courts of Appeal dating back to 1850 are readily available online and in print, but historical decisions of the Superior Courts can be more difficult to locate, given the changes to the court structure and the spotty nature of publication in the early decades of the courts.

Since the establishment in 1929 of the Appellate Departments of the Superior Court (now known as the Appellate Divisions), reported cases can be found in the “California Supplement” section of *California Appellate Reports*. Decisions issued prior to 1929 can be found in two separate sets published commercially by Henry J. Labatt, a San Francisco attorney, and Rufus Ely Ragland, also a San Francisco attorney and publisher. These volumes are housed in the library's Rare Book Room.

Ragland explains in the Preface to his publication that these volumes include “certain notable cases of general interest,” including those from counties both large (Alameda, Los Angeles, San Francisco) and small (Butte, Siskiyou, Tulare), such as a 1921 ruling on the legality of chewing

¹⁶ ___ Ops. Cal. Atty. Gen. ___ (April 26, 2019; filed Op. 17-1101), 39 (the opinion's conclusion: yes, but only if the mayor is the city's designated appointee and not serving simultaneously in another capacity, such as a public member).

CALIFORNIA SUPERIOR COURT DECISIONS 73

In the Superior Court of the State of California,
In and for the County of Los Angeles.

JUDGMENT

No. 103,571

Charles Chaplin, Plaintiff,

vs.

Western Feature Productions, Inc., a corporation,
F. M. Sanford, G. B. Sanford, A. J. Xydias,
C. K. Xydias, Charles Amador, John One,
John Two and Mary One, defendants.

JOHN L. HUDNER, Judge

Action by Charles Chaplin against Western Feature Productions, Inc., a corporation, and others. Judgment was entered dismissing the action as to the defendants, Western Feature Productions, Inc., a corporation, A. J. Xydias, C. K. Xydias, John One, John Two and Mary One and trial was had against the remaining defendants. Judgment for plaintiff, with costs.

1. INJUNCTION—USE OF TRADE NAME—SIMILAR
NAME—UNFAIR COMPETITION.

In a suit by "Charles Chaplin," well known moving picture actor and producer, defendants held guilty of unfair competition and enjoined from selling, leasing, releasing, advertising or exhibiting a picture called "The Race Track," and from using the names "Charles Aplin" or "Charlie Aplin" or any other name similar to that of plaintiff in connection therewith or from advertising, leasing, releasing, selling, exhibiting or offering for sale any pictures in imitation of those of plaintiff and so likely to deceive the public.

This cause came on regularly for trial in the
above entitled Court in Department 31 thereof,

LOS ANGELES SUPERIOR COURT APPELLATE DEPARTMENT OPINION
103,571 FROM 1925. PLAINTIFF CHARLIE CHAPLIN WON AN
INJUNCTION AGAINST WESTERN FEATURE PRODUCTIONS, INC.
FOR UNFAIR COMPETITION RELATED TO THEIR RELEASE OF A FILM
CALLED "THE RACE TRACK" FEATURING "CHARLIE APLIN."

gum vending machines in the City of Vallejo; a 1924 case concerning the location of a so-called “pest house” or “isolation hospital” for the treatment of patients with infectious diseases in the City of Pasadena; and a 1924 decision on searches and seizures of intoxicating liquor in Prohibition-era Los Angeles. One such opinion, from 1925 in Los Angeles County, concerns Charlie Chaplin, described as “well known moving picture actor and producer,” who won an injunction against Western Feature Productions, Inc. for unfair competition, based on their release of a film called “The Race Track” featuring one “Charlie Aplin.”¹⁷

LA Law Library has also collected the “Memorandum Opinions” of the Los Angeles Municipal and Superior Courts covering the years 1931 to 1990, most of which are unpublished items that cannot be found online or in *California Appellate Reports*. These are originals, mimeographs, or photocopies. Opinions are designated as either civil or criminal by the abbreviations “Civ.A” and “Cr.A.” in the assigned number. One noteworthy item from this collection is an unpublished opinion from 1981 by Judge Florence Bernstein, a longtime Los Angeles Superior Court judge (her campaign slogans included “Go with the Flo” and “Put a Mensch on the Bench”¹⁸), who went on to become the first woman to serve as presiding appellate judge of the L.A. Superior Court. The case, *People v. Hauntz*, concerns a criminal matter involving a citizen’s arrest, and Bernstein’s opinion illustrates her thoughtful approach:

Private citizens perform a public service in bringing to justice offenders who commit crimes in their presence. But generally, they are unskilled not only in the technicalities of the law but in the methods and procedures for controlling an arrested person, occasionally to their personal harm. We believe it the better policy to encourage private persons to enlist the aid of professional police officers to physically effect an arrest.¹⁹

¹⁷ R. E. Ragland, *California Superior Court Decisions: Notable Cases*, vol. 2 (Sacramento: California Law Book Exchange, 1929), 73 (Op. 103,571).

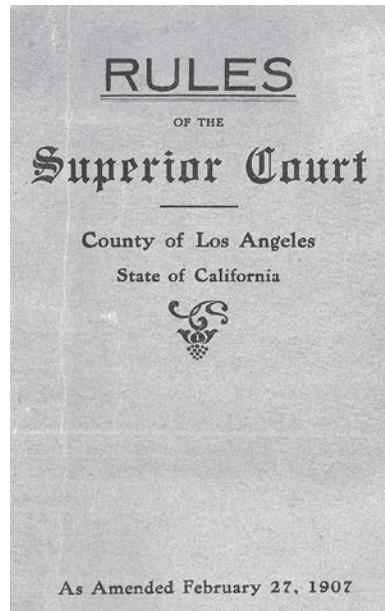
¹⁸ Myrna Oliver, “Florence Bernstein; 1st Woman to Be Presiding Appellate Judge,” *Los Angeles Times* (Dec. 6, 1991), <https://www.latimes.com/archives/la-xpm-1991-12-06-mn-620-story.html> (as of Sept. 4, 2019).

¹⁹ *People v. Hauntz* (App. Dept., Super. Ct. L.A. County, 1981, No. 81-30, Super. Ct. No. Cr.A. 18264), 8.

- *Reports of Cases Determined in the District Courts of the State of California* (Henry J. Labatt, editor, 1857–1858, 2 vols.).
- *California Superior Court Decisions: Notable Cases* (compiled by R. E. Ragland, assisted by Charles E. McGinnis, 1921–1929, 2 vols.).
- *Memorandum Opinions, Civil* (Civ.A. 481–8416, 9586–18493, compiled by LA Law Library, 1932–1990, 25 vols.).
- *Memorandum Opinions, Criminal* (Cr.A. 481–27620, 1959–66 bound with civil opinions, compiled by LA Law Library, 1931–1989, 22 vols., with selective index and citator).

Pamphlet Collection

This collection's utility is matched by its charm. This wide-ranging variety of small printed booklets, pamphlets, reports, court opinions, and various legal ephemera includes over 1,200 items related to California and Los Angeles. For library patrons, this collection's special nature and organizational scheme requires the help of the library's reference librarians to locate materials: these items can be found separately by title in the library's catalog, but they were bound *by size* in a generally chronological order, which can create a research challenge for patrons. Included in this collection are a booklet of the Los Angeles Superior Court rules of 1907, which measures only 4 x 5.5 inches and includes only 37 rules, as opposed to over 600 today; a report on the Los Angeles Aqueduct following the year of its completion in 1913 by Dr. Ethel Leonard; and a booklet of short biographies of candidates running to be elected judge of the Los Angeles Superior Court in 1932.



POCKET-SIZE BOOKLET OF
THE LOS ANGELES SUPERIOR
COURT RULES OF 1907.
INCLUDES ONLY 37 RULES.
TODAY THERE ARE OVER 600.

- *Rules of the Superior Court, County of Los Angeles, State of California* [adopted Aug. 3, 1905, in effect Sept. 11, 1905], *As Amended Feb. 27, 1907* (California Superior Court (Los Angeles County), [1907?], 1 vol.).
- *Report of Sanitary Investigation of the Tributaries and Mountain Streams Emptying into Owens River from the Upper End of Long Valley via Owens River Gorge, Following the Course of Owens River and Los Angeles Aqueduct to Fairmount Reservoir* (by Ethel Leonard; Including the Chemical Sanitary Analysis of the Water by A. F. Wagner, [1914?], 1 vol.).
- *Biographical Sketches of Candidates for Office of the Superior Court of Los Angeles County* (by the Los Angeles Bar Association, [1932?], 1 vol.).

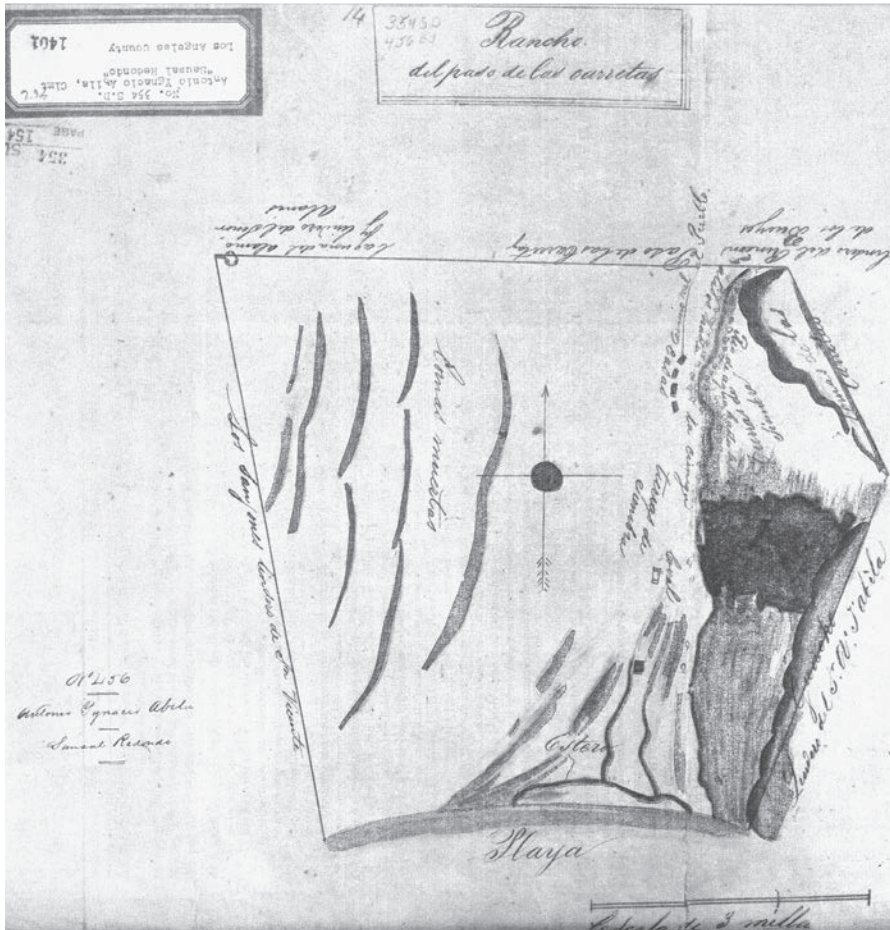
California Law Prior to Statehood

LA Law Library's collection of rare books includes several items from the period when Alta California (Upper California) was a territory of Mexico and later when it was ceded to the United States by the Treaty of Guadalupe Hidalgo, just prior to statehood in 1850. A translation of the Mexican Laws of 1837, still in force in California in 1849, describes the unsettled legal environment of the time:

The Mexican Constitution of 1844, partially adopted in Mexico, was never regarded as in force in California, nor was it known here that these laws were materially modified by any decrees or orders of the Mexican Congress. It will be a question hereafter for the decision of courts, what modifications were legally made by Mexico, and how far they are actually in force under the existing circumstances of the country.²⁰

The debates of the Constitutional Convention of 1849 in Monterey, California, which the library has collected in both English and Spanish, include reports by delegates on the advisability of statehood and a final congratulatory speech by the military governor of California, Brigadier General Bennet Riley wishing the participants "happiness and prosperity"

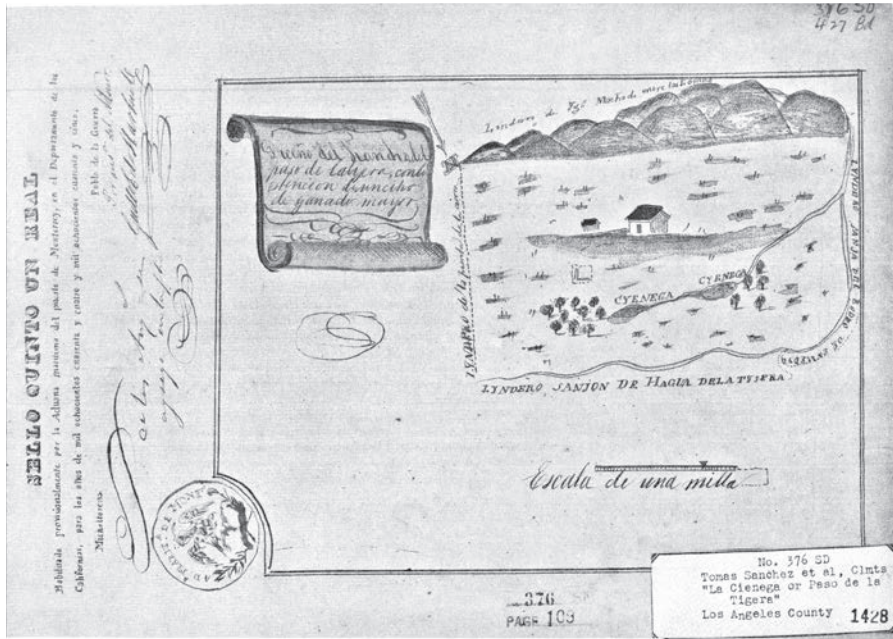
²⁰ J. Halleck and W. E. P. Hartnell, *Translation and Digest of Such Portions of the Mexican Laws of March 20th and May 23rd, 1837, as are Supposed to Be Still in Force and Adapted to the Present Condition of California; With an Introduction and Notes* (San Francisco: Office of the Alta California, 1849), 4.



REPRODUCTION OF HAND-DRAWN MAP OF RANCHO LA BALLONA, THE 1839 MEXICAN LAND GRANT IN LOS ANGELES COUNTY, WHICH INCLUDES THE PRESENT-DAY WESTSIDE CITIES OF SANTA MONICA AND CULVER CITY, AND THE BALLONA WETLANDS ECOLOGICAL RESERVE.

upon the successful conclusion of their “arduous labors.”²¹ The collection also includes several twentieth-century publications of early California legal documents, including rules and regulations for the *presidios* (military bases) on the frontier line of New Spain, ordered by King Carlos III of Spain in a decree of September 10, 1772, and the decree of President Santa Anna of

²¹ J. Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849* (Washington: 1850), 477.



REPRODUCTION OF HAND-DRAWN MAP OF RANCHO LA CIENEGA O PASO DE LA TIJERA, THE 1843 MEXICAN LAND GRANT IN LOS ANGELES COUNTY, WHICH INCLUDES THE PRESENT-DAY NEIGHBORHOODS OF LEIMERT PARK AND BALDWIN HILLS, AND THE KENNETH HAHN STATE RECREATION AREA.

Mexico, May 22, 1834 establishing circuit tribunals and district courts.²² An oversized volume of illustrated color maps of the California *ranchos* from 1822 to 1846 brings to life the early California landscape, both geographic and political, under Mexican rule.²³

- *Translation and Digest of Such Portions of the Mexican Laws of March 20th and May 23rd, 1837, as are Supposed to Be Still in Force and Adapted to the Present Condition of California; With an Introduction and Notes* (by J. Halleck and W. E. P. Hartnell, government translator, 1849, 1 vol.).

²² John Galvin, ed., *The Coming of Justice to California: Three Documents*, translated from the Spanish by Adelaide Smithers (San Francisco: John Howell Books, 1963).

²³ Robert H. Becker, *Diseños of California Ranchos: Maps of Thirty-Seven Land Grants, 1822–1846, From the Records of the United States District Court, San Francisco* (San Francisco: The Book Club of California, 1964).

- *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849* (by J. Ross Browne, 1850, 1 vol.).
- *Relación de los Debates de la Convención de California, Sobre la Formación de la Constitución de Estado, en Setiembre y Octubre de 1849* (by J. Ross Browne, 1851, 1 vol.).
- *The Coming of Justice to California: Three Documents*, translated from the Spanish by Adelaide Smithers, edited by John Galvin (1963, 1 vol., with appendices).
- *Diseños of California Ranchos; Maps of Thirty-Seven Land Grants, 1822–1846, From the Records of the United States District Court, San Francisco* (by Robert H. Becker, 1964, 1 vol., with folded color maps).

CONCLUSION

Those who revel in the intricacies, obscurities and complexities of California legal history, will find virtually endless opportunities to delve into that history in the LA Law Library collection. For those simply trying to put a best foot forward in understanding and advocating for their own legal rights, the scope and depth of the collection will be a sobering reminder of how daunting a task they face. In either circumstance, the support and assistance of the able librarians at LA Law Library will make the journey more manageable and, hopefully, rewarding.

★ ★ ★

BOOK SECTION

A HISTORY OF THE
CALIFORNIA SUPREME
COURT IN ITS FIRST
THREE DECADES,
1850-1879

A HISTORY OF THE CALIFORNIA SUPREME COURT IN ITS FIRST THREE DECADES, 1850–1879

ARNOLD ROTH*

PREFACE

“The history of the United States has been written not merely in the halls of Congress, in the Executive offices, and on the battlefields, but to a great extent in the chambers of the Supreme Court of the United States.”¹ It is no exaggeration to say that the Supreme Court of California holds an analogous position in the history of the Golden State.

The discovery of gold made California a turbulent and volatile state during the first decades of statehood. The presence of the precious ore transformed an essentially pastoral society into an active commercial and industrial society. Drawn to what was once a relatively tranquil Mexican province was a disparate population from all sections of the United States and from many foreign nations.

Helping to create order from veritable chaos was the California Supreme Court. The Court served the dual function of bringing a settled

* Ph.D., University of Southern California, 1973 (see Preface for additional information).

¹ Charles Warren, *The Supreme Court in United States History*, vol. I (2 vols.; rev. ed., Boston: Little, Brown, and Company, 1922, 1926), 1.

order of affairs to the state, and also, in a less noticeable role, of providing a sense of continuity with the rest of the nation by bringing the state into the mainstream of American law.

This study presents the story of the Court for the entire thirty-year period during which California's 1849 Constitution served as the state's organic law. In spite of the importance of the State Supreme Court to the history of California, no attempt has yet been made at a full study of the Court's work during its formative years, although there have been articles and books treating specific aspects of the Court, its personnel, and its decisions. This study attempts to fill at least part of the void. The bulk of the materials used, and indeed the basis of this study, was the decisions of the Court, but this work has not been designed as a legal treatise, but an examination of an active, living institution in a certain period of time, and within the context of that period.

★ ★ ★

In its present form, this study combines two prior works: my 1969 master's thesis covering the period of 1849–59,² and my 1973 doctoral dissertation covering the period of 1860–79.³ They have been combined to read as a single work — but without attempting to update the contents, as this seems both unnecessary and futile: in one sense, the record of the cases decided by the Court is a closed one; and in another, scholarship on the history of the Court remains ongoing.

I wish to quote the closing statement from each of my prior works —

From 1969: "Special thanks must be extended to Dr. Doyce B. Nunis, Jr. for his guidance and encouragement, to my wife Carol for her patience and typing ability, and to my son Joseph, who made my work easier by not crying during his first year of life."

From 1972: "The author of any lengthy work such as this incurs numerous obligations for help received, and I am no exception. First, many thanks to Louis Lipofsky and Daniel Shafon, members of the California Bar, for helping me resolve some legal questions; to Dr. Doyce B. Nunis, Jr. for his guidance, encouragement, and patience; to Joseph, Sharon, and

² Arnold Roth, "The California State Supreme Court: 1850–1859" (M.A. thesis, University of Southern California, 1969).

³ Arnold Roth, "The California State Supreme Court: 1860–1879, A Legal History" (Ph.D. diss., University of Southern California, 1973).

Deborah, for letting daddy “work”; and to my wife, Carol, who has shared the burden of this work in a very real way.”

And, now in 2019, I wish to add:

Reflecting back on this research and writing has instilled me with a sense of accomplishment of task and validation of topic. Similarly, while I did not end up a college history professor, I definitely reached career satisfaction as a public school administrator and math teacher in Northern California for twenty-seven years, afterwards expanding into teaching both history and math college courses at night, and ultimately becoming a full-time retiree in 2012. This course of my life has run from my birth in New York City in 1934 to graduation from Fairfax High School in Los Angeles in 1951, followed by a B.A. in Anthropology in 1955 from the University of California, Los Angeles, and an M.A. in History in 1969 and Ph.D. in History in 1973, both from the University of Southern California.

Beyond just this work, I have been fortunate to continue sharing life experiences and burdens with my wife of fifty-three years, Carol, a nurse who transitioned into a college health professional, in the City of Stockton⁴ (where we moved following receipt of my Ph.D. and continue to reside). With our three grown children living their own lives, four grandchildren, travel, bridge and a bevy of other retirement activities, I periodically have produced some additional historical work:

- “Sunday ‘Blue Laws’ and the California State Supreme Court,” *Southern California Quarterly*, LV, no. 1 (Spring 1973), 43–47; available at <https://scq.ucpress.edu/content/55/1/43>.
- “Stockton’s Jewish Community and Temple Israel,” with an outline of Stockton Jewish history (December 17, 2011); available at <https://templeisraelstockton.com/about-us/our-history/#long>.
- *General Sir Ernest Dunlop Swinton*, a paper written while I was a docent at the Haggin Museum in Stockton for use by docents leading tours. (Dunlop was a leader in “Tank Warfare” in World War I, and came to Stockton to meet with Benjamin Holt about the use of the caterpillar drive for tanks.)
- *The KKK in Stockton in the 1920s*, a study still in progress.

⁴ Ironically, both Commodore Stockton (the person) and the City of Stockton are referenced repeatedly in this work.

I am grateful for the diligence and interest of the California Supreme Court Historical Society and *California Legal History* editor-in-chief Selma Moidel Smith, Esq. to find, appreciate and publish my combined works about the early years of the California Supreme Court. I am glad history remains relevant, and hope it provides useful background and context for studying future eras of California's history and the Court.

— ARNOLD ROTH

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Chapter 1

ORGANIZATION OF THE SUPREME COURT

American forces raised the American flag at Monterey July 7, 1846. That same day their commander, Commodore John D. Sloat, proclaimed California a part of the United States.

HISTORICAL BACKGROUND

Sloat's proclamation notwithstanding, California did not legally pass into the possession of the United States until May 30, 1848, when Mexico ratified the Treaty of Guadalupe Hidalgo. Until that date California remained in the military possession of the United States as an incident of the war, and was governed as a conquered territory under the laws of war. When the peace treaty was signed, California's status changed; it now became a possession of the United States subject to congressional action in regard to civil government.¹ But Congress did not act, and California remained under military rule until December 18, 1849, when Peter H. Burnett was inaugurated as California's first elected governor.

¹ See Theodore Grivas, *Military Governments in California 1846–1850* . . . (Glendale: The Arthur H. Clark Company, 1963), 80.

Before the Treaty of Guadalupe Hidalgo, the military governor, who was the commander of the American military forces in California, had no constitutional limitations on his dealings with the inhabitants. The treaty, however, placed certain restrictions on the military commander; he was now limited by the United States Constitution. Any law, including municipal laws of the province, not in conflict with the Constitution remained in force until changed by congressional action; others were illegal. In addition, political laws, such as tariffs, were automatically extended to the new territories.²

Both before and after the American occupation of California, the most important local administrative official was the *alcalde*, whose role was much the same as a small-town mayor or English justice of the peace. Sometimes the *alcalde* acted in conjunction with a town council, or *ayuntamiento*, but his jurisdiction was always limited, at least in theory. That the limitation was not always apparent, particularly after the discovery of gold, was noted by Stephen J. Field, who became *alcalde* of Yubaville (later Marysville) in 1850. He wrote that “in the anomalous condition of affairs under the American occupation, they [*alcaldes*] exercised almost unlimited powers.”³

By using the existing *alcalde* system, the military governors were not forced to develop a new system, and at the same time they were able to claim that it was a form of civil government, thereby hoping to still the demand for self-government. But this demand, together with the lack of appropriate legislation by Congress, eventually forced General Bennet Riley, military governor at the time, to call for a convention to frame either a state or a territorial government.

Riley’s proclamation was issued June 3, 1849, only two days after the news had arrived that Congress had adjourned without organizing a territorial government for California. He designated August 1 as the day for electing delegates to a convention to meet at Monterey on September 1. Riley clearly lacked the authority to call such a convention, but he apparently wanted to retain his authority and prestige by assuming leadership of the statehood movement. In assuming this position of leadership, he

² Ibid., 80–81.

³ Stephen J. Field, *California Alcalde* (Oakland: Biobooks, 1960), 27.

would also enable himself to keep close to the convention proceedings and modify any possible “wild schemes.”⁴

The elections were held as scheduled, and the delegates met at Colton Hall in Monterey on September 3. The first serious question to be faced by the delegates was whether a state or a territorial government was to be formed. The convention opted for a state government, passing a resolution to that effect introduced by William Gwin.⁵

Once having made the decision to prepare a state constitution, the delegates made generous use of the handiwork of other states, particularly that of Iowa and New York.⁶ The convention completed its work in just under six weeks, and the Constitution was submitted to the people for their approval on November 13. The delegates were so confident that the Constitution would be approved, they set the first general election for the same day. The Constitution was ratified overwhelmingly, and remained, with certain subsequent modifications, California’s fundamental law for thirty years.

ORGANIZATION OF THE JUDICIARY

At the afternoon session of Tuesday, September 25, the Select Committee on the Constitution made its initial report about how the judiciary would be organized.⁷ This proposed plan provided for the establishment of four judicial districts, each with a circuit judge; the four circuit judges, sitting en banc, would constitute the Supreme Court. The Supreme Court was to be a court of appeals with three justices in attendance, but no justice could sit in judgment on a case in which he had rendered an opinion in his own judicial district.

Two other plans were proposed, one from the floor of the convention, and the other by a minority of the committee itself. All plans were rejected, and that evening a Special Committee on the Judiciary, made up of Kimball H. Dimmick of San Jose, Myron Norton of San Francisco, and James M. Jones of San Joaquin, met to separate the circuit and Supreme

⁴ Grivas, *Military Governments*, 143–44.

⁵ J. Ross Browne, *Report of the Debates in the Convention of California . . .* (Washington, D.C.: John T. Towers, 1850), 19.

⁶ *Ibid.*, 22–23.

⁷ *Ibid.*, 212–39.

Courts, “and to bring in a report on the different propositions modeled on that plan.”⁸ The committee reported back the next day and presented a plan in which the judicial power was vested in a Supreme Court, district courts, county courts, and justices of the peace. When submitted to the convention, this scheme was adopted without debate⁹ and became part of the Constitution.¹⁰

The Special Committee on the Judiciary did not limit the appellate jurisdiction of the Supreme Court, but on the floor of the convention Pablo de la Guerra of Santa Barbara suggested that such a limitation be included.¹¹ He claimed that limiting the Supreme Court’s appellate jurisdiction to cases where the amount in dispute exceeded \$200 would prevent capricious appeals by wealthy litigants who were not particularly interested in the amount involved, but in the satisfaction of their personal whims. De la Guerra’s view prevailed, and the fourth section of the Sixth Article gave the Supreme Court “appellate jurisdiction in all cases when the matter in dispute exceeds two hundred dollars, when the legality of any tax, toll, or impost or municipal fine is in question, and in all criminal cases amounting to a felony or questions of law alone.”¹²

The same article gave the district courts original jurisdiction in civil cases in which the amount in controversy exceeded \$200, and unlimited jurisdiction over criminal cases not otherwise provided for, and in issues of fact joined in the probate court. The county courts had appellate jurisdiction in civil cases originating in the justices’ courts, that is, cases involving less than \$200, and original jurisdiction in such “special cases” provided for by the Legislature. The county court also acted as a probate court, and the county judge, together with two justices of the peace from the same county were to constitute a court of sessions with such criminal jurisdiction and duties as prescribed by law.¹³

The third section of the article provided that the first three members of the Supreme Court would be selected by the Legislature at its first session,

⁸ Ibid., 224.

⁹ Ibid.

¹⁰ Cal. Const. (1849), art. VI, § 1.

¹¹ Browne, *Report of the Debates*, 225, 228.

¹² Cal. Const. (1849), art. VI, § 4.

¹³ Ibid., §§ 8, 9.

but thereafter justices were to be elected.¹⁴ No objections were made to the direct election of justices at the Constitutional Convention, although Elisha O. Crosby, representing Sacramento, later claimed to have opposed the idea of an elective judiciary. He said that it “was not the safest, nor calculated to bring to the bench the best talent or the best decisions. That a man who depended in the popular vote for his election was likely to cater more or less to popular sentiment irrespective of the exact enforcement of the law.”¹⁵

Crosby felt that judges should be removed from the turmoil and influences of a popular election and be appointed by the governor, with the approval of the Legislature, for life or good behavior, and that they be given an adequate salary and a remittance upon retirement.

Adoption of the Constitution did not still objections to an elective judiciary. William J. Shaw, in a speech delivered before the State Senate on February 7, 1856, called for a new state constitution, which among other things, would abolish juries because he felt judges were too subservient to them, and urged that the election of judges be ended. In this latter matter Shaw agreed with Crosby that judges should be above partisan politics. The constitutional changes effected in 1862 retained the election of judges, and Shaw continued his drive, again without success, as the Constitutional Convention of 1878–1879 also provided for the election of judges in the Constitution it wrote.¹⁶

The practice of electing judges in California continues until the present time, although not without occasional recurring criticism. Hubert Howe Bancroft, in discussing the California judiciary of the 1850s, expressed his views about an elective judiciary in general:

The administration of justice, particularly of the higher courts, is beyond everything the most important part of the government. By the degree of enlightenment in the jurisprudence of the country, its advancement in national greatness is to be estimated. But it is irrational to expect of an elective judiciary, nominated in party

¹⁴ Ibid., § 3.

¹⁵ Elisha O. Crosby, *The Memoirs of Elisha Oscar Crosby* . . . (San Marino: The Huntington Library, 1945), 44.

¹⁶ William J. Shaw, *An Appeal to Californians* . . . (San Francisco: A. L. Bancroft and Company, 1875). Shaw expressed his views on the Judiciary in this pamphlet and offered his 1856 speech as further support for his stand.

conventions, taking part in exciting campaigns, cognizant of, and sharing in the personal abuse of the rostrum, that dignity, purity, or learning which constitute an enlightened judiciary. The judicial ermine which has been dragged through the political pool in any state must have lost its whiteness.¹⁷

THE THREE-MAN COURT

The first state legislature passed the act organizing the Supreme Court on February 14, 1850. One provision was that a quorum would consist of two justices, and another that no justice could leave the state without the permission of the Legislature.¹⁸ The small number of justices proved a hardship, as due to death, resignation, or freely granted leaves of absence, there were oftentimes only two justices available to hear cases, and if they disagreed, no decision could be rendered. In the seven-year period prior to Stephen J. Field's appointment to the Court by Governor J. Neely Johnson, in October 1857, eight judges had retired from the Court. This constituted a rapid turnover because no more than three justices sat at any one time. Field's biographer has also pointed out that with this turnover, reversals of decisions were likely, and little could be done toward establishing a system of precedents.¹⁹ In all, fifteen men served on the three-man Court in the fourteen-year period 1850–1863. Only twelve different men saw service on the five-man Court established by the 1862 amendments. This covered the years 1863–1879, a period of sixteen years.

An attempt was made in 1852 to aid the work of the Court by the use of temporary or interim justices, but failed. In that year Chief Justice Henry A. Lyons resigned just prior to the start of the April term, and at the same time the Legislature granted a six-month leave of absence to Justice Solomon Heydenfeldt.²⁰ Justice Hugh C. Murray became chief justice, and Alexander Anderson was appointed by Governor John Bigler to fill the remainder

¹⁷ Hubert H. Bancroft, *History of California*, vol. VII (7 vols., San Francisco: The History Company, 1884–1890), 222.

¹⁸ Cal. Stats. (1850), chap. 14.

¹⁹ Carl B. Swisher, *Stephen J. Field: Craftsman of the Law* (Washington, D.C.: The Brookings Institution, 1930), 73.

²⁰ Cal. Stats. (1852), 287.

of Lyons' unexpired term. In order that there be a full complement on the supreme bench the Legislature passed an act authorizing the filling of temporary vacancies by the governor.²¹ Governor Bigler appointed Alexander Wells to serve in Heydenfeldt's place for six months, but when the new term opened April 12, Wells said that the constitutionality of the act had been called into question, and that he would not sit until the matter had been resolved. He suggested that the attorney general be directed to initiate proceedings to test the act. The Court so ordered,²² and state Attorney General Serranus C. Hastings brought the question before the Court in *People v. Wells*.²³ Chief Justice Murray and Justice Anderson were unable to agree, and thus no decision was rendered. Wells was told to do as he thought best, and he assumed his place on the bench May 5, 1852. When Heydenfeldt returned and resumed his seat, he prepared an opinion agreeing with Murray that the law was unconstitutional. Their reasoning was that there had been no vacancy to be filled; in order to have a vacancy, there could not be an incumbent, even though on leave. Interestingly enough, no one questioned the legality of the decisions in which Wells participated even though such participation was predicated on an unconstitutional law.

The Supreme Court could thus function with only two justices, although not with the same dispatch as it could with a full bench. If two justices were incapacitated in any way the Supreme Court could not act at all. This latter possibility occurred during the summer of 1856, when, with Heydenfeldt in Europe again, Justice David A. Terry ran afoul of the San Francisco vigilantes and was imprisoned by them for assaulting and attempting to kill Sterling A. Hopkins, one of their members. Terry was held for six weeks, during which time the Supreme Court was powerless, and could not resume deliberations until Terry was released.

THE CHANGES OF 1862

In his introduction to volume 24 of the *Supreme Court Reports*, Charles A. Tuttle, Supreme Court reporter for the years 1863 to 1867, pointed out the

²¹ Cal. Stats. (1852), chap. 87.

²² Order of Court, 2 Cal. 152.

²³ *People v. Wells* (1852), 2 Cal. 198.

need for changes in the Supreme Court, citing in particular the litigation involving land titles and mining problems:

The Court had thrown upon it the labor not only of working out the intricacies in which titles to real estate had become involved, but also, in some measure, of elaborating a new system, suited to the peculiar condition of the mineral districts. The Court, as organized, was unable to dispose of the cases brought before it with the celerity which particularly in new communities, is desirable.²⁴

In 1861, the Legislature passed certain constitutional amendments dealing with the judiciary, as well as with the legislative and executive departments. The 1862 Legislature concurred and the amendments were presented to the people of the state at the general election of that year. The amendments were implemented in 1863 and the revised judicial system became effective in January 1864.

The Supreme Court now consisted of a chief justice and four associate justices, any three of whom would constitute a quorum.²⁵ In order to ensure the presence of this quorum, the Legislature was specifically barred from granting a leave of absence to any judicial officer, and any such officer who would be absent from the state for thirty or more consecutive days was to be deemed as having forfeited his office.²⁶ The term of office for a justice was extended from six to ten years from the first day of January after election, except for the five men elected at the first election. These justices were to classify themselves by lot so that one justice would leave office every two years; the justice drawing the shortest term was to become the chief justice.²⁷ These steps were all designed to increase the stability and continuity of the Court, as well as easing its work load. Unfortunately, there was a lack of success in at least this last matter. The new Court created by the Constitution of 1879 was made to consist of a chief justice and six associate justices who were to sit together on important cases, but on

²⁴ 24 Cal. iii.

²⁵ Cal. Const. (1849), art. VI, § 2 (amended 1862).

²⁶ Ibid., § 5 (amended 1862).

²⁷ Ibid., § 3 (amended 1862).

most cases they were to sit in two departments, so two cases could be heard at once.²⁸

As noted earlier, the 1862 amendment still provided for the election of justices, but an attempt was made to remove judicial elections from politics at least in part by having special judicial elections at which no nonjudicial officer could be elected except the superintendent of public instruction.²⁹

★ ★ ★

²⁸ Cal. Const. (1879), art. VI, § 2.

²⁹ Cal. Const. (1879), art. VI, § 2. (amended 1862).

Chapter 2

THE JUSTICES

THE THREE-MAN COURT

Under provisions of the third section of the article on the judiciary, the first Legislature elected Serranus C. Hastings, Henry A. Lyons, and Nathaniel Bennett the first three justices of the Supreme Court by a joint vote of both houses.¹ They were sworn into office in January 1850, and on February 1 the Legislature classified them so that Hastings was to serve two years and become chief justice, while Lyons and Bennett, as associate justices, were to have four- and six-year terms, respectively.² In March 1851 the Legislature provided for the election of future justices by having one justice elected that year and one at the general election every second year thereafter. The same section also stated that after the first election of a justice, the senior justice in point of service would become the chief justice.³ The next section provided for the filling of a vacancy on the Court



SERRANUS C.
HASTINGS

¹ California. Legislature, Senate and Assembly. Journals (1849–50), 53–54.

² Cal. Stats. (1850), 462.

³ Cal. Stats. (1851), chap. 1, § 3.



HENRY A.
LYONS



NATHANIEL
BENNETT

by gubernatorial appointment, such appointment lasting until the election and qualification of a successor elected at the first general election after the vacancy occurred.⁴

The office of Supreme Court justice drew the attention of men with quite diverse backgrounds and interests. In the earliest years of statehood many of the justices, together with many of the leaders in the other two branches of the state government, were men who had held high positions in other states before coming to California.⁵ Serranus C. Hastings, California's first chief justice, had already been a member of Congress from Iowa and chief justice of that state's supreme court. He arrived in California in 1849 at the age of thirty-five, and went into the practice of law in Sacramento. In the two years he served on the Court, he wrote thirty-five opinions for the majority, but his most notable opinion (discussed below) was his dissent in *Woodworth v. Fulton*, which was later to become law.⁶ After leaving the Court, Hastings served as attorney general for a term, and he later founded the

Hastings College of the Law as a part of the University of California.

When Hastings' term expired, Henry A. Lyons, who had been elected to the four-year term, acceded to the position of chief justice, but resigned after three months. "About the only distinguishing feature relating to Henry A. Lyons' legal career in California is the fact that he was one of the first three men to come to its Supreme Court. His work on the Court was of a role so minor as to justify little notice."⁷ Lyons wrote only about a dozen opinions, and does not appear to have made any lasting contribution.

The third of the initial justices, Nathaniel Bennett, was the strongest and the most productive member of the first Court. Bennett, who had

⁴ Ibid., § 4.

⁵ Richard Dale Batman, "The California Political Frontier: Democratic or Bureaucratic?" *Journal of the West* VII (October, 1968): 461-70.

⁶ *Woodworth v. Fulton* (1850), 1 Cal. 295.

⁷ J. Edward Johnson, *History of the Supreme Court Justices of California*, vol. 1 (2 vols., vol. 1 San Francisco: Bender-Moss Company, 1963; vol. 2 San Francisco: Bancroft-Whitney Company, 1966), 31. The biographical data used in this chapter is derived from this work.

been chairman of the State Senate Judiciary Committee, wrote more than twice the number of opinions than did Hastings and Lyons together. Even though he drew the longest term, he was the first to resign, leaving the Court in October 1851 to become the court reporter, in which capacity he became responsible for the publication of the first volume of the *Supreme Court Reports*.

To fill the vacancy created by Bennett's resignation, Governor John McDougal appointed Hugh C. Murray to the Court. Murray was only twenty-six at the time, and when Henry A. Lyons resigned the next year, Murray, by now the senior justice, became chief justice, the youngest ever to hold this position in California. Murray was elected to succeed himself in 1852 (to fill the rest of Bennett's term, originally to terminate at the close of 1855), and for a full term in 1855. Murray did not care for change in the law as he had learned it in Illinois; he was also a follower of John C. Calhoun's theories as to states' rights. He died in 1857 at the age of thirty-two of tuberculosis, complicated by heavy drinking.⁸



HUGH C.
MURRAY

The honor of being the first justice to be elected by the people belonged to Solomon Heydenfeldt, who was elected in 1851 to succeed Hastings. As noted above, Heydenfeldt was granted a leave of absence from his duties in 1852 in order to return to Alabama to get his family (during which time Alexander Wells served as temporary justice, as noted above). Heydenfeldt served until January 1857 when he resigned; during his five years on the Court he wrote some 450 opinions, generally marked by their brevity and soundness. A South Carolinian by birth, Heydenfeldt was extremely pro-Southern, almost to the point of being a Secessionist; he refused to take the test oath of loyalty, and consequently was not able to practice law in California during the Civil War, although he remained in the state.



SOLOMON
HEYDENFELDT

Alexander Anderson, a native of Tennessee, was the only member of the Supreme Court to be born prior to 1800. He had fought with Andrew Jackson at New Orleans, and was later a United States senator from his native state.

⁸ Ibid., 43.

Arriving in California in May 1850, he was by September of 1851 an elected member of the State Senate from Tuolumne County. He was appointed to succeed Henry A. Lyons in April 1852 until a successor could be elected to finish the term. Anderson wanted this position himself, but lost the Democratic nomination to Alexander Wells, who won the election as well. After leaving the Court in January 1853, Anderson left California completely.

Alexander Wells arrived in California in 1849 from New York City, where he had been active in politics, being associated with Tammany Hall. As mentioned above, he served temporarily on the Court during Solomon Heydenfeldt's absence, and was elected to finish Henry A. Lyon's term. In 1853 he was elected to a full six-year term, but he served less than a year of the new term, dying suddenly in October 1854.

Wells' death brought about the appointment of Charles H. Bryan to the Court by Governor John Bigler. Bryan had come to California from Ohio in 1850 or 1851, settling in Marysville where he practiced law. He became district attorney of Yuba County in 1852, and in 1853 he was elected to the State Senate. Once on the Supreme Court he attempted to succeed himself and finish Wells' term; he was the candidate of the Democratic Party, but lost the election to the Know-Nothing candidate, David S. Terry. Bryan was considered an outstanding lawyer, but his career on the bench, although lasting only a year, "was nevertheless a disappointment to those who had beheld his brilliant performances at the bar. It was the consensus of opinion that he did not show much aptitude for judicial work."⁹

The man who defeated Charles Bryan in the 1855 election, David S. Terry, was possibly both the most controversial and colorful figure ever to become a justice in California. While on the California Supreme Court, he killed a United States senator in a duel, and had been imprisoned, tried, and convicted of stabbing a member of the Vigilantes. Terry was born in Kentucky in 1823, moving to Texas with his mother in 1835, where he fought in the Texas War of Independence when he was but thirteen. He came to California in 1849, settling down to the practice of law in Stockton, where a number of Southerners had settled. When he won the 1855 election, he was thirty-two, and during his first year on the bench he became involved with the Vigilantes. On Hugh C. Murray's death in 1857, Terry

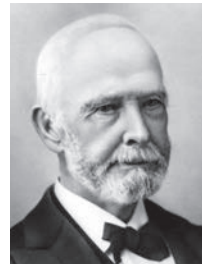
⁹ Johnson, *Supreme Court Justices*, vol. 1, 50.

became chief justice. “Terry’s greatest attribute as a judge was his personal integrity.”¹⁰ This statement by J. Edward Johnson may not do Terry justice, for even Stephen J. Field’s biographer wrote that Terry was “a man with a great deal of legal ability.”¹¹ Terry believed very strongly in the separation of powers in a state, and was not interested “in unduly increasing the authority of the supreme court at the expense of lower courts.”¹²



DAVID S.
TERRY

In 1859, Terry lost the Democratic nomination to Warner W. Cope, but did not finish his term in office, resigning in September when he took part in the famous duel with David C. Broderick. After the duel, Terry left for Nevada, returning to Texas during the Civil War to serve in the Confederate army. After the South was defeated, Terry went to Mexico, but eventually returned to Stockton to practice law. He became the lawyer for Sarah Hill against William Sharon, an association that was to cost him his life; he was fatally shot by the bodyguard of Stephen J. Field, then a United States Supreme Court justice, as the result of an unfavorable decision rendered by Justice Field.



PETER H.
BURNETT

One of Terry’s associates on the Supreme Court was Peter H. Burnett, California’s first governor, who was twice appointed to the bench. Governor J. Neely Johnson appointed Burnett in January 1857 to replace the resigned Solomon Heydenfeldt. Burnett resigned in October of that year to allow the appointment of Stephen J. Field who had been elected to a full term, and the next day Governor Johnson appointed Burnett to take Hugh C. Murray’s place. Burnett remained on the Court until October 1858 when he again resigned so that Joseph G. Baldwin, who had been elected to finish Murray’s term, could be appointed. There are conflicting views as to Burnett’s judicial ability. J. Edward Johnson wrote that “his

¹⁰ Ibid., 56.

¹¹ Carl B. Swisher, *Stephen J. Field; Craftsman of the Law* (Washington, D.C.: The Brookings Institution, 1930), 73.

¹² A. Russell Buchanan, *David S. Terry of California* (San Marino: The Huntington Library, 1956), 73.

opinions are of a high quality.”¹³ Terry’s biographer, A. Russell Buchanan, said that Burnett was “generally considered to have been well-meaning and honest but not exceptionally able.”¹⁴ Carl Swisher wrote in the same vein that Burnett “was probably a fair administrator and a man of sound integrity, but he was not more than “mediocre in his capacity as a Judge.”¹⁵ Most of the criticism of Burnett was based on his refusal to apply the law strictly in the Archy slave case.¹⁶ Burnett himself did not even mention being on the Supreme Court in his memoirs.¹⁷

The position of justice of the Supreme Court was one to challenge the best of men. The Court was faced with new types of situations which were quite puzzling. Even though the common law had been adopted, problems arose that were different from those that had been settled by use of the common law. True, there were principles that could be used, but they were not always in harmony with one another. The judges had to select the principles that would provide the greatest welfare for the state. Thus, recognition by the justices of the state of affairs was, in a sense, as important as their legal knowledge. These considerations helped make the Supreme Court influential as a legislative as well as a judicial body.¹⁸

The most prominent of the justices to sit on the Court in the period of this study was Stephen J. Field, who was chief justice from 1858 to 1863. Field was one of five sons of a well-known New England clergyman, but he was not the only one of his brothers to gain national recognition. His eldest brother, David Dudley Field, was a prominent member of the New York Bar and was responsible for codifying New York’s laws, and Cyrus West Field was to become a well-known New York financier and merchant and promoter for the laying of the Atlantic cable. Field practiced law in New York with his brother David Dudley for several years before coming to California in 1849; these were also the years in which the elder brother was proceeding on his work of codification. Field settled in Marysville

¹³ Johnson, *Supreme Court Justices*, vol. 1, 63.

¹⁴ Buchanan, *David S. Terry*, 72.

¹⁵ Swisher, *Stephen J. Field*, 73.

¹⁶ *Ex parte Archy* (1857), 9 Cal. 147.

¹⁷ Peter H. Burnett, *Recollections and Opinions of an Old Pioneer* (New York: D. Appleton and Company, 1880).

¹⁸ See Swisher, *Stephen J. Field*, 75.

and was elected alcalde there soon after his arrival. He was a member of the State Assembly, where he served on the Judiciary Committee, taking the lead in the preparation of the civil and criminal practice acts, both of which were based on the work of his brother, David Dudley. A most important and far reaching part of the civil practice act was the section upholding local mining laws and customs as legally binding in mining cases.¹⁹ In 1857, the Democrats nominated Field for the Supreme Court,²⁰ and he was elected for the term of office that was to begin January 1858. Peter H. Burnett, who was occupying that seat on the Court, resigned to allow Governor J. Neeley Johnson to appoint Field until Field's elected term began. Field served until appointed to the United States Supreme Court by President Abraham Lincoln in 1863. While on the California Supreme Court bench, Field's most important work lay in stabilizing California land titles and interpreting the laws involving water and mineral rights.



STEPHEN J.
FIELD



JOSEPH G.
BALDWIN

Field's best work probably took place during the years that Joseph G. Baldwin served with him in the Court. Baldwin practiced law in Mississippi and Alabama for nearly twenty years before coming to California in 1854, and had served in the Alabama Legislature in the mid-1840s. While living in the South, he also managed to write and have published two volumes of sketches, the most famous of which was *Flush Times in Alabama and Mississippi*. Baldwin's writings, according to one historian, made him one of the "heralds of realism in literature" in the rebellion against literary traditionalism.²¹ Baldwin wrote some 550 opinions from October 1858 to December 1861, when he left the Court, having declined to run for reelection. In the period during which the three-man Court functioned, Baldwin was considered to be second only to Field in

¹⁹ Cal. Stats. (1851), chap. 5, § 621.

²⁰ Winfield J. Davis, *History of Political Conventions in California, 1849–1892* (Sacramento: The California State Library, 1893), 77.

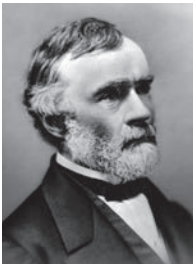
²¹ Ray Allen Billington, *America's Frontier Heritage* (New York: Holt, Rinehart and Winston, 1966), 93.



WARNER W.
COPE

ability, and “did much to give the Court standing before the public.”²²

Forming a most harmonious triumvirate with Field and Baldwin was Warner W. Cope, who was nominated in 1859 by the Lecompton Democrats over the controversial David S. Terry, then chief justice.²³ Cope won the election, and when Terry resigned because of his duel with David C. Broderick, Cope was appointed to the vacancy by Governor John B. Weller. When Field moved to the federal bench, Cope became chief justice, serving in that capacity until the five-man Court commenced in 1864. After leaving the Court, Cope remained active in the law, in private practice, as one of the original trustees of the Hastings College of the Law, president of the San Francisco Bar Association, and Supreme Court reporter for volumes 63 to 72 of the *California Reports*.



EDWARD
NORTON

Baldwin’s successor was Edward Norton, a New Yorker, who practiced law with marked success both in his native state and California before joining the ranks of the judiciary.

He was the first judge of the Twelfth District, serving in that capacity the entire decade of the 1850s, and gaining renown as a fine jurist. After refusing to stand for election to succeed himself, he went to Europe for a vacation. While abroad, he was nominated by the Republican party to the Supreme Court, and was elected in 1861, but was not able to equal the acclaim received for his earlier judicial work. Norton did not get along with Field; the latter questioned Norton’s ability for appellate work. Field wrote:

This gentleman was the exemplar of a judge of a subordinate court. He was learned, patient, industrious, and conscientious; but he was not adapted to an appellate tribunal. He had no confidence in his own unaided judgment. He wanted someone upon whom to lean. Oftentimes he would show me the decision of a tribunal of no reputation with apparent delight, if it corresponded with his own views, or with a shrug of painful doubt, if it conflicted with them. He would

²² Swisher, *Stephen J. Field*, 74.

²³ Davis, *Political Conventions*, 104.

look at me in amazement if I told him that the decision was not worth a fig; and would appear utterly bewildered by my waywardness when, as was sometimes the case, I refused to look at it after hearing by what court it was pronounced.²⁴

Acceptance of Field's comment must be tempered by the realization that Field and Baldwin were very close personal friends as well as associates on the Court; Baldwin took Field's name for one of his sons, Sidney Field Baldwin. Field notwithstanding, Norton served until the constitutional amendments went into effect in January 1864.

Field's own replacement on the Court was also a New Yorker, Edwin Bryant Crocker. Crocker received a degree in civil engineering from Rensselaer Institute, but became unhappy with engineering, and decided to enter the law profession. He read law in Indianapolis, where his family was then living, and settled down to practice law until 1852 when he came to California. While living in Indiana, Crocker became active in the anti-slavery movement and aided fugitive slaves on their way to Canada. In California, Crocker settled in Sacramento, where his brother Charles and Leland Stanford were establishing their mercantile business. Crocker practiced law and became active in politics, being one of the founders of the Republican party in the state. He remained active in the party and was a firm Lincoln supporter. When Field was appointed to the federal bench, Stanford, then governor of California, appointed Crocker an associate justice, although he was to serve only the seven months until the new Court was inaugurated. In those seven months, though, Crocker wrote 237 opinions that appeared in the *Reports*. This production did not go without public comment; Crocker was criticized for his speed at reaching decisions and writing opinions, a far cry from the usual complaint that the wheels of justice grind too slowly.²⁵

After leaving the Court, Crocker became attorney and general agent for the Central Pacific Railroad, and also became closely associated with his brother Charles in the actual building of the railroad. He spent part of the time in the field where construction was taking place, most probably



EDWIN BRYANT
CROCKER

²⁴ Stephen Field, *California Alcalde* (Oakland: Biobooks, 1950), 85.

²⁵ Johnson, *Supreme Court Justices*, vol. 1, 87.

putting his engineering training to good use. Unfortunately, Crocker's rapid pace led to a collapse in 1868; he was unable to work the remaining seven years of his life. Crocker's involvement with the railroad enabled him to amass the largest fortune of any California Supreme Court jurist.

THE FIVE-MAN COURT

As noted earlier, the 1862 amendment to the article on the judiciary provided for five justices, each to serve ten years except that "those elected at the first election, who, at their first meeting, shall so classify themselves by lot that one Justice shall go out of office every two years. The Justice having the shortest term to serve shall be the Chief Justice."²⁶ The five men elected were Silas W. Sanderson, John Currey, Lorenzo Sawyer, Augustus L. Rhodes, and Oscar L. Shafter.

Silas W. Sanderson, the first chief justice under the amended Constitution, was born in Vermont, but studied law and was admitted to the bar in New York. He came to California in 1851 to try his hand at mining, but like other lawyers who made like attempts, he returned to the practice of law. In 1859 he was elected district attorney of El Dorado County, and later served in the Legislature, where he authored the specific contract law. On the Court he drew the short two-year term, ran for reelection, and won a full ten-year term. He served as an associate justice until 1870, when he resigned to become a counsel for the Central Pacific Railroad.

The man to draw the second shortest term was John Currey, another one of the New Yorkers to serve on the Court. In the 1850s, he practiced law in Benicia, where he handled much land-grant litigation. He received a percentage of the lands for which he settled the titles, and held several thousand acres of farmland which provided him an ample income for the rest of his long life. Currey unsuccessfully sought election to the Court in 1858, losing to Joseph G. Baldwin, and lost a bid for the governorship to Milton S. Latham in 1859. On the Court he served two years as an associate justice, and served as chief justice after Sanderson. He returned to private practice, retiring in 1880, and lived on the income from his land holdings until his death in 1912 at the age of ninety-eight.

²⁶ Cal. Const. (1849), art. VI, § 3 (Amend. 1862).

The third of the jurists to join the Court in 1864 was Lorenzo Sawyer, another native of New York, although educated in Pennsylvania and Ohio. He came to California in July 1850 and was elected city attorney of San Francisco little more than a year later. In May 1862, Governor Leland Stanford appointed Sawyer to fill the vacancy as judge of the Twelfth District. He held this post until he took his place on the Supreme Court. He served six years, the last two as chief justice, and ran for a ten-year term to succeed himself, losing to William T. Wallace. Sawyer had barely left the Court when he was appointed federal circuit judge for the Northern District of California, holding court in San Francisco. This was an important position because the circuit court had original federal jurisdiction in law, equity, and serious criminal cases and appellate jurisdiction over the district courts. One scholar has compared Sawyer's work on the state and federal benches by stating, "while Sawyer's work on the Supreme Court of California was important and creditable, his reputation mainly stems from his twenty years as a federal judge."²⁷

As a federal judge Sawyer often worked with Stephen J. Field, the circuit justice. Together they rendered decisions protecting the Chinese in California from discriminating legislation,²⁸ and in holding corporations to be artificial persons under the Fourteenth Amendment.²⁹ "The Field–Sawyer opinions thus today stand as the highest — indeed in most respects the only — authoritative judicial statement and justification of the corporate constitutional 'person.'"³⁰ Sawyer died in office in 1891.

The third native of the Empire State to be an original member of the reorganized Court was Augustus L. Rhodes. Educated in his native state, Rhodes read law in the South, and was admitted to the bar in Indiana, where he practiced until coming to California in 1854. Rhodes took up farming near San Jose, but the dry year of 1856 saw him return to the law, opening a practice in San Jose. His entry into California law practice was quickly followed by participation in politics, as in quick succession he was county

²⁷ Johnson, *Supreme Court Justices*, vol. 1, 96.

²⁸ *In re Ah Fona* (1874), 3 Sawyer 144; *Ho Ah Kow v. Nunan* (1879), 5 Sawyer 552.

²⁹ *County of San Mateo v. Southern Pacific R. R.* (1882), 8 Sawyer 238; *County of Santa Clara v. Southern Pacific R. R.* (1883), 9 Sawyer 165.

³⁰ Howard Jay Graham, "An Innocent Abroad: The Constitutional Corporate 'Person,'" *UCLA Law Review* II (February, 1955): 160.

attorney for Santa Clara County, district attorney, and state senator. In the latter capacity he served on the Judiciary Committee and helped prepare the constitutional amendments of 1862. Rhodes went directly from the Legislature to the Supreme Court, where he drew the next-to-longest or eight-year term. He served six years as associate justice, two as chief justice, and then eight more years as an associate justice by being reelected to a full term in 1871. He was the only man to serve for the entire sixteen-year existence of the five-man Court, but failed in his bid to become a member of the seven-man Court organized under the Constitution of 1879. Except for an eight-year period as a judge of the San Jose superior court from 1899 to 1907, Rhodes kept up his law practice until his death at the age of ninety-eight in 1918.

Like Silas W. Sanderson, Oscar Lovell Shafter was a native of Vermont, making that state and New York the birthplace of all five justices on the new Court. Unlike the other four, however, Shafter was born into a legal family, and rose to prominence himself in his native state. Shafter's father was a lawyer, judge, legislator, and unsuccessful gubernatorial candidate. Shafter was also the only one of the five justices to attend law school, and practiced successfully for some eighteen years before coming to California in 1854. He was unable to attain office in Vermont, although attempting to do so on several occasions. In California Shafter developed a lucrative practice, particularly in the area of land claim litigation. When elected to the Court in 1863, he drew the ten-year term, but resigned due to failing health in 1867, dying in 1873. Without citing specific instances, Oscar T. Shuck wrote:

While his methods at the bar — his investigation, his preparations, his presentation — were the admiration of his associates and of the judiciary, it must be recorded that his judicial career was a disappointment to the profession — that is, his judicial successes were not commensurate with his triumphs at the bar.³¹

The first man to come to the five-man Court after the initial justices was Royal Tyler Sprague, another native of Vermont. Sprague began his study of law after first teaching in New York state and operating a private school in Zanesville, Ohio. He was admitted to the Ohio Bar and practiced in Zanesville until 1849, when he left for California, arriving at Shasta.

³¹ Oscar T. Shuck, *History of the Bench and Bar of California* . . . (Los Angeles: The Commercial Printing House, 1901), 575.

He took a turn at mining, then business, but returned to law, and by 1851 already had a thriving practice. In 1850 Sprague helped organize Shasta township. Although defeated for county judge in 1850, and for Supreme Court positions in 1859 and 1863, Sprague served in the State Senate the third through the sixth Legislatures; in the last term he was president pro tem. He was elected to a ten-year term to the Court in 1867, beginning his service the following January. In 1872 he acceded to the position of chief justice, but died the next month, his death attributed to a heart condition.

The first man to “break” the New York-Vermont monopoly in the Supreme Court was Kentucky-born Joseph Bryant Crockett. Crockett was admitted to the bar in Kentucky, served in that state’s legislature, and was state’s attorney for his county, but even though he was well on the way to financial independence, he moved to St. Louis in 1848. His stay in Missouri lasted only until 1852, when he left for California, but in that brief period he served in the Missouri Legislature and edited a St. Louis newspaper. Settling in San Francisco, he joined the practice of Alexander Wells, the “interim” justice of the 1850s, and became involved in land grant litigation. In 1857 he formed a partnership with Joseph G. Baldwin until the latter’s elevation to the Supreme Court, and in December 1867 Crockett was himself appointed to the Court by Governor Henry H. Haight, a close personal friend, to replace the resigned Oscar L. Shafter. In the election of 1869 Crockett won a full ten-year term, which he completed, although he suffered from failing eyesight for several years. Crockett had a continuing interest in education and in helping young people. He represented the Court at the founding of the Hastings College of the Law, and was also instrumental in establishing the first industrial school for delinquents in San Francisco.

A second Kentuckian, William. T. Wallace, was the next justice to assume a place on the Court. Wallace arrived in California in 1850, when he was only twenty-two, but had already completed his legal training. He set up practice in San Jose, and in 1851 became district attorney for the third judicial district. In 1853 Wallace married a daughter of Peter H. Burnett, California’s first governor, a two-time appointee to the Court himself, and joined his father-in-law in practice. Two years later Wallace was elected attorney general, in which position he served two years, and then sought election to the Court three times, failing in 1861 and 1863, and defeating incumbent Lorenzo Sawyer in 1869 by 300 votes. Although elected to a full ten-year

term, Wallace actively sought to be sent to the United States Senate, and was in the running in both 1872 and 1879. Wallace was an associate justice for two years, and spent the remainder of his term as chief justice. After leaving the Court, Wallace remained active in politics and as a regent of the University of California. He and Stephen J. Field did not like each other, and Wallace actively opposed the other's presidential ambitions. In 1882 Wallace was elected to the Assembly, and two years later went to Washington to aid his friend Barclay Henry, who had been elected to Congress. Upon completing his stay in Washington, Wallace returned to San Francisco and was elected to the superior court, and it was as the presiding judge of the court that he led the grand jury investigation into San Francisco corruption.

Jackson Temple holds the distinction of having been a member of the Supreme Court on three separate occasions, although only once in the years before 1880. Temple was born in Massachusetts and educated at Williams College and Yale University, graduating in law from the latter institution. Immediately after graduation he left for California, arriving in San Francisco April 15, 1853. After staying in San Francisco for about six months, he moved to the area near Petaluma, where he joined his brothers, who had preceded him to California, in their ranching operations. This arrangement lasted about a year, after which time Temple entered the practice of law in Petaluma, then county seat of Sonoma. When the county seat moved to Santa Rosa he followed, and Santa Rosa was to remain his home for the rest of his life. Temple generally practiced in association with other lawyers, and tried to avoid criminal practice. Curiously enough, although Temple began his law work in California in 1855, he was not admitted to Supreme Court practice until 1859, which meant that for four years he could not appear before the state's highest tribunal. Thus, having associates who could continue with a case on appeal was a practical necessity. In 1867, when Henry H. Haight was about to run for governor, he offered his practice to Temple, who accepted and moved to San Francisco. Haight repaid Temple by appointing him to the Supreme Court when Silas W. Sanderson resigned. Temple only served two years, as his bid to succeed himself was defeated by Addison C. Niles at the October 1871 election. Haight and Jackson left office at the same time and they went into practice together in San Francisco, with Jackson returning to his Santa Rosa home on weekends. He later moved his practice to Santa Rosa, and in 1876 he was appointed a district judge, remained in the superior

court until 1886, and served on the Supreme Court from 1886 to 1889, and 1894 to 1902, each time by vote of the electorate.

Still another native of the Empire State to serve on the Court was Addison Cook Niles. Niles graduated from Williams College, read law in his father's office, and was admitted to the New York Bar, although he came to California instead of starting his practice. Niles arrived in the winter of 1854-55, settling in Nevada City, where his sister and her husband had settled. Niles' brother-in-law, Niles Searls, was also a cousin, and was himself to become a Supreme Court justice in 1887. Niles formed partnerships with various lawyers until 1862 when he was elected county judge, in which capacity he continued until winning election to the Supreme Court in 1871, defeating the incumbent Jackson Temple. Niles remained on the Court until the seven-man Court took office, and then returned to Nevada City. In the mid-1880s he moved to San Francisco where he maintained a small practice and assisted Warner W. Cope in reporting decisions of the Court.

Isaac S. Belcher, a graduate of the University of Vermont, came to California in 1853, after practicing in his native Vermont only briefly. He landed in San Francisco, went to Oregon for a month, and then tried his hand at mining on the Yuba River. He returned to the practice of law, though, settling in Marysville, where he also became active in Republican party politics and won several positions. In 1855 he was elected Yuba County's district attorney, in 1859 he was city attorney in Marysville, district judge from 1864 to 1869, and finally a justice on the Supreme Court, being appointed by Governor Newton Booth March 4, 1872. Belcher did not choose to succeed himself and returned to practice in Marysville, although he continued to be active in public affairs. In 1878 Belcher was elected a delegate to the Constitutional Convention, where he was one of the conservatives opposing many of the provisions of the Constitution. He unsuccessfully ran for one of the positions on the new Court. The 1885 Legislature passed an act authorizing the Supreme Court to appoint three commissioners to aid it with its work, and Belcher was one of those selected.³² "While Belcher had been a member of the Court two years, it was as a commissioner that

³² Cal. Stats. (1855), chap. 120.

he made the great judicial showing of his life.”³³ He continued his work as a commissioner until his death in 1898.

The last justice to take part in the deliberations of the Supreme Court prior to the adoption of the new Constitution was Elisha Williams McKinstry, a native of Michigan. He was educated in Michigan and Ohio, but read law and was admitted to the bar in New York. He came to California as a member of the international boundary commission, and stayed to become a leader of the California Bar. By 1850 he was in practice in Sacramento, and represented that community in the first Legislature. The next Legislature elected him adjutant general even though he was only twenty-four; he never entered office, though, because the Legislature neglected to provide a salary. In 1851 McKinstry shifted to Napa, practiced law there, and served as district judge for ten years. In 1862 he resigned to run for lieutenant governor in 1863. Defeated in that election, he went to Nevada, but failed there in a bid to be on that state’s high tribunal. McKinstry returned to California in 1867, locating in San Francisco. After his return he was, in successive order, county judge, district judge, justice on the five-man Court, and justice on the seven-man Court, the only justice to carry over directly to the new Court. In 1888 he resigned to join the faculty at Hastings College of the Law, while also maintaining his practice. In 1895 the trustees felt that faculty members should not also maintain practices, and McKinstry resigned. While on the Court, McKinstry wrote opinions for many important cases, most important of which was the key water rights case of *Lux v. Haggin*.³⁴

While it is admittedly difficult to generalize about the justices as a whole without more information about them, some conclusions may be essayed nonetheless from what is known. The most obvious factor was the relative youth of the justices; only Joseph B. Crockett, Edward Norton, and Royal T. Sprague had reached the half-century mark, while Warner W. Cope, Silas W. Sanderson, and Addison C. Niles were not yet forty.

Based on the available evidence, the backgrounds of the justices show a similar homogeneity. For one, twelve of the seventeen justices hailed from New England or New York, and ten of the twelve from either New York or

³³ Johnson, *Supreme Court Justices*, vol. 1, 122.

³⁴ *Lux v. Haggin* (1886), 69 Cal. 255.

Vermont. Of the five from other areas, one, Elisha McKinstry, although born in Detroit, came from an old New York family, and Virginia-born Joseph Baldwin could trace his ancestry to the early days of New England.

Not only was there a preponderance of men from the Northeast, it would also seem that these justices came from families long established in the New World, and were members of established religious groups. The family lineages of only six justices are known, and five of these were of old English stock that came to the New England–New York area early in the colonial period. The sixth, Kentuckian Joseph Crockett, was of Scotch-Irish and French extraction. The religious affiliations of six justices are definitely known. Two were Roman Catholics and the other four were members of established Protestant denominations: Congregational, Presbyterian, and Unitarian. Three justices whose religious preferences are not known were nonetheless buried in cemeteries belonging to Protestant groups. Absent were members of evangelical or revival groups. Interestingly enough, none of the six men whose religion is known were men who could trace their ancestry, although two of the men buried in Protestant cemeteries were of old English stock. The relative geographical homogeneity and what is already known about the religions and lineages of the justices probably indicate that even more justices came of old English stock and belonged to established religious groups.

To add to the similarities between the justices, all seventeen were born in rural areas, although only the fathers of Lorenzo Sawyer and Isaac Belcher were farmers. The rest lived in small towns, but by no means could rural life be equated with poverty. Several of the justices were born into educated, professional families. The fathers of Edward Norton and Addison Niles were lawyers, William Wallace's father was a doctor, and Stephen Field's father was a Congregational clergyman. In addition, Jackson Temple, Elisha McKinstry, and Joseph Crockett had fathers who were engaged in various types of business enterprises.

Elisha McKinstry and Addison Niles were both members of wealthy families, but the families of the other justices, if not wealthy, had the wherewithal to provide the future justices with some education. Eight of the men graduated from college, and three others spent at least some time as college students. The seven who did not attend college were by no means illiterate, however. Joseph Baldwin, for example, spent only a limited amount of time attending a common school in Virginia, but worked for a newspaper and

was able to write the critically acclaimed books mentioned earlier. Warner Cope attended an academy and was well grounded in the classics, while Lorenzo Sawyer was able to teach school without the benefit of a college education prior to his entry into legal studies.

The judges, then, were rural-born members of the middle class from New England or New York. They came from well-established families and belonged to established religious sects. None were themselves immigrants or members of newer evangelical groups. The lack of Southerners on the Court was probably no coincidence or mere accident due to the passage of a law requiring a loyalty oath of lawyers; the effect was to exclude many prominent men from judicial work during the Civil War years. Among those so affected were Solomon Heydenfeldt, the oft-traveling justice of the 1850s, and Gregory Yale, a noted expert on land and water law.³⁵ Without this law there probably would have been more Southerners on the Court, but it is doubtful that any of the similarities given would be affected except that of geography.

In discussing the beginnings of the California Supreme Court, writers often times use terms such as “unprecedented state of affairs” or “anomalous conditions” in California’s early years of statehood. These statements refer to the tremendous growth of population and other consequences of the discovery of gold. Many of the problems that arose were settled in the 1850s; others were not settled at all, and others incorrectly. An incorrect solution to a problem was not unique in the Western states where judicial experience was far more limited than in the older states of the union. Western courts, while continuing the use of precedents, realized that some of their early decisions were erroneous and had to be overruled. The California Supreme Court faced this problem in 1858, and stated that the doctrine of *stare decisis* was not to be used merely to protect a new innovation against a settled principle of law.³⁶ The period after 1859 saw the Court settle some old problems, such as the ownership of minerals on the public lands, and face new ones — such as the loyalty oath and greenback controversies of the Civil War period.

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³⁵ See *Ex parte Yale* (1864), 24 Cal. 241.

³⁶ *Aud v. Magruder* (1858), 10 Cal. 282.

Chapter 3

COMMON LAW AND MEXICAN LAW

In order to bolster his claim of being a civil governor, General Bennet Riley appointed men to fill the judicial posts that existed under Mexican government. Joseph G. Baldwin combined his legal background and literary ability to write:

However easy it may have been to establish the Mexican system, it was not so easy to carry it out — seeing that that system of law was an inscrutable mystery to the American population, now constituting the mass of the people, who did not know whether an *Alcalde* was a sheriff or a Judge, . . . and seeing, further, that the Natives, even if they could make themselves understood to the Americans, knew but little more of the jurisprudence than the names and general nature of the duties of the public officers. The old colonists were in a state of unsophisticated innocence in regard to conventional law: with the exception of a few in authority who only knew the rudiments. They had, indeed, but little use for law; and what little they *did* have use for, was guessed at or improvised for the occasion. In such a state of primitive innocence and social felicity were they, that no lawyers infested the country before the invaders came in; and no law books were in the province. Justice was administered in its primeval purity, and the

quirks and quibbles, the forms and ceremonies which surround litigation and embarrass justice, were wholly absent.¹

Baldwin may have been guilty of taking literary license in claiming an absence of lawyers in Mexican California, although Theodore H. Hittell reached the same conclusion. A somewhat different view was taken by W. W. Robinson:

Under the Spanish and Mexican regimes there was little practice of law by professional lawyers in . . . all of California.

Lawyers then did not hang out shingles. Their services were not available to the public. The few trained lawyers who came from Mexico to California acted as legal advisors (*asesores*) to governors or held appointive offices, which permitted them to carry on other activities as *rancheros*. To say there were *no* lawyers in California during certain years of the Mexican period, as did historian Theodore H. Hittell, seems to have been an exaggeration. Law practice . . . was almost exclusively in the hands of non-professionals during the whole of California's Spanish-Mexican period.²

The lack of practicing attorneys in California before the conquest together with the lack of familiarity with the civil law on the part of the new American settlers, some of whom were trained in the law, made Riley's attempt to keep the Mexican system intact impractical if not totally impossible, for "the American settlers . . . brought with them from the Atlantic side of the continent common law principles and common law forms, which either amalgamated with or supplanted the old customs and procedures."³ Some lawyers, of course, did practice in the courts staffed by Riley, but with statehood the Mexican system was doomed.

ADOPTION OF THE COMMON LAW

The legislative and executive branches of the new California government began functioning some months before the Supreme Court held its first

¹ Joseph Glover Baldwin, *The Flush Times of California*, edited by Richard E. Amacher and George W. Polhemus (Athens: University of Georgia Press, 1966), 35.

² W. W. Robinson, *Lawyers of Los Angeles* . . . (Los Angeles: Los Angeles Bar Association, 1959), 14.

³ Theodore H. Hittell, *History of California*, vol. II (4 vols., San Francisco: N. J. Stone & Company, 1885–97), 663.

session in March of 1850. The Legislature had organized the courts, and the executive branch took the lead in attempting to establish the basis of jurisprudence that would be followed by the judiciary.

Governor Peter H. Burnett, who had also been chief justice under General Riley, delivered his first annual message December 21, 1849. In it, Burnett asked for the adoption of civil and criminal codes of justice to establish the basis of jurisprudence of the state, a matter of prime importance. He recommended a mixture of the English common law and the civil law, the latter to be taken from the Louisiana Civil Code and Code of Practice, since the Bayou state was the only one that had chosen the civil law over the common law up to that time.⁴

As already noted, there was a lack of familiarity with the civil law as practiced in Mexican California, and this was further accentuated by the continuing influx of settlers from the East. The majority of these migrants were of English stock and had lived under the common law. It was natural that they favored this system over the civil law in California. Further, the lawyers in California for the most part had studied and practiced under the common law system and knew little of the civil law.

Petitions representing both views were presented to the Legislature, where they were referred to the Senate Judiciary Committee. The committee's chairman, Elisha O. Crosby, with the assistance of Nathaniel Bennett, wrote a report comparing the two systems, and found the common law system superior. He observed: "Of course being from the Common Law country and in favor of it, and a great majority of the people coming to California being from the Common Law States I thought it was vastly important that we should adopt the common law."⁵

The statute as finally passed read, "The Common Law of England, so far as it is not repugnant to or inconsistent with the Constitution or Laws of the State of California, shall be the rule of decision in all Courts of this State."⁶

⁴ Cardinal Goodwin, *The Establishment of State Government, 1846–1850* (New York: The Macmillan Company, 1914), 281.

⁵ Elisha Oscar Crosby, *Memoirs of Elisha Oscar Crosby; Reminiscences of California and Guatemala from 1849 to 1864*, edited by Charles Albro Parker (San Marino: The Huntington Library, 1945), 57.

⁶ Cal. Stats. (1850), chap. 95.

At the same session, the Legislature passed another act abolishing all laws in force in California except those passed by the first Legislature. A saving section stated that all rights acquired before the statute's passage were not to be affected, including suits then pending.⁷

The Court's decisions were affected by this law in several ways. For one, the common law was to be used to decide cases where there were no statutory provisions in point. The law also made the civil law of Mexico the rule of decision in cases originating, or dealing with events that took place, prior to statehood, thus giving formal legal recognition that a different system of law was in force prior to statehood.

THE COMMON LAW IN PRACTICE

As early as 1851, the Supreme Court used the common law to hold a faro debt uncollectable because such debts could not be collected under the common law, and no state statute dealt with the question.⁸ By 1869 there was a statute dealing with gaming debts, but the Court resorted to the common law to declare that a wager on which presidential candidate would carry California in the 1868 election was void, as being against public policy.⁹ Justice Silas W. Sanderson spelled out the use of the common law when he said, "There is no statute in this State on the subject of wagers, except the statute against gaming, which does not include wagers of this character, and hence the question, whether these facts are a defense, must be decided by a reference to the principles of the common law."¹⁰ Likewise, there was no modification in the common law rule that an alien could not hold public office, so Leopold Rabolt could not serve as county treasurer of Amador, an office to which he was elected.¹¹

The common law was also the support for a Court decision that the state librarian was not a public officer of the highest station, but a ministerial agent, and as such could hold his office past the date of his term's

⁷ Cal. Stats. (1850), chap. 125.

⁸ *Bryant v. Mead* (1851), 1 Cal. 441.

⁹ *Johnston v. Russell* (1869), 37 Cal. 670.

¹⁰ *Ibid.*, 672.

¹¹ *Walther v. Rabolt* (1866), 30 Cal. 185.

expiration until his successor took office.¹² The same source was also available if the proper statute was in some way incomplete. In a suit for damages under provisions of a statute providing compensation to persons whose property might be destroyed by riots or mobs, the Court found that the statute did not establish a rule of damages.¹³ Said Justice Sanderson, “For the measure of damages we must,¹⁴ therefore, look to the common law.”¹⁵

The respect that the American lawyers and judges felt for the common law was very great indeed, for if a law was passed that was at variance with the common law rule on the subject, such law was to be construed very strictly.

LAWS OF MEXICO IN THE COURTS

It was well accepted that the California courts had jurisdiction over cases that had begun in the civil law system prior to statehood.¹⁶ Most of these cases were decided in the 1850s, although as late as 1874 the Supreme Court reaffirmed the 1850 transfer of jurisdiction from the Mexican-era Courts of First Instance to the newly established District Courts of the state.¹⁷ Likewise, in 1869, the Supreme Court approved probate proceedings initiated in 1849 by San Francisco Alcalde John Geary and transferred to the Court of First Instance in 1850. Justice Joseph Bryant Crockett admitted, “If the validity of these proceedings were to be tested by our present Probate Act, they would be held to be void But they must be tested by a wholly different standard.”¹⁸ He went on to discuss conditions in California just prior to statehood, and mentioned that the law used was sort of a conglomerate of civil and common law. He continued:

Nevertheless, the judgment of the Court of First Instance was the judgment of a *de facto* Court, exercising general and unlimited jurisdiction in civil cases and in matters of administration on the estates of deceased persons. It was the only Court then in existence in California exercising these functions, and its authority

¹² Stratton v. Oulton (1865), 28 Cal. 44.

¹³ Cal. Stats. (1868), chap. 344.

¹⁴ Chamon v. San Francisco (1869), 1 Cal. Unrep. 509.

¹⁵ Gilmer v. Lime Point (1861), 19 Cal. 47.

¹⁶ Loring v. Illsley (1850), 1 Cal. 24.

¹⁷ Clark v. Sawyer (1874), 48 Cal. 133.

¹⁸ Ryder v. Cohn (1869), 37 Cal. 86.

was universally acquiesced in and respected by the people. Being a Court of general jurisdiction, its judgments . . . would be upheld.¹⁹

In another case upholding probate proceedings in a Court of First Instance prior to statehood, Justice Sanderson noted that the jurisdiction of such courts and their use of the civil law were both long accepted in the state, and added, "It is impossible to estimate the mischief which might result from a departure from a rule which for so long a time has been regarded by both the bench and the bar as finally settled."²⁰

A key case was *Fowler v. Smith*, first decided by the Supreme Court at its January 1852 term, which held that all contracts made before the common law was adopted were to be construed by the civil law.²¹ In return for the conveyance of land, Peter and Mary Smith executed seventeen \$1,000 promissory notes at 2 percent per month interest to De Grasse B. Fowler in January 1850; this was after the adoption of the Constitution but before the passage of the acts adopting the common law and saving previously acquired rights. In 1851, Fowler brought suit to collect on five of the notes; he won in the lower court, and the Smiths appealed. Among the points raised by the Smiths was that under Mexican law the conveyance was void and the interest rate usurious.

In affirming the decision of the lower court, Justice Murray admitted that as a general rule the laws of a conquered or ceded territory remained in force until changed by the new sovereign. In his words:

In an acquired territory, containing a population governed, in their business and social relations, by a system of laws of their own, well understood and generally accepted, it is but reasonable that the inhabitants should continue to regulate their conduct and commercial transactions by their own laws, until the same are changed.²²

But Justice Murray refused to apply this rule to this instance, saying it would be unjust in many cases, and that the Mexican laws in question in this case were in effect annulled by the customs and usages of American emigrants even before the act abolishing them was passed on April 22,

¹⁹ Ibid., 89.

²⁰ *Coppinger v. Rice* (1867), 33 Cal. 408.

²¹ *Fowler v. Smith* (1852), 2 Cal. 568.

²² *Fowler v. Smith* (1852), 2 Cal. 47.

1850. He pointed out that the newly arrived settlers were not familiar with the Mexican laws, which in any event were written in a language foreign to the American settler. Justice Murray seemingly proved his point by noting that he himself had been unable to get a copy of the Mexican laws under discussion. He summed up:

From these considerations, I am of opinion, that from the adoption of our State constitution — a period antecedent to the execution of the present contract (or even a still more remote period), the Courts ought not, on grounds of public policy, to disturb these contracts, whenever they have been entered into under the sanction of well known and recognized custom.²³

In the last sentence of his opinion Justice Murray did leave a slight opening when he noted, “There are doubtless many cases arising, to which it will be the duty of the Courts of this State to apply the rules of the Mexican law; but this is not one of them.”²⁴

The attorney for the Smiths petitioned for a rehearing; it was granted and the cause again came before the Court at the October 1852 term. Since January the personnel of the Court changed somewhat, Henry A. Lyons having resigned as chief justice, with Alexander Anderson taking his place, and Justice Murray becoming chief justice.

The decision at the rehearing affirmed the January ruling, but used an entirely different basis. In his opinion Justice Heydenfeldt referred to the provision of the state constitution that stated, “All rights, prosecution, claims and contracts . . . and all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, until altered or repealed by the Legislature, shall continue as if the same had not been adopted.”²⁵ Since the act repealing previous laws was not passed until April 22, 1850, “[i]t must, therefore, be considered beyond dispute, that all contracts made here before the 22nd April, 1850, must have their effect and construction by the rules of the civil law.”²⁶

²³ Ibid., 50.

²⁴ Ibid.

²⁵ Cal. Const. (1849), art. XII, § 1.

²⁶ *Fowler v. Smith* (1852), 2 Cal. 569.

Having established the civil law as the basis for his decision, Justice Heydenfeldt affirmed the lower court, holding that the conveyance was correct and the interest not usurious under Mexican law. Justice Anderson concurred, and Chief Justice Murray reaffirmed his January opinion, saying he could not give his “assent to any other rule of decision.”²⁷

Thus, any contract that did not conform to the California Statute of Frauds would be enforced if it met civil law requirements.²⁸ In *Havens v. Dale*, the Court declared a land sale valid even though no price or consideration was shown in the deed.²⁹ Perhaps in an attempt to justify this ruling in light of the common law, the Court later said that the word “sold” on a deed implied a price paid as a consideration,³⁰ although in *Schmitt v. Giovanari* the Court said that no consideration was needed under Mexican law.³¹ The Court moved even further from the common law by acknowledging that under Mexican law the sale of real property was on the same footing as the sale of personal property, and such sale could be either written or parol.³²

Although not always scrupulous in recognizing Mexican law, the Court did on occasion sanction custom, particularly in regard to wills. In *Von Schmidt v. Huntington*, Justice Bennett noted in passing that, under Mexican law, custom was sometimes allowed to change the positive written law.³³ Although not the decisive point in that case, later Courts seized upon that statement and used it as precedent in succeeding years for various ends. In *Panaud v. Jones*, certain formalities as to the number of witnesses were not a bar to the execution of a will when it was shown that this had generally been the custom for a long time,³⁴ or that starting a will one day and completing it several days later was not unusual,³⁵ or that upon the death of witnesses to a codicil their proven signatures would validate the document.³⁶

²⁷ Ibid., 571.

²⁸ Cal. Stats. (1850), chap. 114.

²⁹ *Havens v. Dale* (1861), 18 Cal. 359.

³⁰ *Merle v. Mathews* (1864), 26 Cal. 455.

³¹ *Schmitt v. Giovanari* (1872), 43 Cal. 617.

³² *Long v. Dollarhide* (1864), 24 Cal. 218.

³³ Ibid., 64.

³⁴ *Panaud v. Jones* (1851), 1 Cal. 488.

³⁵ *Castro v. Castro* (1856), 6 Cal. 158.

³⁶ *Tevis v. Pitcher* (1858), 10 Cal. 465.

One continually arising question had to do with the powers of alcaldes, particularly that of granting land, and of their jurisdiction during the period of military rule in California. “It was expedient for the military commanders of the United States to continue the office of alcalde and to retain as many loyal Californians in the office as was practicable.”³⁷ Some native Californian alcaldes did not care to serve under American military rule, and these were replaced by the military governor, Commodore John D. Sloat, generally with American naval officers.

Commodore Sloat’s successor, Commodore Robert F. Stockton, pursued a more vigorous policy as a result of which many alcaldes were replaced with Americans. With these appointments Commodore Stockton felt the province to be more secure. The American alcaldes made a real contribution by introducing trial by jury, the actual credit belonging to Walter Colton, the alcalde of Monterey. The successors to Commodore Stockton, General Stephen W. Kearny, Colonel Richard B. Mason, and General Bennet Riley, replaced naval officers with civilians, but these were almost invariably Americans,³⁸ and they were not familiar with Mexican law. The most important question in regard to the American alcaldes was whether they could make grants of land, and the court was soon called upon to answer this question.

The first case involving a grant by an American alcalde to reach the Supreme Court was *Woodworth v. Fulton*, decided at the December 1850 term. The plaintiff based his title to the land on a grant, dated April 15, 1847, made by Edwin Bryant, the second American alcalde of San Francisco. Speaking for himself and Chief Justice Lyons, Justice Bennett declared that Bryant had not been appointed by, nor did he hold office under, the authority of the Mexican government, and that the grant had been made to a United States citizen while the two countries were at war. Since he was not appointed by Mexico, he had neither the right nor the power to make the grant, even though he might have followed the formalities of Mexican law. Further, Bryant had no authority from the United States government, nor was there anything in international law to sanction grants since the property in question was not public, but belonged to the pueblo of Yerba

³⁷ Theodore Grivas, *Military Governments in California 1846–1850* (Glendale: The Arthur H. Clark Company, 1963), 165.

³⁸ *Ibid.*, 177.

Buena. Bennett went on to say that the title of the United States to the land related back to the time of the occupation of the country, at which time Mexican laws dealing with the disposition of land ceased, but this did not give any color of title to Woodworth.³⁹ Chief Justice Hastings dissented, saying that even if no authority vested in the alcalde, “his conveyances being in the usual form, and fit to transfer a title, an adverse possession under such a deed for the time the law requires will grow into sufficient title to prevail against the true owner.”⁴⁰

In the next case reported, *Reynolds v. West*, Justice Bennett affirmed *Woodworth v. Fulton*, holding a grant by a Mexican alcalde made before the war valid, and voiding a grant of the same land by an American alcalde. The grant by the Mexican alcalde, having been made according to the laws and customs of Mexico, created a legal presumption of its validity.⁴¹ The decision in the *Woodworth* case stood only three years, until the October 1853 term, when it was overturned in the case of *Cohas v. Raisin*. Following Chief Justice Hastings’ dissent in *Woodworth v. Fulton*, Justice Heydenfeldt spoke for a unanimous Court when he held that the alcalde could grant lots within a town, when that town held the title to the land, and that the 1847 grant in San Francisco, “made by an Alcalde, whether a Mexican, or of any other nation, raises the presumption, that the alcalde was a properly qualified officer, that he had authority to make the grant.”⁴² This later view became the rule; it was reviewed at length and affirmed in the later case of *Welch v. Sullivan*. In that case Chief Justice Murray said that if the *Cohas* case were to be overturned, every title in San Francisco except the few made before 1846 would be void; thus, a grant of pueblo lands by an American alcalde was a grant by the pueblo of its own property, which it had a right to transfer.⁴³

The alcalde also had some judicial powers, but the Supreme Court tended to limit such jurisdiction strictly. The alcalde as a magistrate could not issue an order to vacate land, as this was within the power of a Court of First Instance, even if both parties consented to the jurisdiction of the

³⁹ *Woodworth v. Fulton* (1850), 1 Cal. 295.

⁴⁰ *Ibid.*, 318.

⁴¹ *Reynolds v. West* (1850), 1 Cal. 322.

⁴² *Cohas v. Raisin* (1853), 3 Cal. 453.

⁴³ *Welch v. Sullivan* (1857), 8 Cal. 165; *Welch v. Sullivan* (1857), 8 Cal. 511.

alcalde,⁴⁴ and an alcalde could not issue a judgment for \$1,000, when his jurisdiction was limited to \$100.⁴⁵

In two cases arising from the San Francisco fire of December 1849, the Court rendered differing opinions as to the powers of the alcalde and *ayuntamiento* to blow up goods and buildings in the path of the fire. In both cases the alcalde, John W. Geary, claimed to be acting under orders of the *ayuntamiento*. In *Dunbar v. The Alcalde and City of San Francisco*, the Court held that the powers of the *ayuntamiento* were less than those of a United States municipality, and it had acted beyond the scope of its authority in blowing up the building.⁴⁶ In *Surocco v. Geary*, the Court stated that the house and goods were a nuisance which the municipality had the right to abate.⁴⁷ The difference in the two cases would seem to be that Murray, who was then chief justice, wrote the later opinion based on common law without any mention of Mexican law.

In *Von Schmidt v. Huntington*, a case involving a dispute between members of a mining association, the Court felt that the lack of an attempt at conciliation (*conciliación*) by an alcalde as required by Mexican law, was unnecessary, as “amongst the American people it can be looked upon in no other light than as a useless and dilatory formality, unattended by a single profitable result, and not affecting the substantial justice of any case.”⁴⁸ In this opinion Justice Bennett also stated that since the acquisition of California by the Americans, the use of *conciliación* had become obsolete, having passed into disuse.

The adoption of the common law was indeed a victory for the American conquerors, and upon the native Californians was placed the burden of becoming acquainted with a new legal system. Very little has been done to see how the native population reacted to the new system of laws. In his diaries, Benjamin Hayes, district judge of Los Angeles, wrote, January 28, 1861:

Don Casildo Aguilar calls. A man of the city [of Los Angeles] was out yesterday shooting birds, and set fire to the woods, burning up some 8 acres before Don D. could with his servants put a stop

⁴⁴ Ladd v. Stevenson (1850), 1 Cal. 18.

⁴⁵ Horrell v. Gray (1850), 1 Cal. 133.

⁴⁶ Dunbar v. The Alcalde and City of San Francisco (1850), 1 Cal. 355.

⁴⁷ Surocco v. Geary (1853), 3 Cal. 69.

⁴⁸ Von Schmidt v. Huntington (1850), 1 Cal. 65.

to its progress. He calls upon me to “issue an order that the man shall settle with him for the damage.” He was surprised to learn that he would be the loser in the end, if the culprit should have no property wherewith to pay, and left me, no doubt disgusted with our system of laws.⁴⁹

While the adoption of the common law did provide a hardship upon the native Californians, it was certainly not an unusual event, because Louisiana was the only state with a civil law heritage to reject the common law as a rule of decision. By using common law and civil law in the appropriate instances, the Court took another step toward placing California within the larger framework of American law.

LAND GRANTS BY MEXICAN GOVERNORS

“The unsettled condition of the land titles of the State gave occasion to a great deal of litigation and was for a long time the cause of much bad feeling toward the judges who essayed to administer impartial justice.”⁵⁰ This comment by Justice Field was an understatement, since the land question was more difficult in California than on any other American frontier.⁵¹ “The land question in California was of a threefold character: the adjudication upon the validity of land titles claimed under the Mexican Government; the disposition of the public domain; the control and disposition of the gold fields.”⁵² Most land cases did not reach the California Supreme Court largely through the operation of the Federal Land Act of 1851, which established a Land Commission to settle land disputes in the states.⁵³ Certain land questions did arise in the state courts, principally having to do with the power of the Mexican governors to make grants. These will be discussed here (and problems dealing with the mineral lands will be discussed in chapter 10).

⁴⁹ Benjamin Hayes, *Pioneer Notes from the Diaries of Judge Benjamin Hayes, 1849–1875*, edited by Marjorie Tisdale Wolcott (Los Angeles: Marjorie Tisdale Wolcott, 1929), 252.

⁵⁰ Field, *California Alcalde*, 79.

⁵¹ William H. Ellison, *A Self-Governing Dominion; California, 1849–1860* (Berkeley: University of California Press, 1950), 102.

⁵² Joseph Ellison, *California and the Nation, 1850–1869*, University of California Publications in History, vol. XVI (Berkeley: University of California Press, 1927), 7.

⁵³ 9 U.S. Stat. at L. (1851), 631–34.

In the case of *Suñol v. Hepburn*, the Supreme Court upheld a grant by Governor Manuel Micheltorena to an emancipated Native American named Roberto, and also upheld the limitation placed on the grant that Roberto could not alienate or encumber the land in any way. Thus, the plaintiffs, to whom Roberto had conveyed the land, could not claim sufficient title to eject another person from an unoccupied portion of it.⁵⁴ In *Leese and Vallejo v. Clarke*, a grant by Governor Juan B. Alvarado was held to be imperfect, as the map of the grant was not shown to have been made, the Court here construing the powers of the Mexican governors very strictly.⁵⁵

At the same October 1852 term, the Court, in *Vanderslice v. Hanks*, a case similar to the *Leese* case in its facts, upheld the title of another grant by Governor Micheltorena even though the grant may not have been forwarded to the territorial *deputación* for its sanction as was required under Mexican law. It was held here that a presumption arose that the governor had fulfilled his duty, and the contrary would have to be proved.⁵⁶ Thus the two cases were at variance.

Because of the importance of these two cases, they were not reported in the 1852 volume of *Supreme Court Reports*, but appeared in the 1853 volume together with the report of the rehearing of the *Vanderslice* case, which decided which of the two earlier cases would be controlling. Thus, at the next term, January 1853, *Vanderslice v. Hanks* came up again. Now the Court upheld the *Leese* case, and overruled its earlier decision in *Vanderslice v. Hanks*, saying that it would not presume the fulfillment of any requirement; the meeting of all requirements would have to be proved.⁵⁷

At the July 1855 term, Justice Heydenfeldt, with Chief Justice Murray concurring, went back and in effect reaffirmed the first *Vanderslice* case, but refused to apply it to a grant from a municipal corporation.⁵⁸ To show the return to the doctrine of the first *Vanderslice* case, Heydenfeldt wrote, with Murray concurring, “*Prima facie* the Governor of California under the Mexican dominion had the power . . . to grant . . . under the general

⁵⁴ *Suñol v. Hepburn* (1850), 1 Cal. 254.

⁵⁵ *Leese and Vallejo v. Clarke* (1852), 3 Cal. 17.

⁵⁶ *Vanderslice v. Hanks* (1852), 3 Cal. 27.

⁵⁷ *Vanderslice v. Hanks* (1853), 3 Cal. 47.

⁵⁸ *Touchard v. Touchard* (1855), 5 Cal. 306.

doctrine that an officer will not be presumed to have exceeded his authority especially the officer of a foreign government.”⁵⁹ The change was brought about by decisions of the United States Supreme Court to the effect that a conditional grant under Mexican rule conveyed a title sufficient to maintain an action of ejectment even without performance of the conditions,⁶⁰ although Murray continued to defend his own views.⁶¹

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⁵⁹ *Den v. Den* (1856), 6 Cal. 82.

⁶⁰ *Ritchie v. United States* (1854), 17 Howard, 525; *Fremont v. United States* (1854), 17 Howard, 542.

⁶¹ *Gunn v. Bates* (1856), 6 Cal. 263.

Chapter 4

DEFINING THE POWERS OF THE COURTS

As the highest appellate body in the state, the Supreme Court had the final say in disputes involving the jurisdictions of the various courts. A few of these disputes involved courts of equal jurisdiction, more involved conflicts between higher and lower courts, but the vast majority involved merely determining the powers of each type of court. If the Supreme Court was in the position of having to define and draw the limits of its own powers, it had to do the same for the other courts. In deciding these disputes, the Court *attempted* to establish a uniform pattern, with each court having well-defined powers within an equally definite area of jurisdiction.

THE SUPREME COURT

In dealing with the powers and jurisdiction of the various courts, the Supreme Court, above all, had to deal with its own position in the judicial system.

As originally passed, the Constitution placed a rigid limitation on the Supreme Court's appellate power in that the Court could not hear an appeal unless the amount in dispute exceeded \$200, or "when the legality of any tax, toll, or impost or municipal fine is in question, and in all criminal

cases amounting to a felony, or questions of law alone.”¹ The 1862 amendments made \$300 the minimum that could be in controversy, and added appellate jurisdiction in all cases in equity and cases involving the title or possession of real estate.² The dollar value needed for an appeal was rigidly adhered to and had been since the very first session of the Court in 1850.³ But the “amount in dispute” depended on which party sought to appeal. When the plaintiff appealed from a judgment for the defendant, the “amount claimed by the complaint . . . is to be considered in determining whether this Court has appellate jurisdiction or not.”⁴ In the 1850s the Court allowed costs awarded in the lower court to be considered,⁵ but reversed itself in 1858.⁶ Later, Chief Justice Stephen J. Field, who wrote the earlier opinion disallowing costs, succinctly noted, “Costs are merely incidental to the action. They constitute no part of the matter in dispute.”⁷ In *Meeker v. Harris*, decided at the October 1863 term, only the costs assessed by the lower court were appealed, and being over the constitutional amount, the Supreme Court held that it had jurisdiction because the costs had become the amount in controversy.⁸ Normally, interest awarded with a judgment was not considered part of the amount in dispute, but when a demand was scheduled to draw interest, the interest was to be considered part of the demand sued for.⁹

The Supreme Court followed the Legislature and Constitution closely on other points as well. Since the Legislature extended appellate jurisdiction to cases originating in district courts only,¹⁰ the Court refused to hear appeals from county courts.¹¹ “Its [Supreme Court] appellate jurisdiction extends only to those cases in which the legislature authorized it to

¹ Cal. Const. (1849), art. VI, § 4.

² Cal. Const. (1849), art. VI, § 4 (amended 1862).

³ *Luther v. Master and Owners of Ship Apollo* (1850), 1 Cal. 15.

⁴ *Gillespie v. Benson* (1861), 18 Cal. 411.

⁵ *Gordon v. Ross* (1852), 2 Cal. 157.

⁶ *Dunphey v. Guindon* (1858), 13 Cal. 28.

⁷ *Votan v. Reese* (1862), 20 Cal. 89.

⁸ *Meeker v. Harris* (1863), 23 Cal. 285.

⁹ *Matson v. Vaughn* (1863), 23 Cal. 61; *Skillman v. Lachman* (1863), 23 Cal. 198.

¹⁰ Cal. Stats. (1850), chap. 23, § 35.

¹¹ *Warner v. Hall* (1850), 1 Cal. 90.

entertain appeals. The legislature has conferred upon us no power to review judgments of the county court, on appeal, or in any other way.”¹²

Further, the Supreme Court would not hear an appeal to review the facts of a case, unless a new trial was asked for at the lower court, and there refused,¹³ as the statute so stated.¹⁴ Nor would the Court accept a case involving original jurisdiction, turning down a petition by the attorney general to hear a case in order to test the constitutionality of the foreign miners’ tax.¹⁵ Chief Justice Hastings, speaking for the Court, said that any miner who felt his rights violated could commence an action in the proper court, and the matter might eventually reach the Supreme Court on appeal.¹⁶

The Court was not always satisfied with the restrictions placed upon it. In one case the Court refused to hear an appeal from a court of sessions on a conviction of a misdemeanor, but added that the courts of sessions did not have the best legal talents on their benches, and it would be better if the more serious of the misdemeanors were to be tried at the district court level instead. Chief Justice Murray, speaking for all three justices, recommended this to the Legislature at the conclusion of his opinion.¹⁷

In one instance the Court itself found a way around the Constitution when it answered an objection to its appellate power in a divorce case by saying that the framers of the Constitution could never have meant to deny appellate powers over civil cases where the relief sought could not be weighed in dollars and cents.¹⁸

In some instances, the Court had more room in which to exercise its discretion. Thus, while the law stated that an appeal could only be taken from a “final judgment,”¹⁹ that term was open to varying interpretations. At its first term the Court said that the final judgment was the determination of the issue in which the rights of the litigants were absolutely fixed.²⁰ At

¹² *White v. Lighthall* (1850), 1 Cal. 348.

¹³ *Brown v. Graves* (1852), 2 Cal. 118.

¹⁴ Cal. Stats. (1851), chap. 5, § 347.

¹⁵ Cal. Stats. (1850), chap. 97.

¹⁶ *Attorney General, ex parte* (1850), 1 Cal. 85.

¹⁷ *People v. Applegate* (1855), 5 Cal. 295.

¹⁸ *Conant v. Conant* (1858), 10 Cal. 249.

¹⁹ Cal. Stats. (1851), chap. 5, § 336.

²⁰ *Loring v. Illsley*, 28.

the next term the Court broadened its definition so that the final judgment only determined a particular suit, and not necessarily the rights involved.²¹

In 1857 the Court was called upon to decide whether a reversal of a case on appeal was a bar to further proceedings. This point never having come up before, the Court had no precedent in the state, nor any law on the subject, so it applied a common law principle to the effect that after a reversal of an erroneous judgment, the parties in the inferior court had the same rights they originally had.²² As to the appellate power of the Supreme Court, the Court said that the Legislature could not impair the right of appeal, but could regulate the mode in which appeals were to be made.²³

The Supreme Court's jurisdiction in criminal appeals was limited to felonies. A felony was any offense "which is punishable with death, or by imprisonment in the State prison."²⁴ But certain offenses could be punished either as felonies or misdemeanors, and in such cases the punishment decided the grade of the offense,²⁵ but the prosecution had to be in the form of a felony.²⁶ The application of the last two cases may be seen in *People v. Apgar*, where the defendant was indicted and prosecuted for assault with a deadly weapon, a felony, but convicted of simple assault, a misdemeanor. The conviction for simple assault was an acquittal for all felonies involved, and since the judgment was for a misdemeanor, the Supreme Court lacked the jurisdiction to hear an appeal.²⁷

The 1862 amendments gave the Court appellate jurisdiction of cases in equity, and a suit to abate a nuisance was an example of such an equity case.²⁸ The appeal power over cases dealing with the title or possession of real estate was affirmed in *Doherty v. Thayer*,²⁹ and in the same October 1866 term the Court took appeal jurisdiction over a case involving a disputed election even though there was no specific constitutional authorization

²¹ *Belt v. Davis* (1850), 1 Cal. 134.

²² *Stearns v. Aguirre* (1857), 7 Cal. 443.

²³ *Haight v. Gay*, 8 Cal. 297.

²⁴ *People v. Cornell* (1860), 16 Cal. 188.

²⁵ *Ibid.*, 187.

²⁶ *People v. War* (1862), 20 Cal. 117.

²⁷ *People v. Apgar* (1868), 35 Cal. 389.

²⁸ *People v. Moore* (1866), 29 Cal. 427.

²⁹ *Doherty v. Thayer* (1866), 31 Cal. 140.

to do so.³⁰ In his opinion Chief Justice John Currey cited with approval the earlier opinion of Stephen J. Field in *Conant v. Conant*, noted above, regarding the intent of the framers of the Constitution. Currey noted the division of the state government into three departments, and the various courts of the judiciary, “among which the Supreme Court is of highest authority. To it, as the Court of dernier resort, it may fairly be presumed the people intended the citizen might go, in matters of gravest concern, for the enforcement of his rights or for the redress of wrongs sustained.”³¹

No right was of greater value to a citizen than that of voting:

Then to deny to him the right of appeal to the highest tribunal of the State in cases where he may have been deprived of a right which lies at the foundation of all others would . . . be depriving him of a privilege which it was designed to those who adopted the Constitution he should have and enjoy. To so interpret the provisions of the Constitution defining the jurisdiction of this Court as to close the door to his appeal would . . . be to refuse to appreciate the intention of the people who adopted the Constitution, . . . a charter of our liberties, and would . . . involve us in a contradiction of the manifest design of the Constitution as a whole; and further, we would thereby hold that in cases involving rights of the highest and most sacred importance the party concerned could be heard only in Courts of inferior grade, though reason and justice might demand that he should have a right of redress commensurate with the magnitude of the interest at stake.³²

In 1871 a majority of the Court, in a three-to-two decision, disapproved of *Knowles v. Yeates*, in part, by refusing to give the Court jurisdiction to hear the appeal of a case involving a street assessment because provisions of the statute in question said that the report of the county court was to be final and conclusive.³³ Justice Joseph B. Crockett said that when the Legislature made the county court’s report “final and conclusive,” it intended that there be no appeal.³⁴

³⁰ *Knowles v. Yeates* (1866), 31 Cal. 82.

³¹ *Knowles v. Yeates*, 88.

³² *Ibid.*

³³ Cal. Stats. (1869–70), chap. 36, § 5.

³⁴ *Appeal of S. O. Houghton* (1871), 42 Cal. 35.

The Constitution also empowered the Court to issue such writs as necessary to the exercise of its appellate powers.³⁵ The writs whose use caused the most controversy were those of mandamus and certiorari. The Court affirmed its right to use the writ of mandamus to review acts of subordinate bodies,³⁶ but refused to use the writ to order dismissal of a case in a district court when the action of the lower court's judge was judicial and discretionary.³⁷ As Justice Sanderson stated in *Lewis v. Barclay*, "Mandamus lies to compel an inferior tribunal to perform a duty enjoined by law, if it refused to do so; but if the duty is judicial, the writ cannot prescribe what the decision of the inferior tribunal shall be."³⁸

Like mandamus, the writ of certiorari was to be used when there was no other available appeal. The purpose of this writ was only to see if a lower judicial body had exceeded its jurisdiction. Justice Edward Norton stated: "This Court has only appellate jurisdiction, and is only authorized to issue the writ of certiorari in aid of such jurisdiction."³⁹ The Court would not issue the writ if the lower tribunal had not exceeded its jurisdiction, even if a matter of law were involved. "It is now too well settled to admit of argument that we cannot on certiorari review mere errors of law committed by an inferior Court."⁴⁰ The writ also included the right to review the acts of nonjudicial bodies, if such bodies acted judicially. In *Robinson v. Board of Supervisors of Sacramento*, the Court said that while the defendants did not constitute an ordinary judicial tribunal, they were invested by the Legislature with power to decide on the property or rights of the citizen. "In making their decision they act judicially, whatever may be their public character."⁴¹

With the three-man Court, as noted earlier, it was not uncommon for only two justices to hear a case and then fail to agree on a decision. This was possible with the five-man Court if there were a vacancy or if a justice were disqualified for any reason, such as illness of having been counsel

³⁵ Cal. Const. (1849), art. VI, § 4.

³⁶ *Tyler v. Houghton* (1864), 25 Cal. 26.

³⁷ *People v. Pratt* (1865), 28 Cal. 166.

³⁸ *Lewis v. Barclay* (1868), 35 Cal. 213.

³⁹ *Miliken v. Huber* (1862), 21 Cal. 169.

⁴⁰ *People v. Burney* (1866), 29 Cal. 460.

⁴¹ *Robinson v. Board of Supervisors of Sacramento* (1860), 16 Cal. 210.

for one of the parties at a different hearing of the same cause. In 1867 the Court said that in such an instance:

The rule seems to be that where the motion is such as to make an affirmative decision indispensable to the further progress of the action, the action must stop in case of an equal division; but where the motion is in arrest of the progress of the action, all equal division is equivalent to a denial of the motion.⁴²

In practical effect, the action of the tribunal from which the appeal was taken was allowed to stand.

Occasionally, the Court had to spell out the legal import of its decisions. In a case at the January 1864 term the Court commented that a dismissal of an appeal was a legal affirmance of the lower court's judgment.⁴³ On several occasions the Court had to point out that when it decided a case, the decision became the rule of that particular case, and no appeal could be taken again on the same merits. In referring to a previous decision it made in the same case, the Court said that the earlier decision "stands as the judgment of the highest Court of record of the State; and it is not in our power now to retry it on appeal, for . . . we have no appellate power over our own judgment."⁴⁴ This meant that a decision on points of law by the Supreme Court in the same case on a former appeal was conclusive,⁴⁵ and binding on the court below.⁴⁶ Again: "The legal propositions which arose and were decided on the former appeal, whether they were correctly decided or not, have become the law of the case. . . . There would be no end to the litigation, if the same questions in the case once decided by the appellate Court were open to examination on every succeeding appeal."⁴⁷

THE INFERIOR COURTS

The lower courts also had limited powers, and as with its own powers, the Supreme Court was called upon to examine the powers of these courts.

⁴² *Ayres v. Bensley* (1867), 32 Cal. 633.

⁴³ *Rowland v. Krayenhagen* — *Krayenhagen v. Rowland* (1864), 24 Cal. 52.

⁴⁴ *Davidson v. Dallas* (1860), 15 Cal. 75.

⁴⁵ *Soule v. Ritter* (1862), 20 Cal. 522.

⁴⁶ *Megerle v. Ashe* (1874), 47 Cal. 632.

⁴⁷ *Page v. Fowler* (1869), 37 Cal. 105.

The district courts had unlimited jurisdiction in all criminal cases not otherwise provided for and in all issues of fact in the probate courts, and had original jurisdiction, in both law and equity, in all civil cases where the amount in dispute exceeded \$200, exclusive of interest.⁴⁸ In addition to these powers, the district courts, along with the Supreme Court and county courts, could issue writs of certiorari to determine whether lower judicial bodies had exceeded their jurisdiction.⁴⁹ The amendments of 1862 extended the jurisdiction of the district courts to include all cases involving the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, and raised the limit on the amount in controversy to \$300 or more,⁵⁰ and the Legislature continued the use of the certiorari writ.⁵¹

The constitutional limitations on the powers of the district courts were similar to those of the Supreme Court, and as a consequence most cases heard by the high tribunal were from the district courts. In a suit to recover \$550, the Supreme Court affirmed the district court's power to try the case, and its own power to hear the appeal, by saying that it had jurisdiction over any case the district court could try.⁵² If a suit were brought for a sum below the constitutional amount the district court could transfer the case to the proper court, that of a justice of the peace.⁵³

One way around the monetary limit after the 1862 amendments was to bring suit in equity rather than in law. In *People v. Mier*, the Court, in discussing a suit to recover taxes, noted that a complaint asking for a money judgment was an action at law, but a complaint asking for a foreclosure was an action in equity and the district court would have jurisdiction regardless of the amount in controversy.⁵⁴ The same reasoning also held true for a suit to collect for a street assessment,⁵⁵ and even in a suit to collect for damage done to real property by sheep.⁵⁶ In the latter case the

⁴⁸ Cal. Const. (1849), art. VI, § 6.

⁴⁹ Ibid., § 4; Cal. Stats. (1851), chap. 5, § 456.

⁵⁰ Cal. Const. (1849), art. VI, § 6 (amended 1862).

⁵¹ Cal. Stats. (1863), chap. 260, § 225.

⁵² *Solomon v. Reese* (1867), 34 Cal. 28.

⁵³ *Hopkins v. Cheeseman* (1865), 28 Cal. 180.

⁵⁴ *People v. Mier* (1864), 24 Cal. 61.

⁵⁵ *Mahlstadt v. Blanc* (1868), 34 Cal. 577.

⁵⁶ *Young v. Wright* (1877), 52 Cal. 407.

plaintiff, rather than suing the owner of the sheep for money, brought an action in rem, against the animals, which had the same effect as enforcing a lien since the property (animals) were to be sold in the same manner as a foreclosure on real property. Another method used to bring an action to the district court for trial even though less than \$300 was in controversy, was to put the title or possession of land in question. Prior to the amended Constitution this was simply a statutory method.⁵⁷ But whether before or after the amendments, if the title or possession of real property was an issuable fact upon which a plaintiff relied for a recovery, or a defendant for a defense, then the district court had jurisdiction regardless of the amount in controversy.⁵⁸

By use of the writ of certiorari, as mentioned earlier, a district court could review actions of an inferior tribunal, but only to the extent of determining whether that tribunal exceeded its jurisdiction. In *Will v. Sinkwitz*, the district court modified a judgment of the county court, changing an award from \$300 to \$299, so as to keep the amount within the lower court's limits. This was wrong; the district court should have merely set aside the judgment because it had no authority to modify or reduce it.⁵⁹ The power to review the jurisdiction of judicial tribunals included normally nonjudicial bodies performing judicial functions, such as boards of supervisors. A judicial function involved, for example, the proceedings necessary to authorize the establishment of a road.⁶⁰ The Supreme Court said that district courts could also issue writs of mandamus, although the amended Constitution did not specifically grant district courts the use of this writ. The Court said that they could use this writ before the amendments, and if it were intended that they should not continue to do so, language limiting the district courts should have been used.⁶¹

The Legislature was left to decide the jurisdiction of justices of the peace and the classes of cases appealable to the county courts.⁶² The 1862 amendment prescribed the areas of appeal, saying that the Legislature was

⁵⁷ Cal. Stats. (1851), chap. 1, § 23.

⁵⁸ *Holman v. Taylor* (1866), 31 Cal. 338.

⁵⁹ *Will v. Sinkwitz* (1870), 39 Cal. 570.

⁶⁰ *Keys v. Marin County* (1871), 42 Cal. 253.

⁶¹ *Perry v. Ames* (1864), 26 Cal. 372.

⁶² Cal. Const. (1849), art. VI, § 14.

to fix the powers of the justices, and that such powers could not impinge on those of the other courts.⁶³ In 1850 the Legislature limited the jurisdiction of justices of the peace to civil cases involving personal property with a maximum value of \$200.⁶⁴ After the 1862 amendments the monetary limit was raised to \$300 and the justices were given jurisdiction over certain misdemeanors.⁶⁵ The monetary limitation was strictly adhered to,⁶⁶ and when a penalty stipulated in the original contract raised the award past \$300, the justice of the peace court lost its jurisdiction even though the original amount in controversy was but \$125. The reasoning of the Supreme Court was that the stipulation raised the amount in controversy beyond the legal maximum for a justice's court.⁶⁷

The county courts were presided over by the county judge, who was also the probate judge. In addition to these duties he was to hold courts of sessions with two justices of the peace as associates, with such criminal jurisdiction as the Legislature allowed, and he was to "perform such other duties as shall be required by law."⁶⁸ The county courts themselves were given "such jurisdiction, in cases arising in Justice's Courts, and in special cases, as the Legislature may prescribe, but shall have no original civil jurisdiction, except in special cases."⁶⁹ The Legislature gave to the courts of sessions jurisdiction over all "cases of assault, assault and battery, breach of the peace, riot, affray, and petit larceny, and over all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding three months, or both such fine and imprisonment."⁷⁰ The county court was given appellate jurisdiction over civil cases arising in justices' courts, and as already mentioned, those courts had a \$200, later \$300, limit on the amount involved in cases they could hear.

The 1862 amendments did not include the courts of sessions but otherwise increased the powers of the county judge, one of whom described his job thusly in 1866:

⁶³ Cal. Const. (1849), art. VI, § 9 (amended 1862).

⁶⁴ Cal. Stats. (1850), chap. 73, § 3.

⁶⁵ Cal. Stats. (1863), chap. 260, §§ 48, 51.

⁶⁶ *Cariaga v. Dryden* (1865), 29 Cal. 307.

⁶⁷ *Reed v. Bernal* (1871), 40 Cal. 628.

⁶⁸ Cal. Const. (1849), art. VI, § 8.

⁶⁹ *Ibid.*, § 9.

⁷⁰ Cal. Stats. (1850), chap. 86, § 5.

County judges have jurisdiction in cases of forcible entry and detainers, insolvency, actions to prevent or abate a nuisance[.] They have appellate jurisdiction in all cases coming before justice of the peace. They are Ex officio Judges of Probate, have power to issue writs of Habeas Corpus [and] Mandamus and can grant Naturalization papers. There is no appeal from the County Court in civil cases . . . Justices have jurisdiction to \$300. . . . Jurisdiction in criminal cases[.] all crimes short of murder and treason.⁷¹

In *People v. Moore*, the Supreme Court affirmed the constitutional mandate that gave the county courts jurisdiction in cases of nuisance,⁷² but such actions could also be brought in equity, which would give the district courts jurisdiction as well, and the Supreme Court said that there was no reason why both county and district courts could not have concurrent jurisdiction. Though the Constitution may have given original jurisdiction over a class of cases to one court, other courts were not necessarily deprived of concurrent jurisdiction unless the Constitution also expressly excluded these other courts.⁷³

The original jurisdiction of county courts in criminal matters was limited to cases in which an indictment had been found by a grand jury.⁷⁴ The same offenses, if there were no grand jury indictments, could be tried in a justice's court, providing another instance of concurrent jurisdiction.⁷⁵

The Constitution, in both its original and amended forms, gave the county courts original jurisdiction in all “special cases” prescribed by the Legislature. In 1860 the Supreme Court said that the use of the writ of mandamus could be included as a special case,⁷⁶ but in 1873 the Court reversed itself, holding, “The familiar definition of a special case is that it is a case unknown to the general framework of Courts of law or equity.”⁷⁷ Mandamus was certainly known to the general framework, and the act of

⁷¹ Henry Eno, *Twenty Years on the Pacific Slope: Letters of Henry Eno* . . . edited by W. Turrentine Jackson. Yale Americana Series, no. 8 (New Haven: Yale University Press, 1965), 143–44.

⁷² *People v. Moore* (1866), 29 Cal. 427.

⁷³ *Courtwright v. B. R. & A. W. & M. Co.* (1866), 30 Cal. 573.

⁷⁴ *People v. Halloway* (1864), 26 Cal. 651.

⁷⁵ *Ex parte McCarthy* (1879), 53 Cal. 412.

⁷⁶ *Jacks v. Day* (1860), 15 Cal. 91.

⁷⁷ *People v. Kern County* (1873), 45 Cal. 679.

the Legislature attempting to give county courts the power to issue such writs was unconstitutional.⁷⁸ A mechanic's lien was unknown to the common law, though, and was an acceptable special case,⁷⁹ as was a proceeding dealing with conflicting claims to town lots,⁸⁰ or an action to contest an election.⁸¹

The appellate jurisdiction of the county courts was limited to appeals from justices' courts and any other inferior courts established by the Legislature, such as the San Francisco police judge's court.⁸² In civil cases appeals from a justice's court could only take place when the sum in controversy did not exceed \$200 before the 1862 changes or \$299 afterwards. This limitation was enforced here as with the other courts.⁸³ The appellate jurisdiction of the county courts in criminal matters was limited to misdemeanors, and the decision of the county court was final unless there was an excess of jurisdiction.⁸⁴

Until they were abolished by the 1862 amendments, the courts of sessions had wide-ranging criminal jurisdiction of all indictments for public offenses except arson, murder, and manslaughter. Although the jurisdiction of these courts seemed clear-cut, questions still arose, such as whether a death caused by dueling was murder, manslaughter, or a separate offense. The Supreme Court in *Terry v. Bartlett* said that the Legislature enacted special legislation dealing with dueling and removed the death caused by the duel from the category of a murder.⁸⁵ The "Terry" in the name of the case was David S. Terry, and the duel involved was his famous duel with David C. Broderick, resulting in the latter's death.⁸⁶

The first section of the article on the judiciary contained a provision that the Legislature could "establish such municipal and other inferior

⁷⁸ Cal. Code Civ. Proc. (1872), § 85, subdiv. 5.

⁷⁹ *McNeil v. Borland* (1863), 23 Cal. 144.

⁸⁰ *Ryan v. Tomlinson* (1866), 31 Cal. 11.

⁸¹ *Kirk v. Rhoads* (1873), 46 Cal. 398.

⁸² *People v. Maguire* (1864), 26 Cal. 635.

⁸³ *Bradley v. Kent* (1863), 22 Cal. 169.

⁸⁴ *People v. Johnson* (1866), 30 Cal. 98.

⁸⁵ *Terry v. Bartlett* (1860), 14 Cal. 651.

⁸⁶ A. Russell Buchanan, *David S. Terry of California; Dueling Judge* (San Marino: The Huntington Library, 1956), 83–112.

courts as may be deemed necessary.”⁸⁷ The Legislature took advantage of the provision on several occasions to create new courts, particularly for San Francisco, where, because it was both the most populous city and the financial center of the state, additional courts were needed to keep up with the cases to be heard. One of these courts, the San Francisco Superior Court, even had the same powers as a district court, except that its jurisdiction in cases dealing with property was limited to land in San Francisco.⁸⁸ In 1870 the Legislature established a municipal criminal court for San Francisco with the power to try felony cases, but without the right of appeal to the county courts.⁸⁹ The Supreme Court held this provision constitutional, saying there could be no appeals unless the Legislature also provided the mode and means for making the appeals.⁹⁰ The Legislature created a similar court in 1876, again without providing for appeals to the county courts.⁹¹ Without referring to its earlier decision, the Court said that the act creating the new court was unconstitutional and void because the Legislature did not provide the machinery for appeals.⁹²

COURTS AND JUDGES

Without necessarily mentioning a particular court by name, the Supreme Court made decisions that applied to several courts or the whole judicial system at once. One such instance was *Hahn v. Kelly*, in which a decision in one district court was attacked in the court of another district.⁹³ Justice Sanderson wrote that when a judgment of a court of general jurisdiction was introduced as evidence, it could only be attacked by the opposition on the ground that the court rendering that decision lacked jurisdiction. He said that

the presumptions of law are in favor of the jurisdiction and of the regularity of the proceedings of superior Courts, or Courts of general jurisdiction, . . . The rule itself is founded upon the idea that

⁸⁷ Cal. Const. (1849), art. VI, § 1.

⁸⁸ *Vassault v. Austin* (1869), 36 Cal. 691.

⁸⁹ Cal. Stats. (869–70), chap. 384.

⁹⁰ *People v. Nyland* (1871), 41 Cal. 129.

⁹¹ Cal. Stats. (1875–76), chap. 548.

⁹² *Ex parte Thistleton* (1877), 52 Cal. 220.

⁹³ *Hahn v. Kelly* (1868), 34 Cal. 391.

the peace and good order of society require that a matter once litigated and determined shall be regarded as determined for all time, or that rights of person and property, once determined ought not to be again put in jeopardy.⁹⁴

This presumption, being limited to superior courts, did not apply to inferior courts, which in California meant any court not a court of record.

Nevertheless, the Supreme Court refused to interpret the Constitution so as to limit a district judge solely to his own district since districts could be altered at will by the Legislature. Thus, the Court refused to reverse a murder conviction solely because the presiding judge was from a different district.⁹⁵ Further, a court could not interfere with the decrees and judgments of another court of concurrent jurisdiction.⁹⁶

Any court, whether of inferior or superior jurisdiction, could take judicial notice of readily known facts. In *People v. Potter*, Joel C. Potter was indicted for embezzling money from the city of San Jose.⁹⁷ The indictment stated that the money belonged to the city, whereas technically it belonged to the mayor and common council under the acts incorporating the city.⁹⁸ Justice Sanderson said that the misnaming was not important because the intention of the indictment was clear, and the acts incorporating the city were public acts that the courts were bound to notice judicially.

In discussing any judicial system constant reference is made to various courts, often without considering the judges who manned the courts, their duties, powers, and areas of direction. In 1858 the Legislature passed an act for the incorporation of water companies, and conferring authority upon county judges to hear and determine applications to appropriate land and water.⁹⁹ The Supreme Court admitted that such proceedings were “special cases” within the constitutional meaning of the term, and that while jurisdiction could be given to the county courts, the Legislature could not confer the jurisdiction on the county judge. The county judge was not the county court, and although the Legislature might authorize the judges of

⁹⁴ Ibid., 409.

⁹⁵ *People v. McCauley* (1851), 1 Cal. 379.

⁹⁶ *Anthony v. Dunlap* (1857), 8 Cal. 26.

⁹⁷ *People v. Potter* (1868), 35 Cal. 110.

⁹⁸ Cal. Stats. (1859), chap. 117, § 16; Cal. Stats. (1863), chap. 69, § 15.

⁹⁹ Cal. Stats. (1858), chap. 262, § 2.

courts, at chambers, to perform certain duties in respect to a cause, yet some court had to have had jurisdiction.¹⁰⁰ But even with the court having jurisdiction, a judge could not settle the case in chambers.¹⁰¹

After rejecting part of the defendants' appeal in *Smith v. Billett*, the Supreme Court noted: "The other points involve only questions of discretion of the presiding Judge, in controlling and conducting the proceedings, which we never review, unless in extreme cases, where the power of the Court is grossly abused, to the oppression of the party."¹⁰²

One area in which a judge was allowed to use a great deal of discretion was in attempts to change the place of trial, or venue. The Supreme Court had early said that the granting of a change of venue was discretionary in the hands of the lower courts and would only be reversed in cases of gross abuse.¹⁰³ What would be considered gross abuse, though, was open to question. In one instance a defendant claimed that the presiding judge had been an active member of the San Francisco Vigilance Committee of 1856, and that group had at that time banished the defendant from the city. There was no abuse here because the facts as presented dealt with past events and were unconnected to the present charge.¹⁰⁴ In *McCauley v. Weller*, the Court said that any change of venue based on the disqualification of a judicial officer would have to be for a cause listed in the statute.¹⁰⁵ Chief Justice Terry noted that partisan feeling or an opinion on the justice or merits of a case would not be within the causes given in the statute; the judge has only to decide on the law, not the facts, and if his opinion as to the law was erroneous, it could be reversed upon appeal.¹⁰⁶

If a judge did allow the change of venue, the Supreme Court would not interfere. In *People v. Sexton*, the judge said he was not conscious of any bias, but he granted the change of venue, even though the plaintiff objected. "In making the order changing the venue, the Court acted judicially upon a matter within its cognizance."¹⁰⁷ But the plaintiff in civil suit

¹⁰⁰ *Spencer Creek Water Co. v. Vallejo* (1874), 48 Cal. 70.

¹⁰¹ *Brennan v. Gaston* (1861), 17 Cal. 374.

¹⁰² *Smith v. Billett* (1860), 15 Cal. 23.

¹⁰³ *Sloan v. Smith* (1853), 3 Cal. 410.

¹⁰⁴ *People v. Mahoney* (1860), 18 Cal. 180.

¹⁰⁵ Cal. Stats. (1853), chap. 180, § 87.

¹⁰⁶ *McCauley v. Weller* (1859), 12 Cal. 500.

¹⁰⁷ *People v. Sexton* (1864), 24 Cal. 78.

moved for a change of venue from San Joaquin to Stanislaus, because his witnesses and the property involved were in the latter county. The judge refused the change, but the Supreme Court, in reversing the lower court, said that if a defendant in a similar case asked for a change, it would be granted, and the plaintiff was entitled to the same consideration.¹⁰⁸

One area in which there could be no discretion was when the judge was closely related to one of the parties. In *De la Guerra v. Burton*, the plaintiff and the judge were first cousins, and the judge was thus incompetent to try the case.¹⁰⁹ Not only could a judge not try such a case, he could not even examine the pleadings.¹¹⁰ Punishment or contempt by a judge would not be upheld except under the circumstances and in the manner prescribed by law because such punishment was arbitrary.¹¹¹ Certain acts of judges were so irregular as to be reversed by the Supreme Court. These included the disbarment of an attorney for making a motion not supported by the facts of the case,¹¹² and ordering a woman not to remarry in her lifetime, when a divorce was granted.¹¹³

There is no pattern readily discernible in the cases enumerated in this chapter, but there is the picture of a young state attempting to regularize its judicial system along the lines of normally recognized legal procedure. Compounding the work of the Supreme Court was the problem of men, not always competent or lacking the same outlook in regard to the importance of uniform decisions in all the courts of the state, as the men on the supreme bench. Henry Eno, the county judge quoted earlier, also wrote, "I make it a rule to decide all cases according to my ideas of right and wrong and not according to the ideas of any of our Supreme Judges — for whom I dont [*sic*] have much respect."¹¹⁴ The Court faced the need to settle important questions in numerous instances, such as *Teschemacher v. Thompson*, where the Court had technical grounds for a reversal because the lower court did not define key terms for the jury.¹¹⁵ But, said Chief

¹⁰⁸ *Grewell v. Walden* (1863), 23 Cal. 165.

¹⁰⁹ *De la Guerra v. Burton* (1863), 23 Cal. 592.

¹¹⁰ *People v. de la Guerra* (1864), 24 Cal. 73.

¹¹¹ *Batchelder v. Moore* (1871), 42 Cal. 412.

¹¹² *Fletcher v. Daingerfield* (1862), 20 Cal. 427.

¹¹³ *Barber v. Barber* (1860), 16 Cal. 378.

¹¹⁴ Eno, *Twenty Years on the Pacific Slope*, 143–44.

¹¹⁵ *Teschemacher v. Thompson* (1861), 18 Cal. 11.

Justice Stephen J. Field, “We do not intend, however, to determine the appeal in this way. We prefer to place our decisions upon grounds which will finally dispose of the controversy between the present parties, and furnish a rule for the settlement of other controversies of a similar character.”¹¹⁶

Field’s desire to furnish a rule for the settlement of similar cases indicated that the justices themselves realized the importance of a consistent line of decisions as a stable element in a not always stable society.

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¹¹⁶ Ibid., 21-22.

Chapter 5

DEFINING INDIVIDUAL JUDICIAL RIGHTS

A principal complaint made by American settlers during the period of military rule was that the power of the *alcaldes* was too arbitrary. Americans felt that they were being deprived of rights guaranteed by their government as part of their common law tradition. These rights were fully granted with the coming of state government, but unfortunately not all segments of the population were able to avail themselves of these various constitutional guarantees. The Chinese, the most prominent minority group in California, as well as African Americans, Native Americans, and other minority groups, were placed under various disabilities. The Supreme Court, while upholding individual constitutional rights, was called upon to decide many cases involving minorities and help define the position of these groups within the larger framework of a growing and developing California.

INDIVIDUAL RIGHTS

When the Constitution was drawn up in Monterey in 1849, the first article, designated a “Declaration of Rights,” pledged various common law rights

such as trial by jury and habeas corpus. The Court supported that pledge by insisting that these rights be adhered to.¹

The majority of cases dealing with these guaranteed rights coming before the Supreme Court involved trials and imprisonment. One constitutional guarantee was, “The right of trial by jury shall be secured to all, and remain inviolate forever.”² As early as 1846, Walter Colton, soon after he became the American alcalde of Monterey, summoned California’s first jury.³ The practice of using juries became widespread, and Governor Richard B. Mason soon issued a general order that jury trials should be held in all cases where the sum involved was more than \$100.⁴

With the jury system already in operation, and the common law background of the by-then majority of American settlers, it was natural for the jury trial provision to be included in the Constitution, although it could be waived by the parties “in all civil cases, in the manner to be prescribed by law.”⁵ Statutory provisions provided that waiver of a jury trial could be indicated by not showing up, and if there were no complete waiver, the parties could consent to less than twelve members on a jury, but the minimum needed was three.⁶ In order to waive any aspect of the jury trial, though, the consent to do so had to be express and could not be inferred.⁷ One way in which a jury could be waived in a civil case was through the use of a referee, but the parties had to consent, and the mere failure to object did not constitute consent.⁸ Nor could a court send a case to a referee for a trial without jury against the objection of the defendant, even if the defendant subsequently waived his objection by participating in the trial.⁹

For the majority of civil cases there was no waiver of the jury, and the Court would not countenance irregularities by the jury. In *Donner v.*

¹ Cal. Const. (1849), art. I.

² *Ibid.*, § 3.

³ Walter Colton, *Three Years in California*, edited by Marguerite Eyer Wilbur (Stanford, Calif.: Stanford University Press, 1949), 47.

⁴ William H. Ellison, *A Self-Governing Dominion: California, 1849–1860* (Berkeley: University of California Press, 1950), 13.

⁵ Cal. Const. (1849), art. I, § 3.

⁶ Cal. Stats. (1851), chap. 5, §§ 159, 179.

⁷ *Gillespie v. Benson* (1861), 18 Cal. 409.

⁸ *Smith v. Pollock* (1852), 2 Cal. 92.

⁹ *Grim v. Norris* (1861), 19 Cal. 140.

Palmer, as one example, two jurors flipped a coin for their decisions, and this naturally vitiated the verdict.¹⁰ The majority of cases involving juries arose from criminal cases, and the Court uniformly protected the rights of defendants. The Court said that a defendant was entitled “to all the protection which the statute intends to secure, against any interference with the action of the jury, . . . if such protection be not afforded, suspicions are excited and confidence in the justice of their decision is destroyed.”¹¹

This case contained two irregularities that could possibly have affected the verdict of the jury. The jury separated without permission after retiring, and while at dinner, the hotel proprietor admonished them to convict the defendant, which in point of fact they did. The Supreme Court reversed the decision, although it noted that there would have been no reversal if the prosecution could have shown that the defendant suffered no injury from the irregularity.

The Legislature enacted various qualifications for jurors, including provisions that each juror be a United States citizen and an elector of his county.¹² Any person not meeting these requirements could not sit as a juror in a criminal case even if the defendant waived either of them.¹³ In *People v. Chung Lit*, an alien participated as a juror unbeknown to the defendants or their counsel, and this was brought up in the motion for a new trial after the defendants’ conviction. The Court said that it was too late at that point since the defendants could have examined the juror on that subject and challenged him earlier, “but having failed to do this, they must suffer the consequences of their own neglect.”¹⁴ Under Section 341 of the Criminal Practice Act a peremptory challenge could be used any time before a juror was sworn in, and after the swearing in, but before the jury was completed, for good cause.¹⁵

This plain and express provision of the statute cannot be contravened by any arbitrary rule of the Court; on the contrary, the security which the law humanely affords to the prisoner in criminal

¹⁰ *Donner v. Palmer* (1863), 23 Cal. 40.

¹¹ *People v. Brannigan* (1863), 21 Cal. 337.

¹² Cal. Stats. (1851), chap. 30, § 1.

¹³ *People v. March* (1855), 1 Cal. Unrep. 6.

¹⁴ *People v. Chung Lit* (1861), 17 Cal. 320.

¹⁵ Cal. Stats. (1851), chap. 29, § 341.

prosecutions, against public excitement and private animosity, ought in no degree to be impaired or diminished by any action on the part of the tribunal before which he is being tried.¹⁶

In several instances the Supreme Court was called upon to decide whether jurors had preconceived ideas before a trial. In a trial for grand larceny, a juror admitted that he approved of the death penalty for murder, but not for stealing. The court of sessions correctly said that this constituted bias, and the juror was challenged.¹⁷ But in 1857 the Court reviewed a case in which a juror was asked if he had a conscientious opinion which would prevent him from finding the defendant guilty of murder. He answered that he was opposed to capital punishment on principle, and he was excluded. On appeal the Supreme Court reversed the cause for a new trial, holding that there was a great difference between conscience and principle; thus the juror had really not answered the question that was asked him.¹⁸ Also reversed was *People v. Williams* where a juror admitted having formed an unqualified opinion as to guilt or innocence, but did not say what it was.¹⁹ The Court also held that once a juror was passed upon by the defendant's lawyer, he could not later challenge that juror for cause.²⁰

In *People v. Reyes*, the court of sessions did not allow the counsel for the defendant to ask a juror about his membership in the Know-Nothings and possible prejudice against Catholic foreigners. The Supreme Court held that this refusal was an error and "destroyed the surest method of determining whether the person called as a juror was that impartial and unbiased person which the law contemplates should sit upon a jury."²¹

If a juror were challenged for bias, a specific bias had to be shown, providing another area of decisions for the courts.²² In *People v. Williams*, one juror admitted that he had heard rumors as to the facts and on the basis of the rumors, if correct, his mind was set. The Court said that this was not sufficient to show bias, for if the facts did not match the rumors, then his

¹⁶ *People v. Jenks* (1864), 24 Cal. 13.

¹⁷ *People v. Tanner* (1852), 2 Cal. 257.

¹⁸ *People v. Stewart* (1857), 7 Cal. 140.

¹⁹ *People v. Williams* (1856), 6 Cal. 206.

²⁰ *People v. Stonecifer* (1856), 6 Cal. 405.

²¹ *People v. Reyes* (1855), 5 Cal. 350.

²² *People v. Reynolds* (1860), 16 Cal. 128.

mind was not set,²³ but the prosecution could challenge a juror in a murder case for conscientious scruples against the death penalty.²⁴

During a trial the litigants had to be present during the proceedings. In *People v. Kohler*, the jury returned to hear two depositions in the absence of the prisoner.²⁵ The Supreme Court said that this was an error since the evidence in the depositions, although read after the jury had retired, was a part of the trial and the defendant should have been present. "In favor of life, the strictest rule which has any sound reason to sustain it, will not be relaxed."²⁶ When the jury returned for further instructions in the absence of the parties or their counsels, the Court said that this was also an error. "Such instructions will be considered important . . . from the very fact that the jury have asked for them."²⁷

Another protection for the defendant in criminal cases was the statutory provision that all instructions be reduced to writing before being given, unless by mutual consent of the parties.²⁸ That provision was uniformly held to be mandatory,²⁹ and extended to verbal modifications of written instructions as well.³⁰

The cases are numerous and uniform to the point that the giving of an oral charge or instruction to the jury, in a criminal case, without the consent of the defendant, is error, and that his consent cannot be presumed from his presence and failure to make the objection, when the oral instruction is given.³¹

The mandatory nature of the provision made its violation error per se, even if the violation was merely a clarification or qualification to a written instruction.³² The repeated violation of this provision by lower courts

²³ *People v. Williams* (1860), 17 Cal. 142.

²⁴ *People v. Sanchez* (1864), 24 Cal. 17.

²⁵ *People v. Kohler* (1855), 5 Cal. 72.

²⁶ *Ibid.*

²⁷ *Redman v. Gulnac* (1855), 5 Cal. 148.

²⁸ Cal. Stats. (1855), chap. 208, 21.

²⁹ *People v. Beeler* (1856), 6 Cal. 246.

³⁰ *People v. Payne* (1857), 8 Cal. 341.

³¹ *People v. Chares* (1864), 26 Cal. 79.

³² *People v. Sanford* (1872), 43 Cal. 29.

brought some particularly acid comments from the Supreme Court at its January 1873 term.

We have no time to go over again the numerous cases in which this has been held to be erroneous . . . the repetition of the error in the present case betrays a degree of ignorance of the plain provisions of the statute and of the uniform decision of this Court, which is wholly without excuse.³³

Once a jury retired, it had to stay together.³⁴ In 1855 the Court ordered a new trial when at the original trial, one of the jurors absented himself from the jury room, possibly with the consent of the defendant's counsel, but without the court's permission. Even if he had the counsel's permission, the absence was irregular as the juror might have been improperly influenced by another.³⁵

Other irregularities also came up for review, such as occurred in *People v. Keenan* when each counsel was limited to one and one-half hours in which to make his argument to the jury.³⁶ One of the defendant's lawyers did not finish in the prescribed time, he was not allowed to continue, and his client was convicted of first-degree murder. While the Supreme Court did not dispute the right of the judge to direct and control proceedings, or even limit counsel to a reasonable time for argument, "It is, unquestionably, a constitutional privilege of the accused to be fully heard by his counsel."³⁷ The case was remanded for a new trial.

Constitutional guarantees affecting those charged with crimes, and which were brought to the Court included the right to bail, the use of habeas corpus, and the guarantee that no one should twice be put in jeopardy for the same crime.

In *Ex parte Voll* the Court upheld the denial of a motion for bail after the defendant had been convicted of manslaughter.³⁸ The statute said bail was a matter of right before conviction, but a matter of discretion

³³ *People v. Max* (1873), 45 Cal. 254–55.

³⁴ Cal. Stats. (1851), chap. 29, § 405.

³⁵ *People v. Backus* (1855), 5 Cal. 275.

³⁶ *People v. Keenan* (1859), 13 Cal. 581.

³⁷ *Ibid.*, 584.

³⁸ *Ex parte Voll* (1871), 41 Cal. 29.

afterward,³⁹ and the Court said the constitutional section providing for bail only contemplated persons prior to conviction.⁴⁰

The Supreme Court justices, district judges, and county judges were all empowered by the original Constitution to issue writs of habeas corpus,⁴¹ and the Supreme Court took pains to justify their use. When Peter B. Manchester was placed in custody by order of the state's governor, on the request of the governor of Ohio under an act of Congress regulating fugitives from justice, the Court held that the judiciary had power in such a case:

The very object of the habeas corpus was to reach just such cases; and while the Courts of the State possess no power to control the Executive discretion, and compel surrender, yet, having once acted, that discretion may be examined into, in every case where the liberty of the subject is involved.⁴²

The liberty of Alfred A. Cohen was looked into at the July 1856 term, and he was freed from a contempt order of the district court. Cohen had been jailed for not complying with a court order, and was to remain jailed until he did comply, although an uncontradicted affidavit in the lower court showed he was unable to comply.⁴³

In a series of three separate habeas corpus cases in 1857, all arising out of the refusal of Edwin R. Rowe to answer questions about the activities of Henry Bates as state treasurer, the Court upheld the *Cohen* case, discharging a prisoner still held for refusing to answer questions after the suit had abated⁴⁴ and holding that it was the right and duty of the Supreme Court to review the decisions of the lower courts in cases of contempt, and others,⁴⁵ and that refusing to answer questions because to do so might disgrace oneself was not a sufficient reason.⁴⁶

The 1862 amendments to the Constitution limited the power of habeas corpus to the justices of the Supreme Court and judges of district and

³⁹ Cal. Stats. (1851), chap. 29, §§ 509, 512.

⁴⁰ Cal. Const. (1849), art. I, § 7.

⁴¹ Cal. Const. (1849), art. VI, § 4.

⁴² *Ex parte Manchester* (1855), 5 Cal. 237.

⁴³ *Ex parte Cohen* (1856), 6 Cal. 318.

⁴⁴ *Ex parte Rowe* (1857), 7 Cal. 175.

⁴⁵ *Ibid.*, 181.

⁴⁶ *Ibid.*, 184.

county courts.⁴⁷ Nevertheless, irrespective of how many judges could issue the writ, the denial of a motion to issue it was not considered to be *res adjudicata*. The Court, in affirming the use of the writ in an 1852 case,⁴⁸ said that “a party in custody might apply in succession to every Judge of every Court of record in the State for his discharge on habeas corpus until the entire judicial power of the State was exhausted.”⁴⁹

On the other hand, in *People v. Shuster*,⁵⁰ the Court said there was no appeal after a lower court, acting on a writ of habeas corpus, reduced a defendant’s bail from \$15,000 to \$10,000, as he was unable to raise the larger amount. The Court said that there was no provision in the Habeas Corpus Act permitting an appeal from an order given in a proceeding under that act.⁵¹

The cases involving the question of double jeopardy show both the protection afforded individuals by the Supreme Court and the evident respect of the justices for guaranteed individual rights, and also indicated the feeling of the time that imprisonment was to act as a deterrent against future criminal acts.

A question of double jeopardy arose in the case of *People v. Gilmore* where the defendant was tried for murder, but convicted of manslaughter, a lesser offense. The defendant appealed, and a new trial ordered, for which he was again arraigned for murder. He pleaded the former trial, and the question was raised whether he had to answer to the murder charge again, and if not, whether he could be tried for manslaughter on the murder indictment. The Supreme Court held that the manslaughter conviction acted as an acquittal to the murder charge, even if the prisoner wanted to be tried again. He could be tried for manslaughter on the murder indictment, however, since that indictment included indictments for all the lesser offenses included in a murder charge, as though each charge were made separately. Even though the Court ordered Gilmore to be retried, a *nolle prosequi* was

⁴⁷ Cal. Const. (1849), art. VI, § 4 (amended 1862).

⁴⁸ In the Matter of Perkins (1852), 2 Cal. 424.

⁴⁹ Matter of Edward Ring (1865), 28 Cal. 251.

⁵⁰ *People v. Schuster* (1871), 40 Cal. 627.

⁵¹ Cal. Stats. (1850), chap. 122.

entered, which showed that the prosecution was unwilling to continue, and the prisoner was discharged.⁵²

In *People v. Hunckeler*, the defendant was indicted and stood trial for manslaughter, but before the case went to the jury, the judge, on motion from the state, remanded the defendant for an indictment for a greater offense. He was then indicted and tried for murder, but convicted of manslaughter.⁵³ The Court discharged the defendant and said that double jeopardy was more than being tried twice for the same offense. "A defendant is placed in apparent jeopardy when he is placed on trial before a competent Court and a jury empaneled and sworn."⁵⁴ Such jeopardy was real unless a verdict could not be rendered due to some necessity compelling the discharge of the jury, such as death or illness of a jurymen or judge, or failure by the jury to agree. In such case there was no actual jeopardy. But

when a person has been placed in actual jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject . . . Once in actual jeopardy, a defendant becomes entitled to a verdict which may constitute a bar to a new prosecution; and he cannot be deprived of his right to a verdict by nolle prosequi entered by the prosecuting officer, or by a discharge of the jury, and continuance of the cause.⁵⁵

In this case a verdict could have been reached as to the indicted offense, and "The mere opinion of the District Judge that the evidence showed the defendant to be guilty of a higher degree of crime, was not such a necessity as required the discharge of the jury, or authorized a re-trial of the defendant for the same offense."⁵⁶

A most important case was *People v. Webb*, which for the first time in the nearly twenty years of deliberations up to that time, raised the question of whether, in a criminal case, the prosecution could appeal a not-guilty verdict. The Court said no appeal would lie, even if there had been an error, because a retrial would have placed the defendant in double jeopardy.⁵⁷

⁵² *People v. Gilmore* (1854), 4 Cal. 376.

⁵³ *People v. Hunckeler* (1874), 48 Cal. 331.

⁵⁴ *Ibid.*, 334.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *People v. Webb* (1869), 38 Cal. 467.

The Court said this ruling was compatible with the federal constitution and constitutions of other states, and that it had not been able to find a single American case where an appeal had been allowed on the motion of the prosecution.

Peter Stanley, having been once convicted of petit larceny, was now convicted of assault with intent to commit robbery, and sentenced to fourteen years in prison under a section of the penal code providing for such a term in such instances.⁵⁸ In *People v. Stanley*, the defense claimed that Stanley was put in jeopardy twice on the argument

that if the punishment of the second offense be increased because of a prior conviction for another offense, the accused will be twice punished for the first offense. The ready answer to the proposition is, that he is not again punished for the first offense, but the punishment for the second is increased, because by his persistence in the perpetration of crime he has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense.⁵⁹

The question of freedom of religion arose in *Ex parte Andrews*, although this case was but a continuation of a debate over enactment of Sunday laws by the Legislature.⁶⁰ As early as 1855 the Legislature passed a law prohibiting all noisy amusements on the Christian Sabbath,⁶¹ but a more important Sunday law was enacted in 1858, which forbade the keeping open of any store, workshop or business house, and the sale of all goods on Sunday, with certain exceptions.⁶² The law was approved April 10, 1858, and late in its April term that year the Supreme Court was already deciding the act's constitutionality in *Ex parte Newman*.⁶³

Newman, a Jewish clothing merchant in Sacramento, was convicted by a justice of the peace for selling on Sunday, and he then petitioned for a writ of habeas corpus, claiming the Sunday law was at variance with the constitutional provisions having to do with the protection of property and

⁵⁸ Cal. Penal Code (1872), § 667.

⁵⁹ *People v. Stanley* (1873), 47 Cal. 116.

⁶⁰ *Ex parte Andrews* (1861), 18 Cal. 678.

⁶¹ Cal. Stats. (1855), chap. 46.

⁶² Cal. Stats. (1858), chap. 171.

⁶³ *Ex parte Newman* (1858), 9 Cal. 502.

freedom of religion.⁶⁴ Chief Justice David S. Terry said the Constitution was interested in protecting religious liberty in its largest sense, and the observance of a day sacred to one sect was a discrimination in favor of that sect and thus a violation of the religious freedom of all other sects. Justice Peter H. Burnett agreed that the law was unconstitutional, but stressed more what he felt was a violation of Newman's right to possess and protect property. Justice Stephen J. Field, whose father, one brother, and brother-in-law were all Protestant clergymen, dissented, saying there was nothing involving religion in the law; the law merely established a civil regulation as to secular pursuits, with the object being to afford rest to those who needed it and could not otherwise get it:

The Legislature possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals, and if it is of opinion that periodical cessation from labor will tend to both, and thinks proper to carry its opinion into a statutory enactment on the subject, there is no power, outside of its constituents, which can sit in Judgment upon its action.⁶⁵

The fact that the term "Christian Sabbath" was used both in the title and body of the act was merely to designate the day selected by the Legislature.

Not everyone agreed with Field's interpretation, however. Discussing the background to the law's passage, Theodore Hittell wrote:

Notwithstanding a certain portion of the community has always been in favor of a Sunday law and other similar enactments for the enforcement of religious observances as well as of what they conceive to be the dictates of correct Sunday living, there can be but little doubt that restrictive acts of this kind do not, and never did, suit the spirit of the people of California. In no other part of the United States has there ever been so much liberty of conscience, so much freedom from dictation and so much disregard of what other people may think in this respect as in California. But repeated clamors for such a law,

⁶⁴ Cal. Const. (1849), art. I, § 1, 4.

⁶⁵ Ex parte Newman, 520.

commencing in the early days at length in 1858 brought about the passage of an act.⁶⁶

The act was declared unconstitutional “after causing much trouble, without accomplishing any good”⁶⁷

Not at all daunted by the rebuff of the Court, the Legislature enacted a similar law in 1861,⁶⁸ and it too was quickly brought to the Supreme Court via a habeas corpus proceeding that same year in *Ex parte Andrews*.⁶⁹ Andrews was convicted in San Francisco’s police court for keeping open a store and transacting business on Sunday. In applying for the writ, he claimed the law was unconstitutional on the same grounds as were successfully used in the 1858 case. By now Field had been joined on the Court by Justices Joseph G. Baldwin and Warner W. Cope, and they unanimously upheld the new Sunday law. Justice Baldwin wrote the opinion, and in the process he affirmed the views expressed by Field in the latter’s dissent in *Ex parte Newman*. Baldwin said that the Legislature could repress anything harmful to the general good:

This is a great purpose and end of all government. It is just as true that in our theory the Legislature must generally be the exclusive judge of what is or is not hurtful. Within this wide range of power, the Legislature moves without further restraint than the limitations which the Constitution has fixed to its action.⁷⁰

As to the charge that law was religious in nature, Baldwin said that the constitutional provision providing for the free exercise and enjoyment of religious profession and worship did not bar all legislation on religious subjects, merely legislation “which invidiously discriminates in favor of or against any religious system.”⁷¹ There were various laws to protect sects, but this law

⁶⁶ Theodore H. Hittell, *History of California*, vol. IV (San Francisco: N. J. Stone & Company, 1885–97), 239.

⁶⁷ *Ibid.*, 239–40.

⁶⁸ Cal. Stats. (1861), chap. 535.

⁶⁹ *Ex parte Andrews* (1861), 18 Cal. 678.

⁷⁰ *Ibid.*, 682.

⁷¹ *Ibid.*, 684.

does not discriminate in favor of any sect, system or school in the matter of their religion. It found a particular day of the week recognized by the large majority of the people of the country as a day consecrated to divine worship. It was regarded by all of this large class as a day of rest, but not by all as a day set apart exclusively for divine worship or religious observance. In selecting a day of rest from worldly labor, that day would seem to be most convenient, which, while it offended the scruples of none to observe, was most familiar to the usages, sense of propriety and sense of religious obligations of so many. At least, the mere fact . . . that the closing of shops on that day might be more convenient to Christians, or might advance their religious aims or views, is no reason for holding the law unconstitutional.⁷²

Hittell commented about the 1861 law that “though for a time it also gave much trouble, it was not sustained by public opinion and by degrees fell into substantial desuetude.”⁷³

In 1880 another Sunday law was passed forbidding the baking of bread on the Sabbath,⁷⁴ but was declared unconstitutional because it was class legislation.⁷⁵ This left the 1855 and 1861 laws on the books until 1882 when the enforcement of Sunday laws became a political issue. Many arrests were made, but juries refused to convict.⁷⁶ The result was the repeal of all Sunday laws in 1883.⁷⁷

Another legislative enactment that caused a great deal of controversy was the statute entitled “An Act to Exclude Traitors and Alien Enemies from the Courts of Justice in Civil Cases,” passed April 25, 1863.⁷⁸ As one historian of loyalty oaths has noted, California was not alone in passing such a law. Other states as well as the federal government legislated loyalty for their citizens. Several states in particular enacted test oaths for

⁷² Ibid.

⁷³ Hittell, *History of California*, vol. IV, 240.

⁷⁴ Cal. Stats. (1880), chap. 84.

⁷⁵ Ex parte Westerfield (1880), 55 Cal. 550.

⁷⁶ William A. Blakely, *American State Papers and Related Documents on Freedom in Religion* (4th rev. ed.; Washington, D.C.: The Religious Liberty Association, 1949), 453.

⁷⁷ Cal. Stats. (1883), chap. 2.

⁷⁸ Cal. Stats. (1863), chap. 365.

attorneys and it was from these laws that judicial comment on Civil War loyalty oaths first came.⁷⁹

The general election of 1862 put control of the 1863 Legislature in the hands of the Unionists, and they proceeded to pass this law to exclude Confederate sympathizers from practicing in the courts of the state. By the terms of the act a defendant in a civil suit could challenge the plaintiff's loyalty, and if the plaintiff did not sign a specified oath, the court in which the suit had been brought was required to dismiss the action. The law also required all attorneys to file the oath; the penalties for not so doing were both fine and disbarment.

The test case for this statute was *Cohen v. Wright*, decided at the July 1863 term of the California Supreme Court.⁸⁰ The case itself involved a suit for \$350 begun June 19, 1863. The defendant objected to further prosecution, alleging disloyalty on the part of the plaintiff, and on the appeal the plaintiff's attorney, H. E. Highton, was objected to because he had not filed his oath of allegiance. Thus, the Court was able to undertake deciding the constitutionality of both aspects of the law; that is, whether attorneys at law could be required to file loyalty oaths, and whether litigants should have to file them.

The attempt to challenge the section of the statute pertaining to attorneys was by trying to show that it violated the provision of the state constitution that an officer of the state need take only one oath.⁸¹ The view presented was that an attorney was an "officer" within the meaning of the Constitution, and that the affidavit to be filed as required by the statute was another and different oath. Edwin B. Crocker, who wrote the opinion of the Court upholding the constitutionality of the statute, went over the oath for attorneys, and concluded that only the clause requiring a declaration that the signer had not committed a treasonable act against the national government since the passage of the act went beyond the letter of the oath already required by the Constitution.

and we have therefore had a doubt of its validity. It does, however, but carry out the object, design, and spirit of the constitutional

⁷⁹ Harold M. Hyman, *Era of the Oath: Northern Loyalty Tests . . .* (Philadelphia: University of Pennsylvania Press, 1954), 95.

⁸⁰ *Cohen v. Wright* (1863), 22 Cal. 293.

⁸¹ Cal. Const. (1849), art. XI, § 3.

oath; and as it is not an unreasonable requirement, being confined to acts since the passage of the law, and does not clearly violate the constitution, we are unwilling to declare it void on a mere doubt.⁸²

He added, "In our judgment it was not intended to limit the action of the Legislature to the particular set form of words used in the Constitution, and it is clearly within their power to prescribe any form, so that they do not go beyond the intent object, and meaning of the Constitution."⁸³

Having established the constitutionality of the provisions in the statute affecting attorneys, Crocker argued that lawyers were not "officers of the state" as the term "officers" was generally used, and that an attorney did not fill an "office" within the meaning of the Constitution. "Attorneys are officers of the Court, and as such are subject to the control of the Court before which they practice."⁸⁴

Other constitutional objections to the statute were that it forced an attorney to answer to a criminal charge without a grand jury indictment, prevented a lawyer from defending himself in person or by counsel, only by affidavit, and that a lawyer was thereby deprived of property, the practicing of his profession, without due process and without a jury. Crocker replied,

The exclusion of the attorney from the practice of his profession by this law, is not because he had committed any crime, nor is it in the nature of a punishment for any criminal offense. The right to practice law is not a constitutional right . . . It is a mere statutory privilege . . . This privilege is, by the statute granting it, extended to all persons who comply with certain conditions . . . It is not a crime for him to decline to comply with this new condition, by refusing to take the oath. The taking of it is now made a prerequisite to the exercise of the privilege. If the effect of his refusal is to exclude him from the practice, it is a result caused by his own voluntary act.⁸⁵

Crocker also denied that the right to practice law was property. The right to practice law was not an absolute right, but a creature of a statute,

⁸² Cohen v. Wright, 309–10.

⁸³ Ibid., 310.

⁸⁴ Ibid., 315.

⁸⁵ Ibid., 317.

and after the license issued and the oath taken authorizing an attorney to exercise the right, an attorney had only a statutory privilege subject to the control of the Legislature. A statutory privilege conferred no property right unless it was in the nature of a contract or a vested right of property. But the right to practice law was neither of these. It was also noted that an attorney in this situation was deprived of nothing, since the law left it open for him to resume his practice at any time by taking the oath, "a failure to do which is his own fault."⁸⁶

The Court likewise upheld the portion of the statute dealing with litigants, Justice Crocker saying "The Government owes the duty of protection to the people in the enjoyment of their rights, and the people owe the correlative duty of obedience, and support to the Government."⁸⁷ A citizen could not demand protection without rendering obedience and support in return. One who refused to do so could no longer claim government aid in enforcing his rights, and such refusal was voluntary. Further:

There is nothing in the Constitution which prohibits the Legislature from closing the doors of the Courts against traitors and their aiders and abettors; or which requires that this shall not be done until after conviction of the crime, or that prohibits the Legislature from requiring of those litigating in the Courts that they shall purge themselves, by their own oath, of the imputed offense, before they shall claim their aid. . . . The litigant has no just right to complain, for it is his own voluntary or willful act that closes the doors against him. The law warned him what the result would be, and although it may be severe, it is a consequence of his own voluntary violation of the fundamental rights of society.⁸⁸

Without the oath, a party would lose all remedy for the enforcement of his rights, and such deprivation, it was claimed, was an impairment of the obligation of contracts. Not so, said the Court. The requirement of the oath was merely a new and further condition on litigants, and a denying of all remedies.

⁸⁶ Ibid., 319.

⁸⁷ Ibid., 325.

⁸⁸ Ibid., 325-26.

At its January 1864 term the Court heard a case with similar facts, now with attorney Gregory Yale refusing the oath. Justice Augustus L. Rhodes affirmed the decision in *Cohen v. Wright*, as well as Justice Crocker's reasoning. The fact that this case was heard by the new five-man Court under the amended Constitution, made no difference in the outcome.⁸⁹ When the laws were recodified in 1872, this statute was eliminated along with others considered obsolete.

RIGHTS OF MINORITIES

From the time of the gold rush through the internment of the Japanese Americans during the Second World War, and even beyond, the history of California has been replete with many instances of racial and religious prejudice.

A majority of Americans in California, regardless of the area from which they came, firmly believed in the innate superiority of Caucasians over the other races, the superiority of Protestant Christianity over other religious groups, and the superiority of Anglo Americans compared to those with differing national origins.

The deepest feelings, according to one California historian, were associated with the idea of racial superiority. This came about both because of the irrational aspects of racial hatred and because that idea was also closely associated with the economic self-interest of the American settlers.⁹⁰

Reaction to those of national origins other than Anglo-American was shown as early as the first session of the Legislature, when a law taxing foreign miners was passed.⁹¹ In *People v. Naglee*, the Court held that the law was not at variance with the taxing power of Congress because the state had the power to tax all persons within its territorial limits.⁹² The license fee under this act was \$20 per month, and was designed to exclude Spanish Americans, French, and all other foreigners from the mines. The effectiveness of the measure varied from group to group, however. The French, for

⁸⁹ Ex parte Gregory Yale (1864), 24 Cal. 241.

⁹⁰ Walton Bean, *California: An Interpretive History* (New York: McGraw-Hill Book Company, 1968), 162.

⁹¹ Cal. Stats. (1850), chap. 97.

⁹² *People v. Naglee* (1850), 1 Cal. 232.

one, were not affected by the tax law to the same extent as other groups, although they did suffer from it severely on occasion. But the tax law also had the effect of reinforcing the idea of Anglo-American superiority and encouraged the Americans to deprive other groups of claims on almost any pretext.⁹³

The act was repealed in 1851,⁹⁴ but reenacted in 1852 with a relatively modest \$3 per month tax,⁹⁵ which was raised to \$4 in 1856.⁹⁶ The 1856 act remained in force until 1870 when the act was declared unconstitutional.

The reenactment of the statute in 1852 was the result of the influx of Chinese to the mining areas, and served to provide the state with a sizeable source of income. In the words of Mary Coolidge:

The Foreign Miners' License tax, originally intended to exclude the Spanish-Americans, the French and other foreigners from the mines, was finally directed specifically against the Chinese. The State officials discovered that many of the counties could not exist without the income from this tax and the amount was therefore reduced to a point where the thrifty Chinese would just bear it without leaving the district.⁹⁷

From the above quotation it would seem that the Chinese miners were not discouraged by the tax, and one historian claimed that until 1870 the tax on foreign miners brought in nearly one-fourth of the state's revenue.⁹⁸

The *Naglee* case was not questioned by the California courts, although it was modified somewhat. In 1861 the Court said the foreign miners' tax could only be levied on aliens mining on public mineral lands. In the actual case, *Ah Hee v. Crippen*, the plaintiff was mining on part of the Mariposa estate, under a lease from the owners, one of whom was John C. Frémont.⁹⁹ The patent of the owners, as had been decided in *Moore v.*

⁹³ For the position of the French, see Rufus Kay Wyllys, "The French of California and Sonora," *Pacific Historical Review* I (September, 1932): 337–59.

⁹⁴ Cal. Stats. (1851), chap. 108.

⁹⁵ Cal. Stats. (1852), chap. 37.

⁹⁶ Cal. Stats. (1856), chap. 119.

⁹⁷ Mary Roberts Coolidge, *Chinese Immigration* (New York: Henry Holt and Company, 1909), 69–70.

⁹⁸ Bean, *California: An Interpretive History*, 164.

⁹⁹ *Ah Hee v. Crippen* (1861), 19 Cal. 491.

Smaw and Fremont v. Flower, transferred to them all the rights the United States government had in the mineral lands,¹⁰⁰ and:

By force of this instrument, therefore, the owners possess whatever “mining claims” exist upon the estate, and their rights in that respect can neither be enlarged nor diminished by any license from the State. They hold such claims independent of the section in question, and may extract the gold themselves, or allow others to extract it, upon such terms as they may judge most advantageous to their interests.¹⁰¹

To be liable for the tax, the alien in question had to be actually engaged in mining. The 1861 Revenue Act said that any person ineligible for United States citizenship and living in a mining district was to be considered a miner. In *Ex parte Ah Pong*, the Court said this provision was unsupportable.¹⁰² “The mere fact that the petitioner was a Chinaman residing in a mining district, does not subject him to the foreign miners’ tax.”¹⁰³

Even though the Court did construe the taxing of foreign miners strictly, it did not void the law, that task falling to the federal courts after the passage by Congress of the Civil Rights Act of May 31, 1870.¹⁰⁴ One student of these discriminatory tax laws has suggested that Sections 16 and 17 of the 1870 Civil Rights Act were designed specifically to combat the California taxes on aliens.¹⁰⁵

Following the passage of this act, several Chinese miners brought suits against the collectors of their districts. In a series of test cases the United States Circuit Court, meeting in San Francisco, found the tax collectors guilty of a misdemeanor for unlawfully collecting the tax. The tax was not collected after 1870, and although the state attorney general recommended that the Legislature help take the case up to the United States Supreme Court, no further defense of the tax collectors was attempted.

¹⁰⁰ *Moore v. Smaw and Fremont v. Flower* (1860), 17 Cal. 199.

¹⁰¹ *Ah Hee v. Crippen*, 497.

¹⁰² Cal. Stats. (1861), chap. 401, § 93.

¹⁰³ *Ex parte Ah Pong* (1861), 19 Cal. 108.

¹⁰⁴ 16 U.S. Stat. at L. (1871), 140–46.

¹⁰⁵ Leonard M. Pitt, “The Foreign Miners’ Tax of 1850: A Study of Nativism and Antinativism in Gold Rush California” (M.A. thesis, University of California, Los Angeles, 1955), 190.

If the reenacted foreign miners' tax did not serve to keep the Chinese out of the mining areas, the Legislature passed a number of statutes designed to discourage, or prohibit outright, the further immigration of Chinese to the Golden State. In 1852 an act was passed requiring the master or owner of any vessel arriving in California to post a \$500 bond for each foreign passenger aboard.¹⁰⁶ The act was not enforced for some years, and not brought before the Supreme Court until 1872, when it was declared unconstitutional in the case of *State v. S. S. Constitution*.¹⁰⁷

The defense charged that the act violated the provisions of the United States Constitution giving Congress the right to regulate commerce, and barring a state, without Congressional approval, from placing a duty on any import or export.¹⁰⁸ The state claimed that the purpose of the statute was to provide police and sanitary regulations by excluding persons who might become public charges. The Court said that, conceding the authority of the State to enact police and sanitary conditions, the fact that the statute applied to persons perfectly sound in mind and body, it could not be considered a police regulation. But, continued Justice Crockett, it could still be a valid enactment if within the constitutional power of the Legislature to pass such a statute:

The proposition here announced is, that when a regulation of our foreign commerce is national in its character — that is to say, when it is of such a nature that the power to enact it can be most advantageously and appropriately exercised by Congress under a general system, applicable alike to the whole nation and all its parts, then Congress has the exclusive power to legislate upon it, and the States, severally, have no power to deal with it. But, if the regulation be local in its nature, and demanding varying rules, so as to adapt it to particular localities, it is within the province of the State Legislatures to adopt such local rules and regulations, in the absence of legislation by Congress, on that particular subject.¹⁰⁹

¹⁰⁶ Cal. Stats. (1852), chap. 36; Cal. Stats. (1853), chap. 51.

¹⁰⁷ *State v. S. S. Constitution* (1872), 42 Cal. 578.

¹⁰⁸ U.S. Const., art. III, §§ 8, 10.

¹⁰⁹ *State v. S. S. Constitution*, 589–90.

Tested by this rule, the act was unconstitutional because it placed conditions on people landing in the state not placed on those landing in other states.

An act passed in 1855 placed a passenger tax of \$50 on each Chinese immigrant brought into California,¹¹⁰ but this statute was declared void in 1857 in *People v. Donner*,¹¹¹ because this point had already been adjudicated by the United States Supreme Court in the *Passenger* cases.¹¹²

Judicial rebuffs did nothing to sway the Legislature. In the next year after *People v. Donner*, despite the clear unconstitutionality of such laws, a law was again enacted to prohibit the further immigration of Chinese into the state. The title of this act specifically stated it was designed to prevent further Chinese immigration,¹¹³ and its fate was noted by counsel for the appellant in *Lin Sing v. Washburn*,¹¹⁴ who said, in referring to the act: "This act has never been repealed; but we have been informed from the Bench that an attempt was made to execute it; and that the Supreme Court, in an opinion which has never been reported, declared it unconstitutional and void."¹¹⁵

In 1862 the Legislature tried another form of capitation tax, by enacting a law taxing all Chinese not engaged in mining or in agricultural pursuits.¹¹⁶ This law was declared unconstitutional in the leading case of *Lin Sing v. Washburn* because the California Supreme Court felt that it interfered with the power of Congress to regulate commerce. Justice Warner W. Cope stated that federal decisions had already held that states could not tax the commerce of the United States for any purpose, and such commerce included "an intercourse of persons, as well as the importation of merchandise."¹¹⁷

The difference between this case and the *Passenger* cases was that in those cases the tax was to be paid before the passengers landed, and here they were allowed to land, and the tax became a condition of residence:

¹¹⁰ Cal. Stats. (1855), chap. 153.

¹¹¹ *People v. Donner* (1857), 7 Cal. 169.

¹¹² *Passenger Cases* (1849), 7 Howard, 283.

¹¹³ Cal. Stats. (1858), chap. 313.

¹¹⁴ *Lin Sing v. Washburn* (1862), 20 Cal. 534.

¹¹⁵ *Ibid.*, 538.

¹¹⁶ Cal. Stats. (1862), chap. 339.

¹¹⁷ *Lin Sing v. Washburn*, 566

The person is the same — the only difference is in the circumstances under which the tax is imposed; and if this difference does not relieve the tax of its objectionable feature as an interference with commerce, we conceive that the same rule must be applied. The act is limited in its terms to Chinese residing in the State; but immigration from China will necessarily be affected by it, and it will hardly be pretended that this is a matter in which the commerce of the country is not interested. Its tendency is to diminish intercourse without which commerce cannot exist; and it is obvious that to the extent of its influence in this respect the operations of commerce must suffer a diminution.¹¹⁸

In his concurring opinion Justice Edward Norton distinguished this case from *People v. Naglee*. That case merely taxed foreign miners, whereas in this case foreigners were to be taxed for the privilege of living in the state. Chief Justice Field dissented, saying the law was a legitimate exercise of the state's taxing power.

The last case dealing with attempted Chinese exclusion in the period prior to 1880 was *Ex parte Ah Fook*, decided at the October 1874 term of the Supreme Court.¹¹⁹ At issue here was an amendment to the Political Code making it the duty of the commissioner of immigration at each port in the state to visit each vessel arriving from a foreign port to see if any aliens aboard were lunatics, infirm, etc., or paupers likely to become a charge, or criminals, or lewd or debauched women.¹²⁰ If any such persons were aboard, the commissioner was to prevent them from landing unless an official of the ship could post a bond. In addition, the master of the ship was to give the commissioner seventy cents for each person examined. The petitioner, Ah Fook, was classified as a lewd woman by the commissioner, and was detained by him due to the lack of a bond, and she was to leave on the same vessel. The Court held that this statute was not repugnant to that provision of the Burlingame Treaty between the United States and China giving Chinese subjects the same privileges in respect to travel and residence, as was enjoyed by citizens of the most favored nation.¹²¹ The

¹¹⁸ Ibid., 570.

¹¹⁹ *Ex parte Ah Fook* (1874), 49 Cal. 402.

¹²⁰ Cal. Pol. Code (1874), § 2952; Cal. Stats. (1873–74), chap. 610, § 70.

¹²¹ 16 U.S. Stat. at L. (1871), 739–41.

Court reasoned that the statute did not single out China, but applied to all passengers arriving from foreign ports. Further, it was not contrary to the due process clause of the Fourteenth Amendment to the United States Constitution,¹²² because “to render effectual an inquiry which has for its purpose the carrying into operation of quarantine or health laws it must be prompt and summary.”¹²³

Interestingly enough, the statute upheld in this case was similar to the 1852 statute voided in *State v. S. S. Constitution*, but the Court, with Justice Elisha McKinstry writing the opinion, did not refer to previous decisions by either the California or United States Supreme Courts, even to show how this case differed from prior ones. Possibly the key to the *Ah Fook* case was the difference between the statutes, the later one attempting to prove through inspection by the commissioner that certain aliens were actually as described, enforcing the idea that the statute was a police regulation to protect the health and morals of the state, whereas the earlier statute required a bond without an inspection or other proof. Whatever the reasoning behind the decision in the *Ah Fook* case, the statute in question was declared unconstitutional by federal courts for violating the Burlingame Treaty, the Fourteenth Amendment, and the Civil Rights Act.¹²⁴

A major legal disability affecting the Chinese was their inability to give testimony in cases involving a Caucasian. Although the bulk of the cases before the Supreme Court involving the right to testify dealt with Chinese, other nonwhite residents of the state were included in the legislative enactments. The original statutory provisions were passed in 1850 and 1851 and excluded the testimony of African Americans and “Indians” in all cases in which a white person was a party; included were both civil¹²⁵ and criminal actions.¹²⁶ In 1854, in the case of *People v. Hall*, the leading case for the exclusion of Chinese testimony, the Supreme Court interpreted the term “Indian” so as to include Chinese.¹²⁷ Chief Justice Hugh C. Murray, then but twenty-nine years old, said the intent of the Legislature was to exclude

¹²² U.S. Const., Amend. XIV, § 1.

¹²³ Ex parte Ah Fook, 406.

¹²⁴ Chy Lung v. Freeman (1875), 92 U.S. 275.

¹²⁵ Cal. Stats. (1850), chap. 142, § 306; Cal. Stats. (1851), chap. 5, § 394.

¹²⁶ Cal. Stats. (1850), chap. 99, § 14.

¹²⁷ People v. Hall (1854), 4 Cal. 399.

non-Caucasians not only from the courts, but from all aspects of citizenship. Murray characterized the Chinese as “a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown.”¹²⁸

This case was affirmed without comment in 1859 in *Speer v. See Yup Company*,¹²⁹ but in another case that same year the Court warned against using color as the sole criterion.¹³⁰ In this particular instance there had been an objection to testimony by a dark-complexioned Turkish witness, but the Supreme Court ruled that since he was Caucasian, his testimony could be used.

The unacceptability of nonwhite testimony was a hardship not only to these minorities, but to the cause of justice itself. In *People v. Howard*, the Court refused to admit the testimony of a mulatto even though he was the injured party.¹³¹ The state contended that the section of the act dealing with crimes and punishments that stated that the injured party shall be a witness was an exception to the next section, which barred nonwhite testimony.¹³² Chief Justice Field said it was possible “that instances may arise where, upon this construction, crime may go unpunished. If this be so, it is only matter for the consideration of the Legislature. With the policy, wisdom, or consequences of legislation, when constitutional, we have nothing to do.”¹³³

Only three years after the rendering of this decision, testimony of African Americans in cases involving white persons became admissible under an 1863 statute¹³⁴ that came “As a result of the Civil War and the predominance of the Republican party.”¹³⁵ At the same time, though, the Legislature enacted a new measure expressly prohibiting the testimony of “Mongolians, Chinese and Indians.”¹³⁶ Ending the prohibition against

¹²⁸ Ibid., 405.

¹²⁹ *Speer v. See Yup Company* (1859), 13 Cal. 73.

¹³⁰ *People v. Elyea* (1859), 14 Cal. 144.

¹³¹ *People v. Howard* (1860), 17 Cal. 63.

¹³² Cal. Stats. (1851), chap. 99, § 13.

¹³³ *People v. Howard*, 64.

¹³⁴ Cal. Stats. (1863), chap. 68, § 1.

¹³⁵ Coolidge, Chinese Immigration, 76.

¹³⁶ Cal. Stats. (1863), chap. 70.

testimony by African Americans was, in the words of Theodore Hittell, “one of the glories of the legislature of 1863.”¹³⁷

The continued prohibition against Chinese testimony brought additional cases to the Court. In *People v. Awa*, the Court turned down an attempt to bar Chinese testimony in a case where the defendant was also Chinese.¹³⁸ The prosecution claimed here that the state was a white person, but the Court said in a criminal prosecution the people as a political organization, and not as individual members, was the party mentioned in the complaint. In *People v. Jones*, the district court allowed the injured party, a Chinese, to testify, but the conviction was reversed, although Justice Lorenzo Sawyer said the rule was wrong, that there was no rational ground upon which to prohibit Chinese testimony.¹³⁹

Both Chinese and African Americans were affected by an 1869 case that came before the Supreme Court. The defendant, George Washington, an African American, had been convicted of robbing a Chinese solely on the evidence presented by Chinese witnesses. In *People v. Washington*, the Court reversed Washington’s conviction, saying that Chinese testimony could not be used in cases in which an African American was a party.¹⁴⁰ The Court first said that the federal Civil Rights Act of April 9, 1866,¹⁴¹ was not repugnant to the United States Constitution, and “that its effect was to put all persons irrespective” of race and color, born within the United States and not subject to any foreign power, excluding Native Americans not taxed, upon an equality before the laws of this State in respect to their personal liberty.¹⁴²

The Court also said that the section dealing with nonwhite testimony was null and void so far as it discriminated against persons on the basis of race or color, born in the United States, excluding Native Americans. In essence, the Court said that the Civil Rights Act gave the same civil rights enjoyed by Caucasians to non-Caucasians.

¹³⁷ Hittell, *History of California*, vol. IV, 340.

¹³⁸ *People v. Awa* (1865), 27 Cal. 638.

¹³⁹ *People v. Jones* (1867), 31 Cal. 565.

¹⁴⁰ *People v. Washington* (1869), 36 Cal. 658.

¹⁴¹ 14 U.S. Stat. at L. (1868), 27.

¹⁴² *People v. Washington*, 670.

Justices Joseph Crockett and Royal T. Sprague dissented, with Crockett writing the opinion in which he claimed the Civil Rights Act was unconstitutional because the Thirteenth Amendment, under which the Civil Rights Act was passed, only proposed to abolish slavery, and in order to have this end accomplished, gave Congress the power to pass appropriate legislation. The federal act, said Crockett, did more than abolish slavery. It made all native born, except Native Americans, citizens, and also extended the same property and contractual rights enjoyed by whites. As broad an interpretation of the Thirteenth Amendment as was needed to justify the act, Crockett felt, would limit the power of the states over their citizens.¹⁴³

The next year, in *People v. Brady*, Justice Crockett's views were given greater weight, although the defendant was white and not an African American.¹⁴⁴ Another difference between this case and *People v. Washington* was that now the state act dealing with testimony was being tested by the Fourteenth Amendment, particularly that section providing that no state could pass a law abridging the privileges or immunities of any United States citizen or deprive any person of due process of law or equal protection of the laws.¹⁴⁵

The state contended that the disability to testify deprived Chinese of a degree of legal protection because the ability to testify would tend to deter crimes against them. Of course, there was no problem if a Chinese were accused of robbing either a white or another Chinese, because in such circumstances the testimony of either white or Chinese could convict a Chinese. But if a white man were accused of robbing a Chinese, the latter being unable to testify,

is less protected. That although the law threatens the same punishment for a crime committed upon the person of a Chinaman as when committed upon the person of a white man, the certainty of the punishment, and therefore the amount of protection afforded, is necessarily lessened by his exclusion as a witness.¹⁴⁶

¹⁴³ U.S. Const., Amend. XIII.

¹⁴⁴ *People v. Brady* (1870), 40 Cal. 198.

¹⁴⁵ U.S. Const., Amend. XIV, § 1.

¹⁴⁶ *People v. Brady*, 208.

Justice Jackson Temple, speaking for the majority, rejected this argument, saying that whether someone was permitted to testify or not had nothing to do with being the injured party, but on other grounds. Temple emphatically stated that the Legislature had the power to declare classes of persons incompetent to testify, and that every state had done so. The exclusion of Mongolians was not because they were Mongolians, but because their testimony would not advance the cause of justice. He said the Fourteenth Amendment simply did not apply here, and also dissented from the opinion in *People v. Washington*, agreeing with Justice Crockett's dissent in that case. Chief Justice Rhodes dissented, upholding the decision in *People v. Washington*.

The last two cases involving Chinese testimony both came before the Court at its October 1872 term in *People v. McGuire*¹⁴⁷ and *People v. Harrington*.¹⁴⁸ In the first of these cases the Court refused to reopen the questions raised in *People v. Brady*. The Court took cognizance of the fact that the Legislature repealed the law prohibiting Chinese testimony by not including that provision in the new codes. The codes were to go into effect the following January, and the Court felt:

There is, therefore, now left very little, and after the Codes take effect there will be no practical importance to the question whether that decision is right or wrong.

In view of the circumstances and of the pressure upon our time, whatever might be our opinion, if it were important to enter again upon the discussion, we decline to review that case, or to consider the questions therein passed upon as open ones in this State.¹⁴⁹

People v. Harrington merely affirmed both *People v. Brady* and *People v. McGuire*.

Another group to be placed at a disadvantage was California's small African-American population, although many restrictions against Blacks were removed at the end of the Civil War. One recent study has shown that the removal of these restrictions was in large part due to the inability to

¹⁴⁷ *People v. McGuire* (1872), 45 Cal. 56.

¹⁴⁸ *People v. Harrington* (1872), 1 Cal. Unrep. 768.

¹⁴⁹ *People v. McGuire*, 57.

enforce the laws and because the relatively small African-American population was not the dominant minority problem in the eyes of Californians.¹⁵⁰

Even prior to the Civil War, neither the Legislature nor the state constitution placed any disability on the right of African Americans to claim homestead rights, and the Court would not infer any disability either.¹⁵¹ In 1875 the Court recognized a marriage between a Caucasian and his African-American wife because the marriage was valid where it took place, Utah, and the Court also said that the African-American widow could inherit the estate.¹⁵²

The Court heard two cases in 1868 dealing with claims of African-American passengers that the North Beach and Mission Railroad Company had refused them service because of their color. In the first case the plaintiff, Emma J. Turner, claimed the conductor pushed her off the car even though there was room in the car. She was awarded \$750 damages in the lower court. The Supreme Court reversed the cause, saying that the damages were excessive and also because there was no malice or willful injury shown on the part of the defendant. The Court declared, "We are unable to conceive it possible that a jury free from passion or prejudice upon so trivial a cause of action as that exhibited by the plaintiff in her own testimony could have found a verdict for so large a sum."¹⁵³ The Court added that there was no proof of malice on the part of the defendant. If there were any malice, it was by the conductor. Any liability of the defendant's would only be for the actual damage suffered, to make the defendant liable for punitive damages the plaintiff would have to have shown that the conductor's act was done with the authority, express or implied, of the company.

In *Pleasants v. N. B. & M. R. R. Co.*,¹⁵⁴ there was evidence that the conductor specifically stated that African Americans could not ride the cars. The jury at the trial found a verdict for the plaintiffs for \$500, but the Supreme Court reversed the cause on the authority of the *Turner* case in spite of a strong appeal by George W. Tyler, counsel for the plaintiffs. The

¹⁵⁰ Eugene Berwanger, *The Frontier Against Slavery; . . .* (Urbana: University of Illinois Press, 1967), 76.

¹⁵¹ *Williams v. Young* (1861), 17 Cal. 403.

¹⁵² *Pearson v. Pearson* (1875), 51 Cal. 120.

¹⁵³ *Turner v. N. B. & M. R. R. Co.* (1868), 34 Cal. 598.

¹⁵⁴ *Pleasants v. N. B. & M. R. R. Co.* (1868), 34 Cal. 586.

Court said, “the damages were excessive. There was no proof of special damage, nor of any malice, or ill will, or wanton or violent conduct on the part of the defendant.”¹⁵⁵

There was, in the period 1850–1879, a paucity of Supreme Court cases involving California’s other two racial minorities, the Native Americans and Hispano-Americans. The citizenship of the latter group under the treaty of Guadalupe Hidalgo was unsuccessfully challenged in *People v. de la Guerra*¹⁵⁶ and in *People v. Antonio*.¹⁵⁷ The Court also held in the *Antonio* case that the act of 1850 for the protection and punishment of Native Americans was intended to be applied to those in tribes, and not to those living among whites.¹⁵⁸ At the same time the Court also declared unconstitutional that portion of the 1850 law prescribing whipping as punishment as being a cruel and unusual punishment.¹⁵⁹

Whatever the relaxed attitude of the state toward the African-American population, African-American and Native-American children were uniformly excluded from attending schools with white children unless separate schools were not provided, in which case all the children went to the same school. In 1876 the pertinent provisions read as follows:

The education of children of African descent, and Indian children, must be *provided* for in separate schools; provided, that if the Directors or Trustees fail to provide such separate schools, then such children must be admitted into the schools for white children.

Upon the written application of the parents or guardians of such children to any Board of Trustees or Board of Education, a separate school must be established for the education of such children.¹⁶⁰

Children of Chinese parentage were originally included in earlier, similar provisions,¹⁶¹ but were excluded altogether in the California School Law

¹⁵⁵ Ibid., 590.

¹⁵⁶ *People v. de la Guerra* (1870), 40 Cal. 311.

¹⁵⁷ *People v. Antonio* (1865), 27 Cal. 404.

¹⁵⁸ Cal. Stats. (1850), chap. 150.

¹⁵⁹ Ibid., § 16.

¹⁶⁰ Cal. Pol. Code (1874), §§ 1669, 1670.

¹⁶¹ Cal. Stats. (1860), chap. 329, § 8

of 1870,¹⁶² and remained under this disability until the 1880s. The legality of segregated, or “separated but equal,” schools came before the Supreme Court in 1874 in the case of *Ward v. Flood*.¹⁶³

Mary Frances Ward, an eleven-year-old girl, sought a writ of mandamus directing Noah F. Flood, principal of the Broadway Grammar School in San Francisco, to accept her as a pupil. This school, she alleged, was the closest one to her home, far closer than the segregated school she was then attending. The writ was denied, the Court upheld the provision for separate schools found in the 1870 school act, and declared that the state law was not contrary to the Thirteenth and Fourteenth Amendments of the United States Constitution, a view not surprising when the Court’s opinion in *People v. Brady* is remembered. In regard to the Thirteenth Amendment, Chief Justice William T. Wallace said that segregated schools did not place the petitioner into slavery or involuntary servitude, and there was no lack of equal protection or due process as spoken of in the Fourteenth Amendment. The youth of the state were equally entitled to be educated at public expense. Only if African-American children had been excluded completely would there have been a denial of equal protection,

and in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.¹⁶⁴

Chief Justice Wallace cited for support the 1849 Boston segregation case of *Roberts v. City of Boston*,¹⁶⁵ the same case used by the United States Supreme Court in *Plessy v. Ferguson*.¹⁶⁶ He concluded by stating that the exclusion of African-American children from white schools could only be supported under circumstances like these, where there were actually

¹⁶² Cal. Stats. (1869–70), chap. 556, § 56.

¹⁶³ *Ward v. Flood* (1874), 48 Cal. 36.

¹⁶⁴ *Ibid.*, 52.

¹⁶⁵ *Roberts v. City of Boston* (1849), 5 Cush. 198.

¹⁶⁶ *Plessy v. Ferguson* (1896), 163 U.S. 537.

separate schools for African Americans. If such schools were not maintained, all children would go to the same school.

The disabilities suffered by minority groups in California, while not justified by today's standards, were not atypical of the period as a whole. California attitudes toward nonwhites, all nonwhites, were consistent with those attitudes generally observed in the United States. But the cases as brought before the California Supreme Court also showed another typical facet, the struggle between state and federal authority. Stephen J. Field, for one, supported the state in the use of its "police powers," as may be seen in his dissent in *Lin Sing v. Washburn*. As a member of the federal bench, he held unconstitutional two San Francisco municipal ordinances, not mentioning specifically, but aimed at Chinese residents of that city.¹⁶⁷ In the second of these cases he stated that the courts would not inquire into the motives that inspired an ordinance so long as it was enforced without unjust discrimination.

The case of *Lin Sing v. Washburn* settled the question that when a police power of the state interfered with the central government's power to regulate commerce, the state enactment had to give way. The point, though, was to decide at which point a legislative enactment encroached on a federal power, and this varied from case to case.

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¹⁶⁷ *Barbier v. Connolly* (1885), 113 U.S. 27; *Soon Hing v. Crowley* (1885), 113 U.S. 703.

Chapter 6

THE LEGISLATURE AND THE STATE CONSTITUTION

In common with other state supreme courts, the Supreme Court of California took upon itself to decide the constitutionality of acts of the state legislature. At its second term the Court interpreted its own authority, saying that it was “clothed with all the powers necessary for the exercise of a general appellate jurisdiction.”¹

In *Caulfield v. Hudson*,² the Supreme Court declared unconstitutional that section of an act that allowed appeals to the district court,³ since the Constitution gave the district courts original jurisdiction only.⁴ In the opinion, Justice Heydenfeldt referred to *Attorney General, ex parte* as to the Court’s appellate jurisdiction, and said that if the Legislature were allowed to give the district court appellate powers, it could go even further and give the Supreme Court original jurisdiction, which would be contrary to the Constitution. Citing *Marbury v. Madison*, the case that established judicial review by the United States Supreme Court over

¹ Attorney General, *ex parte* (1850), 1 Cal. 89.

² *Caulfield v. Hudson* (1853), 3 Cal. 389.

³ Cal. Stats. (1851), chap. 1, § 24.

⁴ Cal. Const. (1849), art. VI, § 6.

acts of Congress,⁵ he went on to declare a portion of the California act unconstitutional.

By 1864 the Court, in *Bourland v. Hildreth*, could say that the power of the judicial branch to set aside a legislative act was unquestioned. The key was to ascertain the intent of the framers of the Constitution and of the law in question.⁶ The Legislature had broad power to enact laws, and over the years the constitutionality of many of the statutes passed by the Legislature was tested before the Supreme Court of the state, as the Court continued its role as a stabilizing influence in the state.

INTERPRETING ACTS OF THE LEGISLATURE

While the Court in *Bourland v. Hildreth* may not have had any doubts about its authority to declare acts of the Legislature unconstitutional, it was also careful to make it known that in declaring a law unconstitutional, it was not acting in an arbitrary or capricious manner. Justice Oscar L. Shafter said:

It is, however, to be borne in mind that the Constitution is not a grant of power or an enabling Act to the Legislature. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears either by express terms or by necessary implication, and the delicate office of declaring an Act of the Legislature unconstitutional and void should never be exercised unless there be a clear repugnancy between the statute and the organic law. These principles were repeatedly asserted by the late [three-man] Supreme Court, and have never been questioned by us.⁷

Justice Shafter may have had in mind Justice Joseph G. Baldwin's words in *Smith v. Judge of the Twelfth District*, when that literary judge wrote that the power to declare acts unconstitutional was "not to be exercised in doubtful cases, but that a just deference for the legislative department enjoins upon the Courts the duty to respect its will, unless the act declaring it be clearly inconsistent with the fundamental law, which all members

⁵ *Marbury v. Madison* (1803), 1 Cranch 137.

⁶ *Bourland v. Hildreth* (1864), 26 Cal. 162.

⁷ *Ibid.*, 183.

of the several departments are sworn to obey.”⁸ With the “just deference” mentioned by Justice Baldwin in mind, the Supreme Court developed a system for the interpretation of acts of the Legislature.

In *People v. Frisbie*, the Court said that if an act were susceptible of two different constructions, one consistent, and the other inconsistent with the Constitution, it was “the plain duty of the Court to give it that construction which will make it harmonize with the Constitution, and comport with the legitimate powers of the Legislature.”⁹

Sometimes the problem was not one of harmonizing a law with the Constitution, but of reconciling two laws on the same subject. In such an instance the law first passed had to yield to the later one, because the later enactment was the last will of the Legislature.¹⁰ The later act had to show a clear intention of repealing the earlier act,¹¹ but the intent to repeal could be shown either by express words or necessary implication. If the latter, the subsequent legislation would have to show that the Legislature did not intend the former act to remain in force. In the words of Justice Joseph Crockett: “If a later statute be wholly repugnant to an older one, so that, upon any reasonable construction, they cannot stand together, the first is repealed by implication, though there are no repealing words.”¹²

The rule was different, however, in the case of two acts relating to the same subject matter passed the same day. In such an instance they were to be read together, as if parts of the same act.¹³ If the meaning of an act were doubtful, the Court could also use the title of the act in order to ascertain the intention of the Legislature, although the title could not be used to restrain or control a positive provision of the act.¹⁴ It should be noted, however, that the Court said the title could be used. It did not state that the title was conclusive, even though the Constitution stated that the object of each law should be stated in its title.¹⁵ In construing statutes, “the universal rule

⁸ *Smith v. Judge of the Twelfth District* (1861), 17 Cal. 551.

⁹ *People v. Frisbie* (1864), 26 Cal. 139.

¹⁰ *Matter of the Estate of Wixom* (1868), 35 Cal. 320.

¹¹ *Attorney General v. Brown* (1860), 16 Cal. 441.

¹² *Christy v. B. S. Sacramento Co.* (1870), 39 Cal. 10.

¹³ *People v. Jackson* (1866), 30 Cal. 427.

¹⁴ *Flynn v. Abbott* (1860), 16 Cal. 358.

¹⁵ Cal. Const. (1849), art. IV, § 25.

is that all parts of the statute must be considered, in order to ascertain from the whole what was the real intent of the Legislature.”¹⁶

Another problem involved in interpreting statutes was in determining whether a law was special or general, and if the latter, whether the law was within the constitutional rule that “All laws of a general nature shall have a uniform operation.”¹⁷ An act passed in 1852 to provide for the appointment of a gauger for the port of San Francisco¹⁸ was considered to be a special act because there would be no need for a gauger at any other port in the state,¹⁹ but an act passed April 17, 1861 to lower the maximum interest charged by pawnbrokers from 7 to 4 percent per month,²⁰ was of a general nature and uniform operation, since it dealt with pawnbrokers in general, and affected all in that occupation.²¹ Also considered a general law was an act taxing costs against the losing party in litigated cases in San Francisco.²² The Court said that the law operated “equally and uniformly upon all parties in the same category — upon all upon whom it acts at all.”²³ Corporations as well as individuals were also within the purview of this constitutional provision, and any law granting special privileges to a corporation not granted to all other similar corporations was unconstitutional and void.²⁴

Although elected to office like other public officials, the members of the Supreme Court attempted as much as possible to keep their personal opinions of laws out of their judicial decisions. Justice Crockett said that

it is not our province to discuss the expediency or wisdom of a Legislative Act. Our sole duty is by applying just rules of construction to ascertain the true intent of the Legislature, and carry it into effect. If the Act is unwise or oppressive in its provisions, the fault is with the Legislature and we have no power to remedy the grievance.²⁵

¹⁶ *People v. San Francisco* (1869), 36 Cal. 600.

¹⁷ Cal. Const. (1849), art. I, § 11.

¹⁸ Cal. Stats. (1852), chap. 58.

¹⁹ *Addison v. Saulnier* (1861), 19 Cal. 82.

²⁰ Cal. Stats. (1861), chap. 19, § 2.

²¹ *Jackson v. Shawl* (1865), 29 Cal. 267.

²² Cal. Stats. (1865–66), chap. 91, § 6.

²³ *Corwin v. Ward* (1868), 35 Cal. 198.

²⁴ *Waterloo Turnpike Road Co. v. Cole* (1876), 51 Cal. 381.

²⁵ *People v. San Francisco*, 601.

Acts of the Legislature examined by the Supreme Court extended to many areas of government, with a large number of cases dealing with judicial matters, elections, and offices.

JUDICIAL POWERS

The Legislature, in addition to its power to create courts, also enacted laws dealing with specific courtroom procedure ranging from the amount of interest allowed on a judgment to the rules of evidence.

In *Fitzgerald v. Urton*,²⁶ the Court upheld a law giving jurisdiction in nuisance cases to the county courts,²⁷ while the Constitution gave such cases to the district courts.²⁸ The granting of this jurisdiction by the Legislature to the county courts did not take jurisdiction from the district courts; both could exercise the jurisdiction.

The case of *Parsons v. Tuolumne Water Company* explained the “special cases” in which the Legislature could provide for county courts.²⁹ The Court said: “we think that the term ‘special cases’ was not meant to include any class of cases for which the Courts of general jurisdiction had always supplied a remedy.”³⁰ These “special cases” were limited to new areas of cases as created by statutes, and whose proceedings were unknown to the general rule of courts of equity and common law. One such example was the Insolvent Debtor’s Act of 1852, which gave jurisdiction in cases of insolvency to both county and district courts.³¹ In *Harper v. Freelon*, the Supreme Court held that the Legislature had the right to give any court in the state jurisdiction over these cases, and the two had concurrent jurisdiction.³²

In *Zander v. Coe*³³ the Court voided a statute giving justices’ courts jurisdiction in cases where the sum in dispute exceeded \$200, affirming

²⁶ *Fitzgerald v. Urton* (1854), 4 Cal. 235.

²⁷ Cal. Stats. (1851), chap. 5, § 249.

²⁸ Cal. Const. (1849), art. VI, § 6.

²⁹ Cal. Const. (1849), art. VI, § 9.

³⁰ *Parsons v. Tuolumne Water Company* (1855), 5 Cal. 44.

³¹ Cal. Stats. (1852), chap. 34, § 1; Cal. Stats. (1853), chap. 180, § 44.

³² *Harper v. Freelon* (1856), 6 Cal. 76.

³³ *Zander v. Coe* (1855), 5 Cal. 230.

Holden v. Caulfield.³⁴ In 1850, the Legislature passed an act creating a municipal court for San Francisco, called the Superior Court, and gave it all the powers of a district court.³⁵ Since a district court had jurisdiction beyond its district, so then did the Superior Court. The granting of such jurisdiction was declared invalid by the Supreme Court in *Meyer v. Kalkmann*³⁶ as being in conflict with the state constitution, which stated, “The Legislature may also establish such municipal and other inferior courts as may be deemed necessary.”³⁷

The Court said that any courts created by the Legislature had to be “of inferior, limited and special jurisdiction.”³⁸ This meant that the jurisdiction of a municipal court had to be confined to its municipal territory, and the Legislature could not extend its jurisdiction, thus letting its processes go beyond its territory.

In *Ex parte Harker*, the Supreme Court upheld the right of the Legislature to abolish a writ, noting that “the mere procedure by which jurisdiction is to be exercised may be prescribed by the Legislature, unless, indeed, such regulations should be found to substantially impair the constitutional powers of the Courts, or practically defeat their exercise.”³⁹

By an act of March 30, 1868, the Legislature reduced interest rates on judgments from 10 to 7 percent.⁴⁰ The power of the Legislature to enact such a measure was not questioned, the Court saying only that such an act could only operate prospectively, and interest could only be computed at the lower rate from the act’s passage, and not from the still-earlier judgment.⁴¹ In *Mitchell v. Haggemeyer*,⁴² the Legislature changed the rules of evidence dealing with the admissibility of depositions after the deposition in question was taken, but prior to the time the cause was tried.⁴³ Said the

³⁴ Cal. Stats. (1851), chap. 1, § 87.

³⁵ Cal. Stats. (1850), chap. 63, §§ 1, 4; Cal. Stats. (1851), chap. 1, §§ 37, 42.

³⁶ *Meyer v. Kalkmann* (1856), 6 Cal. 583.

³⁷ Cal. Const. (1849), art. VI, § 1.

³⁸ *Meyer v. Kalkmann*, 590.

³⁹ *Ex parte Harker* (1875), 49 Cal. 465.

⁴⁰ Cal. Stats. (1867–68), chap. 429.

⁴¹ *White v. Lyons* (1871), 42 Cal. 279.

⁴² *Mitchell v. Haggemeyer* (1875), 51 Cal. 108.

⁴³ Cal. Stats. (1873–74), chap. 383, § 218; Cal. Code Civ. Proc. (1874), § 1880.

Court, “It is competent for the Legislature to change or modify the rules of evidence at any time.”⁴⁴

One legislative act that caused a sharp division among the justices of the Supreme Court was a statute passed March 30, 1868, and amended February 1, 1870, dealing with the grading of streets in San Francisco.⁴⁵ Under the provisions of these statutes the supervisors were to appoint commissioners to assess the damages suffered and benefits accruing to the affected property owners. The commissioners’ report was to be submitted to the county court for approval. Section thirteen of the 1870 amendatory act said that the action of the county court was to be “final and conclusive,” which seemed to rule out the possibility of an appeal.⁴⁶ At its October 1871 term the Supreme Court interpreted the statute as precluding an appeal.⁴⁷ In considering the question Justice Crockett said that

it is our duty so to interpret the Act . . . as to uphold the right of appeal; for it is not lightly to be assumed that the Legislature intended to deny a right of appeal in a case involving so large an amount and affecting the interests of so many persons. If, therefore, the statute is capable of being so construed as to maintain the right of appeal without violating the well established rules for construing statutes, I should deem it, to be my duty to give it that construction.

On the other hand, if the Legislature has clearly expressed its intention that there shall be no appeal in this case, the Courts have no right to defeat this manifest intention by torturing or disregarding the language of the statute.⁴⁸

Justice Crockett added that the Legislature intended the words “final and conclusive” to be binding; that the judgment of the county court was to be

conclusive for all purposes whatsoever, and shall end the litigation. This, in effect, is to deny an appeal from the judgment, and to make it absolutely conclusive on the parties. It is not our province to discuss the wisdom and policy of such Legislation. This

⁴⁴ Mitchell v. Haggemeyer, 109.

⁴⁵ Cal. Stats. (1867–68), chap. 449; Cal. Stats. (1869–70), chap. 36.

⁴⁶ Cal. Stats. (1869–70), chap. 36, 25.

⁴⁷ Appeal of S. O. Houghton (1871), 42 Cal. 35.

⁴⁸ Ibid., 51–52.

belongs solely to the legislative department, whose enactments it is our duty to expound, in accordance with the expressed will of the Legislature.⁴⁹

Having decided that the Legislature fully intended that there be no appeals, the Court said that the statute was not unconstitutional, because proceedings under it were special and not cases in law involving an assessment, which would have given appellate jurisdiction to the Supreme Court. Justice William T. Wallace noted that a “special” case did not include any case for which courts of general jurisdiction had normally supplied a remedy, and had been appealable to the Supreme Court.

Chief Justice Augustus Rhodes, in dissent, said:

The position cannot be maintained that the Court has or has not jurisdiction of special cases accordingly as the Legislature in providing for them has or has not allowed an appeal. The jurisdiction of the Court is derived from the Constitution alone, and the Legislature can neither enlarge or restrict it. When a special case is devised, the question whether this Court has appellate jurisdiction in the matter must be determined by an interpretation of the Constitution.⁵⁰

He felt that while special cases were not mentioned specifically, they fell within the general grant of appellate jurisdiction. Justice Royal T. Sprague also dissented, saying that the words “final and conclusive” referred only to the county court, and were not used to bar an appeal. The majority view prevailed, and was followed in later cases.

The constitutionality of laws dealing with the judicial system was put in question in other cases, including *Uridias v. Morrill*, which upheld a law making the mayor of San Jose ex officio justice of the peace;⁵¹ *People v. Mellon*, which held that a county judge could preside in a county other than the one in which he was elected at the request of the county judge of that other county;⁵² and *People v. Sassovich*, which upheld the power of

⁴⁹ Ibid., 55.

⁵⁰ Ibid., 69.

⁵¹ *Uridias v. Morrill* (1863), 22 Cal. 473.

⁵² *People v. Mellon* (1871), 40 Cal. 648.

the Legislature to create additional judicial districts.⁵³ In the latter case the Court affirmed the rules of constitutional construction laid down in *Bourland v. Hildreth*, and added:

It is well settled that every Act deliberately passed by the Legislature must be regarded by the Courts as valid unless it is clearly and manifestly repugnant to some provision of the Constitution. The people must not be deprived, by judicial construction, of their prerogative right to declare, through the Legislature, what shall be the rule in a given case upon the mere conjecture or suspicion that they have already declared their will upon that subject in the Constitution.⁵⁴

Under no rule of construction, however, could the Legislature make a board of supervisors a purely judicial body as it tried to do in Section 74 of the election law, by making contests in county courts dealing with elections appealable to the board of supervisors.⁵⁵ Under the Constitution the board did not have such powers and any judgment so rendered was a nullity. Boards of supervisors did have certain duties that in some respect had a judicial character, but this case was not one of them.⁵⁶

One class of statutes that received changing interpretations through the years involved giving nonjudicial duties to courts and judges. The leading early case on the subject was *Burgoyne v. Supervisors*, decided in 1855,⁵⁷ which declared unconstitutional an 1850 statute that gave the court of sessions of each county the management of the financial matters of its county.⁵⁸ About June 20, 1850, the court of sessions of San Francisco County had entered into a contract for the purchase of land on which to erect county buildings, in compliance with the statute passed earlier that year.⁵⁹ William M. Burgoyne, assignee of the sellers, sued to collect for the land, bringing the question of nonjudicial powers of the judiciary into courts for review. The Legislature had acted under a provision of the Constitution

⁵³ *People v. Sassovich* (1866), 29 Cal. 480.

⁵⁴ *Ibid.*, 482.

⁵⁵ Cal. Stats. (1855), chap. 131, § 12.

⁵⁶ *Stone v. Elkins* (1864), 24 Cal. 12.

⁵⁷ *Burgoyne v. Supervisors* (1855), 5 Cal. 9.

⁵⁸ Cal. Stats. (1850), chap. 86, § 6.

⁵⁹ Cal. Stats. (1850), chap. 86, § 6.

which said that the county judge “shall perform such other duties as shall be required by law.”⁶⁰ This act was declared unconstitutional in *Burgoyne v. Supervisors*,⁶¹ according to the article of the Constitution dividing the powers of the state government into separate legislative, executive, and judicial departments: “[N]o person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted.”⁶²

An attempt was made to get around the *Burgoyne* decision in *Phelan v. San Francisco* where other sellers of land to the county tried to claim that the sales were not void, but voidable. Under this theory the sale could be later ratified by the Board of Supervisors, after its creation. This was rejected by the Court, which held that since the original sale was void, any subsequent ratification was equally void.⁶³ *Burgoyne v. Supervisors* was repeatedly affirmed in later cases, such as *People v. Town of Nevada*,⁶⁴ which declared unconstitutional a legislative enactment conferring on the county court the power of incorporating town governments.⁶⁵

At its April 1866 term, the Supreme Court applied the principle of *Burgoyne v. Supervisors* and *People v. Town of Nevada* to a law making the chief justice of the California Supreme Court an ex officio member of the state library’s board of trustees.⁶⁶ The Court held that the Legislature, under the third article of the Constitution, could not give the chief justice a nonjudicial duty. In commenting about this constitutional article, Justice John Currey said the provision,

so far as it relates to the judicial department of the State, is, in our judgment, eminently wise. One of its objects seems to have been to confine Judges to the performance of judicial duties; and another to secure them from entangling alliances with matters concerning which they may be called upon to sit in judgment; and another still

⁶⁰ Cal. Const. (1849), art. VI, § 8.

⁶¹ *Burgoyne v. Supervisors* (1855), 5 Cal. 9.

⁶² Cal. Const. (1849), art. III.

⁶³ *Phelan v. San Francisco* (1856), 6 Cal. 531; *Phelan v. San Francisco* (1862), 20 Cal. 41.

⁶⁴ *People v. Town of Nevada* (1856), 6 Cal. 143.

⁶⁵ Cal. Stats. (1850), chap. 30, § 1.

⁶⁶ Cal. Stats. (1861), chap. 57, § 1.

to save them from the temptation to use their vantage ground of position and influence to gain for themselves positions and places from which judicial propriety should of itself induce them to refrain.⁶⁷

The question of a judicial officer performing non-judicial acts came up again in *People v. Provines*, but with far different results.⁶⁸ The statute in this case, passed April 19, 1856, made the judge of San Francisco's police court a police commissioner.⁶⁹ Speaking for the majority of the Court, Justice Silas W. Sanderson, the chief justice whose place on the library board of trustees was challenged above, reviewed many of the cases in point from *Burgoyne v. Supervisors* through his own case, *People v. Sanderson*, and he ended by overruling any that were inconsistent with the views he now propounded. Sanderson now said that

the Third Article of the Constitution means that the powers of the State Government, not the local governments thereafter to be created by the Legislature, shall be divided into three departments, and that the members of one department shall have no part or lot in the management of the affairs of either of the other departments.⁷⁰

He concluded by saying:

Our conclusion is that there is nothing in the Third Article of the Constitution which prohibits a judicial officer from exercising functions, not in their nature judicial, if they do not belong to either the Legislative or Executive Departments, as they are defined and limited in the Constitution itself, as interpreted by us.⁷¹

The *Provines* decision was used for the basis of upholding appointments to the board of supervisors of San Diego made by the county judge in *People v. Bush*.⁷² The Supreme Court said that such an appointment was a ministerial, not a judicial act, and "A judicial officer may be required by law to discharge other than judicial duties."⁷³ Further, since the performance

⁶⁷ *People v. Sanderson* (1866), 30 Cal. 168.

⁶⁸ *People v. Provines* (1868), 34 Cal. 520.

⁶⁹ Cal. Stats. (1856), chap. 125.

⁷⁰ *People v. Provines*, 534.

⁷¹ *Ibid.*, 540.

⁷² *People v. Bush* (1870), 40 Cal. 344.

⁷³ *Ibid.*, 345.

of a nonjudicial act by a judicial officer did not make the act judicial, an important implication was that such an act could not be reviewed by a writ of certiorari, because that writ could only be issued to “an inferior officer or tribunal, exercising judicial functions, and the. proceeding to be brought up for review must be a judicial proceeding.”⁷⁴

The third article of the Constitution, dealing with the division of powers, was also used to decide cases in which the Legislature attempted to give itself judicial powers. In 1861 the Legislature passed an act changing the venue of a murder trial then pending in San Francisco’s district court.⁷⁵ The district judge, defendant in *Smith v. Judge of the Twelfth District*, refused to transfer the case, saying that the statute was unconstitutional. The Supreme Court disagreed, saying first, that the Legislature had both the power and duty to prescribe the rules of procedure for the courts in general acts.

It is not a virtue but a necessary defect of legislation, that general rules are enacted, which, while they apply to all cases, and generally with justice, yet apply harshly in exceptional instances. And as the Legislature possesses the general power to prescribe these rules, it has the same power, and it may be as much its duty to remedy the particular injurious operation of the law, as to enact the statute from which that effect comes.⁷⁶

But, admitting that the Legislature could pass a special law to change a general law in a particular case, was the act an excess of legislative authority because it infringed on the powers of the judiciary? No. While the Legislature cannot decide cases,

it can pass laws which furnish the bases of decision, and which laws the Judiciary are bound to obey. The Legislature cannot dictate to the Courts how they shall decide a particular case, but it can dictate the law to the Judges, and the Judges are bound to decide the given case in pursuance of the law thus dictated. It can, not only dictate a law for cases generally, but, in the absence of restrictive provisions, it can as well dictate a particular as a general law.

⁷⁴ Ibid.

⁷⁵ Cal. Stats. (1861), chap. 58.

⁷⁶ *Smith v. Judge of the Twelfth District*, 555–56.

It is said that this act is objectionable, because it directs the Court to make a particular order. . . . But the whole error is in forgetting that the Court has the discretion only by virtue of the law giving it, and that the same law can take away that discretion as to all matters of remedy and leave to the Court a simple ministerial duty.⁷⁷

The reasoning of the Court seems sound, but in at least this case, there was some evidence of the emotions involved in the case. The facts, according to Theodore Hittell, were that Horace Smith, a prominent San Franciscan, had shot and killed a man in the open, and had therefore been indicted and held for trial. Appearances were against Smith, and as there was a good deal of public feeling, he probably would have been convicted. When his application for a change of venue was denied, his friends introduced a bill in the Senate to move the trial to Placer County from San Francisco. The bill passed both houses, was vetoed by Governor Sheridan Downey, and was passed over the veto by the Legislature. With the Supreme Court declaring the act constitutional, the case was transferred to Placer County. “The result, as was expected, was an acquittal of Smith and a disappointment of the public.”⁷⁸

On the other hand, an act which placed the power of establishing ferries in counties upon the board of supervisors or on the county judge if there were no board, or if a supervisor had an interest in the ferry, was held to have exceeded its authority because it gave the power to two distinct branches of the government.⁷⁹ In his opinion, Chief Justice Murray said the Supreme Court had to decide in which department this power belonged, as it could not exist in both at once, for if it could, there would have been an anomalous situation where the supervisors could act without judicial review, or the court’s act would have the consequences of a trial.⁸⁰

The Court, in *Hardenburgh v. Kidd*,⁸¹ declared void the provisions of the revenue acts of 1853 and 1854 which authorized the court of sessions to assess a county tax.⁸² The Court did uphold the section of the act creating

⁷⁷ Ibid., 559.

⁷⁸ Theodore H. Hittell, *History of California*, vol. IV (San Francisco: N. J. Stone & Company, 1885–97), 281.

⁷⁹ Cal. Stats. (1855), chap. 147, §§ 2, 17, 25.

⁸⁰ *Chard v. Harrison* (1857), 7 Cal. 113.

⁸¹ *Hardenburgh v. Kidd* (1858), 10 Cal. 402.

⁸² Cal. Stats. (1853), chap. 167, art. I, § 1; Cal. Stats. (1854), chap. 63, art. I, § 1.

the County of Stanislaus out of Tuolumne County, and which authorized the county judges of both counties to appoint commissioners to settle the amount of county indebtedness Stanislaus County was to assume,⁸³ since here the duty was to settle and adjust rights between parties, and so it partook of a judicial character.⁸⁴

The Supreme Court also recognized that the Legislature could pass an act authorizing a minor's guardian to sell property belonging to the minor, and noted in passing that the appointment of guardians and the disposition of estates of minors could be regulated directly by the Legislature or be referred to a court of appropriate jurisdiction.⁸⁵ In approving a somewhat different type of sale the next year, the Court said that the laws then in force did not empower any court to authorize that particular type of sale.⁸⁶ Justice Crockett stated that a wiser policy would have been to refer such cases to the courts under general laws, which several states had done through constitutional provisions. "But in this and many other States, a contrary practice has prevailed, and estates of great value have been acquired and are now held under special statutes of this character."⁸⁷ But in *Lincoln v. Alexander*,⁸⁸ the Court refused to countenance a statute allowing the mother of the minor children to sell property belonging to the minors, when she was not their legal guardian.⁸⁹ Although the Legislature may have been ignorant of the fact there was an appointed guardian, the act was judicial, not legislative, in its character, and could not stand.

Another law declared unconstitutional was a general act ratifying real estate sales ordered by probate courts even if there were a defect of form, omissions, or errors.⁹⁰ This law was an attempted exercise of judicial power by the Legislature, and was itself void because it tried to validate judgments which were otherwise void, and sales made under these void judgments.⁹¹

⁸³ Cal. Stats. (1854), chap. 81, § 18.

⁸⁴ *Tuolumne v. Stanislaus* (1856), 6 Cal. 440.

⁸⁵ *Paty v. Smith* (1875), 50 Cal. 153.

⁸⁶ *Brenham v. Davidson* (1876), 51 Cal. 352.

⁸⁷ *Ibid.*, 360.

⁸⁸ *Lincoln v. Alexander* (1877), 52 Cal. 482.

⁸⁹ Cal. Stats. (1857), chap. 259.

⁹⁰ Cal. Stats. (1865–66), chap. 596.

⁹¹ *Pryor v. Downey* (1875), 50 Cal. 388.

On February 17, 1866, an article appeared in the San Francisco *Daily American Flag*, charging in effect, that seven unnamed state senators had received \$12,000 to vote against the repeal of the specific contract law, and that \$24,000 had been divided among certain lobbyists for making the arrangement.⁹² The Senate appointed a committee to investigate the charges, and D. O. McCarthy, editor and proprietor of the newspaper, was summoned to the bar of the Senate, where he admitted that the article was written at his direction and with his approval, although he did not write the article himself. McCarthy refused to say more, was held guilty of contempt, and committed to the Sacramento jail until he would answer the questions posed by the upper house. The jailing of McCarthy was made under an act passed in 1857 authorizing the commitment of anyone refusing to testify.⁹³ McCarthy applied to the Supreme Court for a writ of habeas corpus, claiming he had been imprisoned illegally.

The case was argued before Chief Justice John Currey and Justices Lorenzo Sawyer and Silas W. Sanderson, with the latter writing the opinion. Although the technical point to be decided was the constitutionality of the 1857 act, the opinion of the Court said much about the Legislature, its powers, and its relationship to the state constitution.

A legislative assembly, when established, becomes vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions. These powers and privileges are derived not from the Constitution; on the contrary, they arise from the very creation of a legislative body, and are founded upon the principle of self preservation. The Constitution is not a grant, but a restriction upon the power of the Legislature, and hence an express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms. A legislative assembly has, therefore, all powers and privileges which are necessary to enable it to exercise in all respects, in a free, intelligent and impartial manner, its appropriate functions, except so far as it may be restrained by the express provisions of

⁹² *American Daily Flag*, February 17, 1866.

⁹³ Cal. Stats. (1857), chap. 95, § 5.

the Constitution, or by some express law made unto itself, regulating and limiting the same.⁹⁴

The powers and privileges accruing to a legislative assembly by its creation could be ascertained by reference to the common parliamentary law.

Thus by the common parliamentary law the Senate has the power, among other things, to judge of the qualifications of its own members, to preserve its own honor, dignity, purity and efficiency, by the expulsion of an unworthy or the discharge of an incompetent member; to protect itself and its members from corruption; and as necessary to the intelligent exercise of those powers they may summon and examine witnesses and compel them to testify by process of contempt, when without good cause they refuse to do so.⁹⁵

In the case under discussion the charge made by the article was a charge affecting the honor, etc., of the Senate, and that body had the power to investigate the charge in order to expel any guilty members, and with that aim in view, to summon McCarthy to testify, and to commit him for contempt when he refused to testify without cause. Thus, the 1857 act was constitutional.

ELECTIONS AND OFFICES

The second article of the 1849 Constitution granted the right of suffrage, with certain enumerated limitations,⁹⁶ but other sections dealing with elections and offices were scattered throughout the articles.⁹⁷ On numerous occasions the Supreme Court decided cases involving the constitutionality of statutes, or their interpretation in light of the various constitutional provisions. Among the cases decided were those dealing with the eligibility and right to vote, eligibility to hold office, and what constituted a term of office.

The first case of this nature was *People v. Fitch*, which presented the following facts: James Winchester, the legally appointed state printer resigned

⁹⁴ Ex parte D. O. McCarthy (1866), 29 Cal. 403.

⁹⁵ Ibid., 405.

⁹⁶ Cal. Const. (1849), art. II.

⁹⁷ Cal. Const. (1849), art. IV, §§ 4, 5, 6, 8, 13, 20, 21, 22; art. V, §§ 2, 3, 4, 8, 12, 16, 18; art. VI, §§ 3, 5, 7, 8, 16; art. IX, § 1; Art XI, §§ 5, 6, 7, 17, 18, 20.

March 28, 1851; on the 31st, Governor John McDougal appointed James B. Devoe while the Legislature was in session, but he resigned April 30, 1851; May 2, McDougal appointed G. K. Fitch; May 1, the Legislature appointed Eugene Casserly, having the day before passed a bill to that effect, but the bill was not signed by the governor. The Supreme Court held that when Winchester resigned, the power of filling the vacancy fell to the Legislature, and the appointments of both Devoe and Fitch were void.⁹⁸ The reasoning of the Court was that since the Legislature created the office and retained the power of electing and controlling the same, the governor could only appoint when the Legislature was not in session, and such appointment could only last until the end of the next session, by which time the Legislature would have acted. If the office in question were an office elected by the people, an appointment by the governor would last until the next election. The Court cited another case decided at the same term, but not reported until it was included in the index of volume 3 of the *Supreme Court Reports*. That case, *People v. Mott*,⁹⁹ held that when the governor appointed a judge to fill a district judgeship which the Legislature had created but failed to fill, such appointment was not for the remainder of the term, but only until the next election, as the position was one which was regularly filled by a general election.¹⁰⁰

Another 1851 case not reported until 1853 was *People v. Brenham*,¹⁰¹ which interpreted the election provisions of the act that reincorporated the City of San Francisco.¹⁰² Under this law the first election of city officers was to be held yearly on the first Monday of September. Charles D. Brenham was elected mayor at the April 1851 election, and at the September 1851 election Stephen R. Harris was elected; Brenham refused to give up the office. Chief Justice Hastings said the term of one year was not absolute; it could be limited by a future election, here, the September election. This result, which would make Harris the mayor, was what the Legislature intended. Justice Murray concurred using different reasoning, part of which was to the effect that if there was doubt about a construction, the intention of the law had to

⁹⁸ *People v. Fitch* (1851), 1 Cal. 519.

⁹⁹ *People v. Mott* (1851), 3 Cal. 502.

¹⁰⁰ Cal. Stats. (1851), chap. 84.

¹⁰¹ *People v. Brenham* (1851), 3 Cal. 477.

¹⁰² Cal. Stats. (1851), chap. 1, §§ 18, 19.

be toward popular right, that is, more frequent elections. Justice Lyons dissented, saying Brenham should have been allowed to serve as mayor until the September 1852 election, so as to be able to finish at least a year term, and no harm would have occurred if he actually served more than one year.

The Court adhered more closely to Lyons' dissent at its January 1856 term in *People v. Church*, where the county clerk of Alameda County was allowed to serve several months more than his two-year term.¹⁰³ He had been elected at an April 1853 special election, and held office until after the general election of September 1855. The act organizing Alameda County only said the clerk should serve two years until a successor was elected and qualified, and no provision was made for a second election.¹⁰⁴ The intention of the Legislature was that all future elections should be governed by the general election law, and it was also the intention to extend the term of the office past two years.

In 1855 the City of San Francisco amended its charter so as to hold municipal elections in May, the officers elected to enter into office in July.¹⁰⁵ The clerk of the San Francisco Superior Court, a state office, was elected at these municipal elections, and the Supreme Court decided that he would not enter into office until after the September election, so that the incumbent would be able to serve his statutory two-year term.¹⁰⁶

Whether a resignation became effective when it was accepted by the governor or at the time set by the person resigning was raised in *People v. Porter*.¹⁰⁷ The Court held, "The tenure of the office does not depend upon the will of the Executive but of the incumbent."¹⁰⁸ In *People v. Reed*, the Court said that once the term in office expired, the office was technically vacant, although the incumbent could fulfill the duties until his successor started to perform them.¹⁰⁹ This would prevent a hiatus between the two terms. In this case the Legislature, which was the electing power, did not choose a successor, and the governor could then appoint someone. The governor could

¹⁰³ *People v. Church* (1856), 6 Cal. 76.

¹⁰⁴ Cal. Stats. (1853), chap. 41, § 9.

¹⁰⁵ Cal. Stats. (1855), chap. 197, § 4.

¹⁰⁶ *People v. Haskell* (1855), 5 Cal. 357.

¹⁰⁷ *People v. Porter* (1856), 6 Cal. 26.

¹⁰⁸ *Ibid.*, 28.

¹⁰⁹ *People v. Reed* (1856), 6 Cal. 288.

not, however, remove someone from office before the term ended if the office was one whose term was fixed by law even if the office were one which was appointive by the governor himself.¹¹⁰ In the case of an office which could be filled by the governor *with the advice of the Senate*, in the absence of the Legislature, an appointment by the governor to a vacancy was for the whole term, although subject to later rejection by the state Senate.¹¹¹

In *Conger v. Gilmer*, the Court had to decide which of two men was entitled to succeed the deceased James Coggins as justice of the peace of Sacramento. April 4, 1866, the board of supervisors appointed the plaintiff, but the next day the board reconsidered its action, withheld his certificate, and named the defendant, who received a certificate of appointment.¹¹² The point was whether the board could reconsider its action and change its mind. The Court said the board could so act, and was able to prevent the plaintiff from assuming the office by withholding the certificate of appointment, since the appointment was not complete without it. An elected official, however, could assume his office without a certificate because

[w]hen a person is elected to an office his right is established by the result of the election, and does not depend upon his getting a commission, for in such a case the choice comes from the people, and when they have voted the last act required of them has been performed. In such a case the issuing of the commission is merely a ministerial act, to be performed by the officers, and not, as in the case of a taking by appointment, a part of the act to be done.¹¹³

The board of supervisors had voted in making the appointment and could not change an appointment by government functionaries into an election. That was clear. If the issuing of the certificate of election was a mere ministerial act, then such evidence could be no more than *prima facie* evidence of someone's right to the office in question, for "the real right or title to the office comes from the will of the voters, as expressed at the election."¹¹⁴ In much the same vein the board of supervisors of Sacramento

¹¹⁰ *People v. Jewett* (1856), 6 Cal. 291.

¹¹¹ *People v. Mizner* (1857), 7 Cal. 519.

¹¹² *Conger v. Gilmer* (1867), 32 Cal. 75.

¹¹³ *Ibid.*, 80.

¹¹⁴ *People v. Jones* (1862), 20 Cal. 53.

erred in not allowing an elected official to withdraw a resignation made after he was elected, but before he was sworn in and had posted his bond of office. Until the latter two acts were performed, he was not entitled to the office, and he had no office from which to resign.¹¹⁵

The “will of the voters” presented several problems to the Court, starting with who was eligible to vote. Suffrage was granted to white male citizens of the United States and white male citizens of Mexico who decided to become United States citizens under provisions of the treaty ending the war between the two countries. Each white male had to be at least twenty-one years of age and a resident of the state six months prior to the election, and thirty days in the county or district in which “he claims his vote.”¹¹⁶ The term “month” as used in the Constitution referred to a calendar month and not a lunar month,¹¹⁷ and an attempt by a woman, Ellen R. Van Valdenburg, to vote, was struck down in 1872, even though she claimed that she was entitled to do so under provisions of the Fourteenth Amendment to the United States Constitution.¹¹⁸

One of the provisions of the article granting suffrage in the state said, “For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States.”¹¹⁹ The coming of the Civil War period gave the Supreme Court the opportunity to interpret this provision with a number of soldiers stationed in California. Of course, soldiers who were also residents could vote.

The *mere fact* that the men voting were soldiers of the United States army, did not disqualify them from voting. But they were not entitled to vote unless citizens of this State and of the county for the required period before the election; and a mere residence, or sojourn in the county in this capacity, does not make them citizens, or prove them to be such. The rule, as fixed by the Constitution is, that the fact of such sojourn or residence as soldiers, neither

¹¹⁵ *Miller v. Board of Supervisors of Sacramento County* (1864), 25 Cal. 93.

¹¹⁶ Cal. Const. (1849), art. II, § 1.

¹¹⁷ *Sprague v. Norway* (1866), 31 Cal. 173.

¹¹⁸ *Van Valkenburg v. Brown* (1872), 43 Cal. 43.

¹¹⁹ Cal. Const. (1849), art. II, § 4.

creates nor destroys citizenship — leaving the political *status* of the soldier where it was before.¹²⁰

A member of the military could change his legal residence, but the change could not be due to his service.¹²¹

In 1863 the Legislature enacted a statute providing that California voters in military service outside their counties could vote, and have their votes returned to the secretary of state to be counted in the appropriate counties.¹²² In *Bourland v. Hildreth*, the votes cast by these soldiers were not allowed, the Court saying that the phrase “in which he claims his vote” in the second section of the second article of the state constitution meant that the votes had to have been physically cast in the district of residence. In dissent Chief Justice Sanderson doubted that the Constitution did set the site for voting, but in any event there was enough doubt as to this point so that there was not the clear repugnancy between the statute and the Constitution needed to declare the act unconstitutional.¹²³

Undaunted by this decision, the Legislature passed the same act again in 1864.¹²⁴ In the words of Bancroft, “The legislature asserted its superiority to the courts by renewing the act in 1864, and volunteer votes were not again questioned.”¹²⁵ Theodore Hittell stated things differently, saying, “several new acts were passed for the ‘soldier’s vote’ during the continuance of the war, which would probably have been declared valid. As, however, the war closed in 1865, before an election under them was to be held, they became inoperative.”¹²⁶

Evidently neither historian was acquainted with the 1866 case of *Day v. Jones*, which, in reviewing the September 1865 election in Butte County, voided soldiers’ votes in circumstances much the same as in *Bourland v. Hildreth* and did so on the authority of that case.¹²⁷ The only case to reach the Supreme Court dealing with a soldier trying to gain the residence

¹²⁰ Orman v. Riley (1860), 15 Cal. 49.

¹²¹ People v. Holden (1865), 28 Cal. 123.

¹²² Cal. Stats. (1863), chap. 355.

¹²³ Bourland v. Hildreth, *supra*.

¹²⁴ Cal. Stats. (1863–64), chap. 383.

¹²⁵ Hubert Howe Bancroft, *History of California*, vol. VII (San Francisco: The History Company, 1890), 295.

¹²⁶ Hittell, *History of California*, vol. IV, 340.

¹²⁷ Day v. Jones (1866), 31 Cal. 26.

requirement through military service was heard in 1869, and his claim to residence was not allowed.¹²⁸

The elective process created other problems that needed solutions by the Court. In *Minor v. Kidder*, the Court upheld an 1850 statute providing for contesting county elections,¹²⁹ saying that in order to contest an election the contestant need only allege that he was a qualified elector of the county.¹³⁰ The Court commented:

It is the wholesome purpose of the statute to invite inquiry into the conduct of popular elections. Its aim is to secure that fair expression of the popular will in the selection of public officers, without which we can scarcely hope to maintain the integrity of the political system under which we live. With this view it has provided the means of contesting the claims of persons asserting themselves to have been chosen to office by the people. It has not authorized every citizen or member of the body politic at large to institute proceedings for that purpose, but has limited the authority in that respect to those who are themselves electors.¹³¹

In *People v. Holden* the suit to contest the election was not brought by an elector, but by the state's attorney general, in the name of the people. The Court upheld the action, saying that an elector's right to contest an election could not

impair the right of the people, in their sovereign capacity, to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise, and to remove them therefrom. . . . The two remedies are distinct, the one belonging to the elector in his individual capacity of a power granted, and the other to the people in the right of their sovereignty. Title to office comes from the will of the people as expressed through the ballot-box, and they have a prerogative to enforce their will when it has been so expressed."¹³²

¹²⁸ *Devlin v. Anderson* (1869), 38 Cal. 92.

¹²⁹ Cal. Stats. (1850), chap. 38, § 56.

¹³⁰ *Minor v. Kidder* (1872), 43 Cal. 229.

¹³¹ *Ibid.*, 236–37.

¹³² *People v. Holden*, 129.

For an election to be considered valid the necessary steps prescribed by law had to be taken, and an irregularity in the election procedure could invalidate an election. The Supreme Court discussed irregularities in the election procedure in *Knowles v. Yeates*, the same case that upheld the appeal of a contested election to the Supreme Court. The inspector and judges of the election held the election at a point distant from the one specified by the board of supervisors, and this was enough, in the Courts' view, to invalidate the election. Chief Justice John Currey said the Court was aware that

[c]ourts have been very indulgent respecting the omissions, inadvertencies and mistakes of officers of elections, lest by exacting of them a technical compliance with the requirements of the law the citizen might be deprived of a sacred right. We are not disposed to be less indulgent . . . but we deem it of the highest importance to the protection of the elective franchise that the law should be complied with in substance, and that those interested with the discharge of the duties pertaining to elections should be required so to perform them as to preserve the ballot box pure. Others besides those who may lose their votes by the malconduct of officers of elections are concerned; and while seeking upon just principles to save to the elector his vote offered and given in good faith, we are not to forget that he himself, as well as all honest people, are vitally interested in the protection of the right of suffrage against the fraudulent machinations and devices of men whose partisan moral code bears upon its title page the infamous maxim, "All is fair in politics."¹³³

At its July 1867 term, the Supreme Court voided a Petaluma municipal election because the board of supervisors of the county failed to create election districts as required under the Registry Act.¹³⁴ Justice Lorenzo Sawyer rebuked the Sonoma Board of Supervisors by saying that, "To sustain this election in the face of the prohibitory provisions of the statute would be to hold that a Board of Supervisors, by neglect or willful and contumacious refusal to discharge the duties imposed by law on that body, may wholly nullify an Act of the Legislature."¹³⁵ Under provisions of the

¹³³ *Knowles v. Yeates*, 93.

¹³⁴ Cal. Stats. (1865–66), chap. 265, § 13.

¹³⁵ *People v. Laine* (1867), 33 Cal. 60.

same act the Court also voided certain votes in Tuolumne County because the voters' names were not on the poll list of the election precinct.¹³⁶ In 1877 the Court voided part of a county election in Tuolumne because the board of supervisors did not publish an ordinance it passed consolidating two county offices,¹³⁷ and invalidated a special election to fill the office of state controller after the incumbent died in office because the governor failed to issue a proclamation that the election was to be held.¹³⁸

As the proper forms and procedures had to be followed lest an election be declared void, so, too, those seeking elective office had to meet constitutional and statutory requirements. In *Walther v. Rabolt* the Court held that an alien could not hold an office in the state; this was the rule in the common law and it had not been modified in California.¹³⁹

Another bar to eligibility to hold public office occurred when such election meant the winner would hold two lucrative offices. The constitutional provisions provided that no member of either house of the legislature "shall, during the term for which he shall have been elected, be appointed to any civil office of profit, under this State, which shall have been created, or the emoluments of which shall have been increased, during such term, except such office as may be filled by elections by the people."¹⁴⁰

The next section made anyone holding a lucrative office under the United States or any other power, except unpaid militia officers or local officers and postmasters earning less than \$500 annually, ineligible to hold any civil office of profit under the state.¹⁴¹ In accordance with these constitutional provisions the Supreme Court held that a postmaster with a salary of \$1,400 per annum could not be elected sheriff of Siskiyou County even though he claimed that only \$400 was salary, the rest being for expenses.¹⁴² The Court said that he was paid a certain sum and he could dispose of it as he wished. The Court said, too, that the constitutional provisions meant that the defendant was not eligible to run, and not that he could be elected

¹³⁶ *Webster v. Byrnes* (1867), 34 Cal. 273.

¹³⁷ *People v. Bailhache* (1877), 52 Cal. 310.

¹³⁸ *Kenfield v. Irwin* (1877), 52 Cal. 164.

¹³⁹ *Walther v. Rabolt* (1866), 30 Cal. 185.

¹⁴⁰ Cal. Const. (1849), art. IV, § 20.

¹⁴¹ *Ibid.*, § 21.

¹⁴² *Searcy v. Grow* (1860), 15 Cal. 117.

and then resign his federal post. In *People v. Turner*, the defendant was elected as a district judge while allegedly a United States customs inspector, but the Court said that since the appointment had not yet been approved by the Secretary of the Treasury, he did not hold a lucrative position within the meaning of the provision in the Constitution.¹⁴³

Another method of filling a vacancy in an office was by appointment by the governor; generally, such a situation arose when an incumbent resigned or passed away. But the governor, too, had to follow the proper steps in making appointments, which steps included approval by the Senate if so required by the laws of the state,¹⁴⁴ and once the governor made an appointment, and the commission of office was delivered, the governor could not withdraw the appointment.¹⁴⁵

The question of what constituted a term in office and consequently when there was a vacancy that could be filled either by appointment or election was also brought before the Court.

Both an election and an appointment were involved in *Brooks v. Melony*, decided at the January 1860 term.¹⁴⁶ After the 1857 general election James W. Mandeville, controller-elect, refused his office, causing the new governor, John B. Weller, to declare the office vacant the following April, and appoint the defendant to fill the vacancy. That September the defendant was elected to the office in an election at which no other state officer was elected. The term of office was normally two years, and he refused to surrender his office to S. H. Brooks after the latter's election at the 1859 general election.

The Court held that Brooks was entitled to the office because the defendant was only to serve until the next general election when a complete set of state officers would be elected under a constitutional provision that state officers were to be elected at the same time and place as the governor.¹⁴⁷ Presumably, if there had not been such a constitutional provision, Melony would have served two full years from his own election, without his term coinciding with those of the other state officers, and without reference to

¹⁴³ *People v. Turner* (1862), 20 Cal. 142.

¹⁴⁴ *People v. Bissell* (1874), 49 Cal. 407.

¹⁴⁵ *Wetherbee v. Cazneau* (1862), 20 Cal. 503.

¹⁴⁶ *Brooks v. Melony*, (1860), 15 Cal. 58.

¹⁴⁷ Cal. Const. (1849), art. V, § 20.

when Mandeville's term would have ended. Edward Norton, when a district judge, was in a situation similar to Melony's, but without a limiting constitutional provision. He was appointed to fill a vacancy until the next general election, at which time he was elected to the court. The Supreme Court said he had been elected for a full term of six years irrespective of when his predecessor's term would have ended.¹⁴⁸ Being elected to a full term did not necessarily mean serving it because the Legislature could shorten the term under certain circumstances,¹⁴⁹ as it did in 1863 by enacting a statute regularizing the elections and term of all officers of every county.¹⁵⁰ But the Legislature could also extend a term for the incumbent so long as the term did not last more than four years.¹⁵¹

Most positions were to be held until a successor qualified, which generally was at the end of the term, but the incumbent was sometimes faced with the situation of not having a successor qualify. In *Jacobs v. Murray*, the successor was not selected until two months after the expiration of the incumbent's term, and the latter claimed the appointment was void. He was wrong; after his term expired, he was a mere *locum tenens*, serving until his successor was selected, even though such selection was late in this case.¹⁵² That an incumbent could hold over past his term even applied to the constitutional provision that never should "the duration of any office not fixed by this Constitution ever exceed four years."¹⁵³ The holdover period was not to be considered an extension of his term, but an instance where the public necessities required that the office not be vacant.¹⁵⁴

INTERPRETING OTHER LAWS

At its first session, the Legislature passed a law requiring the captain of each ship arriving in San Francisco to give the local board of health a list of all the passengers and crew, and the owners or consignees to give a bond

¹⁴⁸ *Brodie v. Campbell* (1860), 17 Cal. 11.

¹⁴⁹ *People v. Banvard* (1865), 27 Cal. 470.

¹⁵⁰ Cal. Stats. (1863), chap. 292, § 11.

¹⁵¹ *Jacobs v. Murray* (1860), 15 Cal. 221.

¹⁵² *Christy v. B. S. Sacramento County*. (1870), 39 Cal. 3

¹⁵³ Cal. Const. (1849), art. XI, § 7.

¹⁵⁴ *People v. Stratton* (1865), 28 Cal. 382.

for each person in the report.¹⁵⁵ In *Board of Health v. Pacific Mail Steamship Co.*, the defendants were sued to collect on a penalty for not posting the bond. However, the statute listed no penalty for noncompliance. As a result, the Court ruled that it was “a law without a sanction and, consequently, wholly inoperative.”¹⁵⁶ This case was the first in a series that together provided a framework within which future legislatures could enact laws and the state could operate.

The Court was also called upon to decide where the Legislature would meet. The Constitution provided that the first session of the Legislature would meet at San Jose, which would become the capital until changed by a two-thirds vote of both houses.¹⁵⁷ In *People v. Bigler*, the Court interpreted this clause to mean that only the first removal (to Vallejo) needed a two-thirds vote; any subsequent move needed a majority vote,¹⁵⁸ thus upholding the 1854 act of the Legislature making Sacramento the capital.¹⁵⁹

In *People v. Coleman*,¹⁶⁰ the Court was called upon to determine the constitutionality of sections of the Revenue Act of 1853, placing a tax on certain occupations.¹⁶¹ The defendants, all San Francisco businessmen, claimed that these sections were repugnant to the Constitution of California, one provision of which said, “Taxation shall be equal and uniform throughout the State.”¹⁶² The Court held that this section of the Constitution did not apply to all types of taxes, but only to direct taxation on property; it did not require that everyone should be taxed alike.

In 1856 the Court again held for the power of the Legislature in *Boss v. Whitman*, saying, “the power of the Legislature is supreme, except where it is expressly restricted.”¹⁶³ In this case the Legislature appointed a board of examiners to audit certain accounts, an act formerly performed by the comptroller, but not prescribed by the Constitution. There was no restriction on the Legislature here, since, “[w]here any of the duties or powers of

¹⁵⁵ Cal. Stats. (1850), chap. 65, §§ 10, 11, 12.

¹⁵⁶ *Board of Health v. Pacific Mail Steamship Co.* (1850), 1 Cal. 197.

¹⁵⁷ Cal. Const. (1849), art. XI, § 1.

¹⁵⁸ *People v. Bigler* (1855), 5 Cal. 23.

¹⁵⁹ Cal. Stats. (1854), chap. 9, § 1.

¹⁶⁰ *People v. Coleman* (1854), 4 Cal. 46.

¹⁶¹ Cal. Stats. (1853), chap. 167, arts. II, III, IV, VI.

¹⁶² Cal. Const. (1849), art. XI, § 13.

¹⁶³ *Boss v. Whitman* (1856), 6 Cal. 365.

one of the departments of the State Government are not disposed of, or distributed to particular officers of that department, such powers or duties are left to the disposal of the Legislature.”¹⁶⁴

One express restriction on the Legislature was the constitutional provision that state indebtedness could not exceed \$300,000, with certain exceptions.¹⁶⁵ This caused an 1855 law for building a wagon road to the Sierra Nevada Mountains¹⁶⁶ to be declared unconstitutional in *People v. Johnson* as the state’s debt already exceeded the constitutional limit.¹⁶⁷ This case was affirmed after a lengthy review in *Nougues v. Douglass*,¹⁶⁸ which voided an act of the Legislature providing for the erection of a state capitol.¹⁶⁹ The Legislature had passed an act in 1856 to erect a state capitol at a cost not to exceed \$300,000, and also authorizing that the cost be borne through the sale of state bonds redeemable in thirty years,¹⁷⁰ but the Court declared that the state was already indebted to its constitutional limit. In 1860 the Legislature tried again, but this time provided that the debt be incurred in stages. Although the entire cost was not to exceed \$500,000, only \$100,000 could be contracted for at that time.¹⁷¹ This law was declared constitutional because it did not authorize a debt for the entire \$500,000. The balance over \$100,000 would not become part of the state’s debt until contracted for.¹⁷² The reasoning of the Court was similar to that which it had already used in *State v. McCauley*, one of several cases dealing with the operation of the state prison by private individuals.¹⁷³ At issue there was an 1856 act to pay for the operation of the prison.¹⁷⁴ Although the total sum involved was \$600,000, the act was upheld because no debt on the part of the state was actually incurred until the services were performed.

¹⁶⁴ Ibid., 364.

¹⁶⁵ Cal. Const. (1849), art. VIII.

¹⁶⁶ Cal. Stats. (1855), chap. 145.

¹⁶⁷ *People v. Johnson* (1856), 6 Cal. 499.

¹⁶⁸ *Nougues v. Douglass* (1857), 7 Cal. 65.

¹⁶⁹ Cal. Stats. (1856), chap. 95.

¹⁷⁰ Cal. Stats. (1856), chap. 95.

¹⁷¹ Cal. Stats. (1860), chap. 161.

¹⁷² *Koppikus v. State Capitol Commissioners* (1860), 16 Cal. 248.

¹⁷³ *State v. McCauley* (1860), 15 Cal. 429.

¹⁷⁴ Cal. Stats. (1856), chap. 39.

Another express limitation was found in the first section of the first article of the Constitution, which stated that among the rights of men were those of “acquiring, possessing, and protecting property.”¹⁷⁵ This provision controlled laws of the Legislature that tended to impair a contract, and arose in still another case dealing with the state prison, *McCauley v. Brooks*.¹⁷⁶ Under the statute declared constitutional by *State v. McCauley*, above, the state entered into a five-year contract with James M. Estill for the operation of the state prison. In 1856 and 1858 the Legislature passed acts creating a board of examiners to examine demands before payments could be made to Estill or his assignee,¹⁷⁷ and the next year passed another act condemning and appropriating the interest of “certain persons” in the prison grounds and repealing the act under which the contract was made.¹⁷⁸ The Court declared that the 1856 and 1858 acts creating the board of examiners attempted to impair the contract with Estill and were thus invalid. “The imposition of any conditions not provided by the terms of the original contract,” the Court declared, “is not within the constitutional power of the Legislature. Any law attempting to make such imposition is invalid, as impairing the obligation of the contract.”¹⁷⁹ The 1859 act did repeal the original statute, but could not affect any contracts made on the basis of the repealed law.

The contract was a thing consummated — and after its execution did not depend for its further existence upon the continuation of the act which originally gave it life. The contract remained, after the extinction by repeal of its parent act, possessed of the same operative and binding force as previously. The rights of the parties and their respective obligations became fixed by that instrument beyond the reach of legislative power.¹⁸⁰

Basic rights in respect to property and contracts were also protected by the Supreme Court. In 1856 a law was passed to allow a defendant in

¹⁷⁵ Cal. Const. (1849), art. I, § 1.

¹⁷⁶ *McCauley v. Brooks* (1860), 16 Cal. 11.

¹⁷⁷ Cal. Stats. (1856), chap. 85; Cal. Stats. (1858) chap. 257.

¹⁷⁸ Cal. Stats. (1859), chap. 330.

¹⁷⁹ *McCauley v. Brooks*, 29–30.

¹⁸⁰ *Ibid.*, 33.

an action for ejectment to set up the value of any improvements made by him.¹⁸¹ The effect of this law was to discourage lawful owners of land from ejecting trespassers for fear of having to pay more for the improvements than the property was worth. One historian (and lawyer) felt the law was a bid for the support of squatters in the state.¹⁸² In *Billings v. Hall*,¹⁸³ the Court declared the law unconstitutional as being at variance with the constitutional provision guaranteeing the right of “acquiring, possessing, and protecting property.”¹⁸⁴ In reaching this decision, Chief Justice Murray said that the law had the effect of divesting vested rights, and if such a law were upheld, then a law divesting the right entirely might be maintained. This was a danger “upon the shallow pretext of policy, and under the false assumption of legislative omnipotence.”¹⁸⁵

Contract rights were upheld in *Robinson v. Magee*,¹⁸⁶ where an act designed to arrange the settlement of outstanding county warrants as a result of the organization of Amador County from Calaveras County,¹⁸⁷ was declared unconstitutional because it refused to honor warrants not registered with the county auditor before a certain date. This would have been an impairment of the obligation of contracts which was prohibited by the protection of property clause, above, although the state constitution did not make as clear a statement on this subject as did the federal constitution.¹⁸⁸

Before a law could ever reach the Court for review, it had to go into effect; this required the signature of the governor. The Court, in 1851, had to determine at which point an act became law; the law in question had been passed to repeal an election for judge of San Francisco County on the day the election was held, and to allow the governor to appoint the judge.¹⁸⁹

The governor signed the bill that day and appointed Alexander Campbell. Both he and the elected judge, the defendant here, claimed the office,

¹⁸¹ Cal. Stats. (1856), chap. 47, § 4.

¹⁸² Theodore H. Hittell, *History of California*, vol. III (4 vols., N. J. Stone & Company, 1885–97), 685.

¹⁸³ *Billings v. Hall* (1857), 7 Cal. 1.

¹⁸⁴ Cal. Const. (1849), art. I, § 1.

¹⁸⁵ *Billings v. Hall*, 16.

¹⁸⁶ *Robinson v. Magee* (1858), 9 Cal. 81.

¹⁸⁷ Cal. Stats. (1855), chap. 138, § 2.

¹⁸⁸ U.S. Const., art. I, § 10.

¹⁸⁹ This law is not found in the volume of statutes, Cal. Stats. (1850).

and the decision fell to the Supreme Court in the case of *People v. Clark*.¹⁹⁰ The Court held that the bill became law the very moment it was signed by the governor. In this case, if the signing took place before the election, then the election was void. If after, then the repeal by the Legislature could not deprive the defendant of his office. Until the time question could be solved, the presumption was to be in favor of the right of the people to elect.

In most instances the validity of a law was determined by its provisions and whether they were in conflict with the Constitution, but a law could be deemed invalid because its passage could have been irregular in some way, such as some problem with the governor's approval, which was the point in question in *Harpending v. Haight*.¹⁹¹ Governor Henry H. Haight returned a bill with a veto message via his secretary to the Senate, but the secretary arrived one-half hour after adjournment, and this was the last day that the bill could be vetoed. The next day Haight attempted to return the bill, saying he had been prevented from doing so only by the Senate's adjournment. The Court said that there had not been a legal return to the Senate, the house in which the bill originated, because by not returning the bill within the constitutional period the Senate was unable to reconsider the bill or examine the objections of the governor. There was some testimony to the effect that the Senate adjourned early so as to prevent the return, but the motives of the Legislature were not in question.

The bill itself proposed to extend Montgomery Street and was backed most strongly by the speculator Asbury Harpending. Harpending later wrote that his attorney, Creed Haymond, suggested that if the bill was not returned in time it would become law, and Harpending arranged for the Senate to adjourn early and prepared several people to intercept Governor Haight's secretary on the way to the Senate chamber and engage him in conversation so as to detain him.¹⁹²

In another case involving an attempted veto of a statute, Governor Haight's veto was upheld on the point that the day a bill is presented to

¹⁹⁰ *People v. Clark* (1851), 1 Cal. 406.

¹⁹¹ *Harpending v. Haight* (1870), 39 Cal. 189.

¹⁹² Asbury Harpending, *The Great Diamond Hoax . . .*, edited by James H. Wilkins (San Francisco: The James H. Barry Co., 1913), 154-56.

the governor was not to be counted as one of the ten days allotted to the governor to sign or reject a bill.¹⁹³

Taken on balance, the Supreme Court tended to interpret the Constitution rather strictly, particularly when the powers of the various courts were under consideration. By so doing, the Court was attempting to assert the independence of the judiciary, and perhaps thereby remove some of the political stigma attached to that branch. By rendering a strict judicial interpretation to its own constitutional position, the Court was also setting a precedent for the strict interpretation of the functions of the executive and legislative branches as well.

This latter was particularly important because of the broad powers given to the Legislature by the framers of the Constitution. The Court, although acknowledging these broad powers, by holding its own branch to constitutional limits, it could insist that legislative powers were not unlimited, even if the limitations were only implied. In *Love v. Baehr*, the Court, in discussing the duties of state officers, said that while the Constitution was both silent in respect to the duties and contained no express limitation on the Legislature in imposing duties, “yet a limitation on this power is necessarily implied, from the nature of these offices.”¹⁹⁴

The relationship of the legislative and judicial branches was discussed at length by Chief Justice Stephen J. Field in *McCauley v. Brooks*. He said that the branches of government are independent of each other only in a restricted sense.

There is no such thing as absolute independence. Where discretion is vested in terms, or necessarily implied from the nature of the duties to be performed, they are independent of each other, but in no other case. Where discretion exists, the power of each is absolute, but there is no discretion where rights have vested under the Constitution, or by existing laws. The Legislature can pass such laws as it may judge expedient, subject, only to the prohibitions of the Constitution. If it oversteps those limits . . . the judiciary will set aside its legislation and protect the rights it has assailed. Within

¹⁹³ *Iron Mountain Co., v. Haight* (1870), 39 Cal. 540.

¹⁹⁴ *Love v. Baehr* (1864), 47 Cal. 364.

certain limits it is independent; when it passes over those limits, its power for good or evil is gone.

The duty of the judiciary is to pronounce upon the validity of the laws passed by the Legislature, to construe their language and enforce the rights acquired hereunder. Its judgment in those matters can only be controlled by its intelligence and conscience. From the nature of its duties, its action must be free from coercion.¹⁹⁵

But the judiciary was not itself free of the Legislature's control since the latter branch controlled such things as where the Legislature should meet and the procedure to be used in criminal and civil cases. The Constitution, then, did not make any department of the government above the others or independent of them. It simply provided that the departments be separate, and as the prime interpreter of the Constitution, the Supreme Court was the determiner of the relative position of each branch.

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¹⁹⁵ McCauley v. Brooks, 39.

Chapter 7

STATE AND LOCAL AUTHORITY

The constitutional article entitled “Miscellaneous Provisions” included the provision, “The Legislature shall establish a system of county and town governments, which shall be as nearly uniform as practicable, throughout the State.”¹ The power thus granted the Legislature over the various levels of local government coupled with the power the Legislature also had over the affairs of the state saw a veritable multitude of statutory enactments dealing with the authority and powers apportioned to each level of government.

Many enactments came before the courts of the state, and the Supreme Court, in deciding a goodly number of them, made determinations about the powers and limitations of governments in general, of each level of government alone, and the relationship between the state and the various local governments. These decisions provided guidelines by which the state and each of the subdivisions were able to exercise their governmental functions.

THE STATE

One attribute of power of all governments in the United States is the right to take property for its own use when necessary. This right of eminent

¹ Cal. Const. (1849), art. XI, § 4.

domain, of course, is not unconditional, as seen in that provision of the United States Constitution that states, “nor shall private property be taken for public use, without just compensation.”² The wording of the California Constitution duplicated that of the federal,³ and the Supreme Court uniformly held that statutes providing for the condemnation of land had to be strictly followed. This power “must be exercised precisely as directed, and there can be no departure from the mode prescribed without vitiating the entire proceedings.”⁴ The fact that the United States was the party to receive the land made no difference in this regard, either.⁵

A principal requirement was that compensation must be paid *before* property could be taken for public use, as determined by the Court in *Sacramento Valley Railroad v. Moffatt*.⁶ This view was amplified in *McCauley v. Weller*,⁷ where a seizure of San Quentin Prison by the governor from the prison operator was voided even though a law was later passed allowing compensation.⁸ So accepted was the practice of allowing private concerns to be condemned for public uses that one district judge allowed the San Mateo Waterworks to take possession of and use the land while the proceedings were still pending. Nevertheless, the Court ruled that this went too far because it amounted to the taking of private property without just compensation.⁹

While the statutes had to be adhered to, the Court allowed a broad interpretation to the term “public use,” upholding statutes that provided for the condemnation of land for purposes of private roads going from a main road to the residence or farm of an individual,¹⁰ and for water companies to use in bringing water to populous areas.¹¹ Such condemnations were considered to be for public uses, but in *Consolidated Channel Co. v.*

² U.S. Const., Amend. V.

³ Cal. Const. (1849), art. I, § 8.

⁴ *Stanford v. Worn* (1865), 27 Cal. 171.

⁵ *Gilmer v. Lime Point* (1861), 19 Cal. 47.

⁶ *Sacramento Valley Railroad v. Moffatt* (1857), 7 Cal. 577.

⁷ *McCauley v. Weller* (1859), 12 Cal. 500.

⁸ Cal. Stats. (1858), chap. 43, § 1.

⁹ *San Mateo Waterworks v. Sharpstein* (1875), 50 Cal. 284.

¹⁰ *Sherman v. Buick* (1867), 32 Cal. 241.

¹¹ *S. F. & A. W. Co. v. A. W. Co.* (1869), 36 Cal. 639.

Central Pacific R. R.,¹² the Court refused to allow the condemnation of a portion of the defendant's land for the construction of a flume to carry off the plaintiff's tailings, holding that the flume was only for the plaintiff's benefit, and was not a public use within the meaning of the Constitution, even though the Code of Civil Procedure listed flumes as public uses.¹³ The Court used similar reasoning in *People v. Pittsburgh R. R. Co.*, where the defendant, claiming that it would carry both freight and passengers, was given the right to condemn private land for its railroad. Since its construction, though, the railroad had been used exclusively to carry coal from the Pittsburgh Coal Company's mines to the Sacramento River, and the state brought suit to annul the defendant's franchise.¹⁴ The Court said that the company's claim to carry both freight and passengers was

a mere false pretense; that the use for which these lands were taken was, in fact, a mere private use, and one to which the eminent domain is of course inapplicable. The proceedings in condemnation amounted to an imposition upon the Court before which they were had.

It is certainly competent for the State, upon discovering the misuse of its authority, whereby the private property of one of its citizens has been wrongfully taken for the private use of another, to interpose by its Attorney-General to correct the abuse.¹⁵

Not only were statutes dealing with eminent domain to be strictly construed, but any statute divesting a person of his property had to be so treated, even a statute dealing with animals found to be estrays.¹⁶ Said the Court: "a party claiming to have acquired a right and title to property by virtue of its provisions as against the original owner, must affirmatively allege and prove that the mode prescribed by the statute for the acquisition of such title has, in every particular, been strictly followed."¹⁷

The state's taxing power was in part limited by the revenue act which said that mining claims could not be taxed,¹⁸ although the Court held in

¹² Consolidated Channel Co. v. Central Pacific R. R. (1876), 51 Cal. 269.

¹³ Cal. Code Civ. Proc. (1872), § 1238, subdiv. 4, 5.

¹⁴ *People v. Pittsburgh R. R. Co.* (1879), 53 Cal. 694.

¹⁵ *Ibid.*, 697.

¹⁶ Cal. Stats. (1863), chap. 425.

¹⁷ *Trumpler v. Bemerly* (1870), 39 Cal. 490–91.

¹⁸ Cal. Stats. (1857), chap. 261, § 2.

State of California v. Moore that any improvements made on a claim could be taxed.¹⁹ At the same time, the Court said that when a claim was sold, the purchase price could not be taxed, because such taxation would really be an indirect tax on the claim itself.

Since California was blessed with numerous harbors and many miles of inland waterways, the Legislature attempted to regulate the use of the harbors and waters of the state. At its first session the Legislature passed an act providing for attachments against ships navigating the waters of the state.²⁰

An attachment was attempted against the *Sea Witch*, a ship in San Francisco harbor normally engaged in trade between China and New York. The Court in *Souter v. Sea Witch* said that since the only time this ship navigated in state waters was in entering San Francisco harbor, she was not within the class of ships encompassed by the act.²¹ But a ship used to carry freight between San Francisco and Sacramento, even though it was built in New York, and its owners resided in New York, was liable to taxation by the State of California. If not liable, the effect would be that nonresident foreigners shall receive the protection of the state in the enjoyment of property, and in the profitable pursuits of commerce and traffic, free from any of the burdens of government; and that these shall be borne exclusively by the resident citizens of the state, who enjoy no greater benefits, and receive no higher protection.²² Such a ship was also considered to be “plying coastwise,” and thus liable to harbor dues in San Francisco.²³

Control over the waters extended to the erection of improvements in the water as well as to ships. In *Gunter v. Geary*, the plaintiffs had built a wharf which extended into the water even at low tide. The wharf could be considered a public nuisance if it obstructed anyone’s use of the harbor, since “all that part of a bay or river below low water at low tide, is a public highway, common to all citizens.”²⁴ The city of San Francisco had the power to abate such a nuisance under authority of the Legislature because “[t]he absolute right of a state to control, regulate, and improve the navigable

¹⁹ *State of California v. Moore* (1859), 12 Cal. 56.

²⁰ Cal. Stats. (1850), chap. 75, § 5.

²¹ *Souter v. The Sea Witch* (1850), 1 Cal. 162.

²² *Minturn v. Hays* (1852), 2 Cal. 592.

²³ *San Francisco v. Steam Navigation Company* (1858), 10 Cal. 504.

²⁴ *Gunter v. Geary* (1851), 1 Cal. 468.

waters within its jurisdiction, as an attribute of sovereignty, cannot be in any matter disputed.”²⁵

In 1862 the Legislature passed an act to provide for the straightening of the channel of the American River wherever necessary to protect the city of Sacramento from being flooded.²⁶ As a result of this act, the American River was made to run into the Sacramento River at a point farther north, leaving the land belonging to the plaintiffs in *Green v. Swift* liable to be damaged when spring torrents were heavy.²⁷ They sued for damages done to their improvements, but were unable to collect from either the contractors or the contracting agency. The Court said first, “The work which was directed by the statute was, in itself, distinctively a work of public character and within the general police power of the State to perform.”²⁸ The contractors used proper care and skill in their work, and could not be held liable for an error of judgment, and the Court also denied a claim by the plaintiffs that the damage could also be considered a taking of that property for public use.

The general “police power” referred to by the Court in *Green v. Swift* has been defined as “The power vested in the legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.”²⁹ From this passage it seems clear that the key to the acceptability of various acts dealing with the state’s police powers was the constitutionality of such acts in light of both the state and federal constitutions. The federal constitution was invoked against the state in *State v. S. S. Constitution*,³⁰ but the Sunday blue law was held to be a legitimate function of the state’s police powers in *Ex parte Andrews*.³¹

The 1868 Legislature passed a law making an eight-hour work day the maximum on any public project whether on the state or local level,³² and

²⁵ Ibid., 469.

²⁶ Cal. Stats. (1862), chap. 158.

²⁷ *Green v. Swift* (1874), 47 Cal. 536.

²⁸ Ibid., 539.

²⁹ Henry C. Black, *Black’s Law Dictionary*, edited by the Publisher’s Editorial Staff (4th ed.; St. Paul: West Publishing Company, 1951), 1317.

³⁰ *Supra*, 95–96.

³¹ *Supra*, 85–86.

³² Cal. Stats. (1867–68), chap. 70.

the Court did not question its constitutionality in *Drew v. Smith*.³³ In *Ex parte Shrader*, the petitioner questioned an order of the San Francisco Board of Supervisors prohibiting the keeping of a slaughter house within certain limits, in violation of which he was convicted.³⁴ Oscar L. Shafter, speaking for the Court, said the real question was the constitutional authority of the Legislature to pass the act under which the Board of Supervisors acted. That act, passed April 25, 1863, authorized the San Francisco officials to make all necessary health regulations,³⁵ and was upheld as being part of the Legislature's power to repress what is harmful to the public good, with *Ex parte Andrews* cited as authority.

Another important aspect of this case was that it recognized the power of the state to authorize local governments to pass acts that it could pass and enforce itself, including "police power" ordinances, such as a Sacramento ordinance "to prohibit noisy amusements and to prevent immorality" which was challenged in *Ex parte Smith and Keating*.³⁶ The petitioners, who were convicted under this ordinance, claimed it violated their rights under both the state and federal constitutions. The Court denied this allegation, saying that laws intended to regulate the enjoyment of natural rights of persons did not impair, but fostered and promoted those rights; to provide such laws was the essential purpose and object of government. The Court concluded by giving a succinct summary of the powers of the state: "In ascertaining what is right and providing for its protection, and what is wrong and providing for its prevention, lies the whole duty of the legislature."³⁷

Continuing in a like manner, the Court upheld San Francisco ordinances prohibiting the feeding of "still slops" to milk cows,³⁸ and barring the utterance of profane language.³⁹ Both ordinances were enacted under authority of the act passed upon in *Ex parte Shrader*, and in both instances the Court held that if the local legislative authority felt that the prohibited

³³ *Drew v. Smith* (1869), 38 Cal. 325.

³⁴ *Ex parte Shrader* (1867), 33 Cal. 279.

³⁵ Cal. Stats. (1863), chap. 352, 21.

³⁶ *Ex parte Smith and Keating* (1869), 38 Cal. 702.

³⁷ *Ibid.*, 712.

³⁸ *Johnson v. Simonton* (1872), 43 Cal. 242.

³⁹ *Ex Barte Delaney* (1872), 43 Cal. 478.

practices were harmful to the health and morals of the citizenry, then such decision would be accepted without question by the Court.

A more complicated situation arose in *Ex parte Wall*,⁴⁰ when the Court dealt with a local liquor option law passed in 1874 to permit voters of townships to vote on the granting of licenses for retail liquor sales.⁴¹ The Court held the law to be unconstitutional because “[t]he power to make laws conferred by the Constitution on the Legislature cannot be delegated by the Legislature to the people.”⁴² This statute differed from the act of 1863 discussed above because in that instance the Legislature was giving or delegating the authority to another legislative body, not the people. “Our government is a representative republic, not a simple democracy.”⁴³ The Court also said the law was void because it did not specifically name the condition or subsequent event which would allow the law to take effect. While a statute could be conditional, the condition had to be stated.

The Legislature cannot transfer to others the responsibility of deciding what legislation is expedient and proper, with reference either to present conditions or future contingencies. To say that the legislators may deem a law to be expedient, is to suggest an abandonment of the legislative function by those to whose wisdom and patriotism the Constitution has intrusted the prerogative of determining whether a law is or is not expedient.⁴⁴

The statute authorized the suspension of a general law, which differed from a statute treating a purely local concern that needed local approval. In such an instance, said the Court in *People v. Nally*, “it is competent for the Legislature to enact that a statute affecting only a particular locality shall take effect on condition that it is approved by a vote of a majority of the people whom the Legislature shall decide are those who are interested in the question.”⁴⁵

As was true with governmental bodies generally, the state could enter into contracts, and could not escape a contract entered into by having the

⁴⁰ *Ex parte Wall* (1874), 48 Cal. 279.

⁴¹ Cal. Stats. (1873–74), chap. 300.

⁴² *Ex parte Wall*, 313.

⁴³ *Ibid.*, 314.

⁴⁴ *Ibid.*, 315.

⁴⁵ *People v. Nally* (1875), 49 Cal. 480.

Legislature cancel or change the terms of the contract, as was tried in the case of *McCauley v. Brooks*.⁴⁶ Of course a binding contract could be entered into by a state agency as well as by the state itself, but for such a contract to be binding, the state agency in question had to follow all necessary statutory provisions.⁴⁷

One of the attributes of power given to the state by the Constitution was the control of business corporations. Most often a corporation was formed by receiving a franchise from the state. As the Supreme Court stated in *People v. Selfridge*, “The right to be a corporation is in itself a franchise; and to acquire a franchise under a general law, the prescribed statutory conditions must be complied with.”⁴⁸ Failure to comply with the required conditions would result in a forfeiture, and the state would not have to sue for a court order declaring the forfeiture. The franchise reverted to the state, which could grant it again at its pleasure.⁴⁹

Once a corporation was formed by a general law, as required by the Constitution,⁵⁰ the Court, in *California State Telegraph Co. v. Alta Telegraph Co.*, said that such corporation could later be given an exclusive franchise.⁵¹ There was no constitutional language prohibiting the Legislature “from directly granting to a corporation, already in existence and created under the general laws, special privileges in the nature of a franchise, by a special act, or prohibiting a corporation from purchasing or holding such franchises, which may have been granted to others.”⁵²

This decision was overturned some eleven years later in *San Francisco v. S. V. W. W.*, when the Court held that a law affecting the rights of one corporation alone was to be considered a special law, and thus contrary to the state constitution.⁵³ As to the effects of the earlier decision, the Court said that even if property rights had grown up under the decision in that case, it was better that some inconvenience should have been submitted to, rather than such a decision should stand and a valuable provision of the Constitution be obliterated.

⁴⁶ See, in chapter 6 *supra*, “Interpreting Other Laws.”

⁴⁷ *Cowell v. Martin* (1872), 43 Cal. 605.

⁴⁸ *People v. Selfridge* (1877), 52 Cal. 333.

⁴⁹ *O. R. R. Co. v. O. B. & F. V. R. R. Co.* (1873), 45 Cal. 365

⁵⁰ Cal. Const. (1849), art. IV, § 31.

⁵¹ *California State Telegraph Co. v. Alta Telegraph Co.* (1863), 22 Cal. 398.

⁵² *Ibid.*, 425.

⁵³ *San Francisco v. Spring Valley Water Works* (1874), 48 Cal. 493.

The state also granted franchises for toll roads, bridges, and the like, but such “public grants are to be strictly construed, that nothing passes to the grantee by implication, and that the grant of a franchise is not exclusive, unless it is expressly made such by the grant itself.”⁵⁴

In *Wood v. Truckee Turnpike Co.*, the Court would not allow the defendant’s franchise to collect tolls on a road through public lands pass to the plaintiffs through an execution by the sheriff. The defendant had neither a possessory interest nor a title in the land through which the road passed. Further, being a corporation, the defendant lacked the capacity to hold lands by title unless needed by the purpose of the corporation. That the road ran over public lands made no difference since a corporation was not considered a natural person; settlers, as natural persons, had the unlimited capacity to acquire estates in land and hold them indefinitely thereafter.⁵⁵

The general trend of the Supreme Court’s decisions was to allow the state government a large amount of latitude in its activities, feeling that such had been the intent of the framers of the Constitution. The result of this trend was to consider a state law constitutional unless it was clearly (in the eyes of the justices) repugnant to the Constitution. Thus, what generally would be considered “borderline” cases were allowed to stand, and this probably went a long way toward keeping the state government strong and the cities and counties relatively weak.

THE COUNTIES

When California was first organized as a state, it was not yet divided into counties, but a provision of the Constitution directed the Legislature to do so. A uniform system of county and municipal governments was to be established, and the Legislature was also to provide for the election of boards of supervisors and prescribe their duties as well.⁵⁶ By a series of acts the Legislature implemented the constitutional directive and continued to create new counties as time went on.⁵⁷

⁵⁴ *Bartram v. Central Turnpike Co.* and *Bartram v. Ogilby* (1864), 25 Cal. 283.

⁵⁵ *Wood v. Truckee Turnpike Co.* (1864), 24 Cal. 474.

⁵⁶ Cal. Const. (1849), art. XI, §§ 4, 5.

⁵⁷ Cal. Stats. (1850), chap. 15.

The right of a county to build a bridge across a county line was upheld as a right of sovereignty in *Gilman v. County of Contra Costa*.⁵⁸ In 1852 Contra Costa County entered into a contract with one T. C. Gilman for the construction of a bridge across San Antonio Creek. The lower court held that the bridge, which crossed San Antonio Creek to the city of Oakland, was in Oakland, and that the city had jurisdiction over the bridge. The Supreme Court reversed the lower court, with Justice Heydenfeldt saying, “In such a case, I think the rule for public convenience would admit the power of either jurisdiction to have a bridge constructed, to enable the citizens of its own territory to pass beyond it.”⁵⁹

However, Gilman never actually received recompense because there was no money in the county treasury. He was given a warrant, but had no recourse at that time because the law of private contracts was not applicable where the state or county government was a party, in regard to either the mode or measure of enforcement. In 1854, however, the Legislature gave counties the right to sue and be sued in general terms,⁶⁰ and also enacted legislation the following year to fund the debts of the county.⁶¹ Gilman, choosing not to avail himself of the funding act, sued, and was awarded a judgment, the Court holding that the 1854 act applied to claims that arose prior to its passage as well as afterward.⁶² Gilman was unable to execute his judgment, even trying to execute and levy funds in the hands of the county treasurer and public buildings belonging to the county.⁶³ Having failed here, Gilman sued out an alias execution against property owned by a county resident, and an attempt was made to prevent the execution in *Emeric v. Gilman*.⁶⁴ The Court held against Gilman, with Justice Field saying:

Whoever becomes a creditor of a county, must look to its revenues alone for payment. The statute has authorized a suit against the county by which his demand may pass into judgment, but it has

⁵⁸ *Gilman v. County of Contra Costa* (1855), 5 Cal. 426.

⁵⁹ *Ibid.*, 428.

⁶⁰ Cal. Stats. (1854), chap. 122.

⁶¹ Cal. Stats. (1855), chap. 16.

⁶² *Gilman v. County of Contra Costa* (1856), 6 Cal. 676

⁶³ *Gilman v. County of Contra Costa* (1857), 8 Cal. 52.

⁶⁴ *Emeric v. Gilman* (1858), 10 Cal. 404.

given no remedy by execution. When the judgment is rendered, it becomes the duty of the supervisors to apply such funds in the treasury of the county as are not otherwise appropriated, to its payment, or if there are no funds, and they possess the requisite power to levy a tax for that purpose, and if they fail or refuse to apply the funds, or to exercise the power, he can resort to a *mandamus*. But if they have no funds, and the power to levy the tax has not been delegated to them, the Legislature must be invoked for additional Authority.⁶⁵

Gilman assigned his judgment to George F. Sharp, who could not get satisfaction either, but on March 14, 1860, the Legislature passed an act to settle the judgment at a lesser rate of interest,⁶⁶ which Sharp accepted, but then sued to recover the original amount. In *Sharp v. Contra Costa County*, decided at the Supreme Court's October 1867 term, the Court held for the county, saying that Sharp had no recourse except to take what had been offered, for

the State had the power to pay or not as she pleased, and of course to determine the time, mode and measure of payment. This she did by passing the Funding Act, and in passing it she fully vindicated her good faith, and left all claimants for whom provision was made in that Act without further claims upon her.⁶⁷

The 1860 act was *ex gratia*; neither Gilman nor Sharp could ask for anything more. As the Court said in the *Sharp* case, regarding the relationship between the state and the counties:

In this case a sovereign is one of the contracting parties; for the government of the County of Contra Costa is a portion of the State Government, and as against a sovereign there are no remedies except such as the sovereign, in the exercise of that good faith by which all Governments are presumed to be actuated, may accord. The State Government, neither in its general nor its local capacity, can be sued by her creditors or made amenable to judicial process

⁶⁵ Ibid., 410.

⁶⁶ Cal. Stats. (1860), chap. 124.

⁶⁷ *Sharp v. Contra Costa County*, 291–92.

except by her own consent. Her creditors must rely solely upon her good faith as to the time, mode, and measure of payment.⁶⁸

Another case arising from Gilman's bridge was *People v. Alameda County* in which the Court said that a county could take part in a suit as a plaintiff, in this case a petition for a writ of mandamus to compel Alameda County to pay its statutory share of the cost of the bridge.⁶⁹ Here the county was a relator, but under the 1854 act mentioned above, a county could sue in its own name.⁷⁰

The legal nature of a county was ruled upon in 1856 in *Price v. Sacramento*, where the plaintiffs sued Sacramento County to collect on a contract entered into with the county; the Board of Supervisors had previously refused to pay the plaintiffs for the performed services.⁷¹ With the 1854 act having granted the power to sue and be sued in general terms,⁷² the Court now said, "The right to sue is not limited to cases of torts, malfeasance, etc., but is given in every case of account."⁷³ The Court referred to the county as a quasi-corporation — while remaining a subdivision of the state for purposes of government, the county was given powers similar to those of a municipal corporation. In such a corporation the people of the county were represented by the board of supervisors.⁷⁴ As the Court stated in *El Dorado County v. Davison*, "The Board of Supervisors are a municipal body, having no powers except those expressly granted by the sovereign authority, or which are necessary to the powers granted in terms."⁷⁵ The practical effect was to allow a county to be sued directly in most instances, whereas the state could be sued only in certain types of cases.

Each county, like the state, possessed the right of eminent domain; for the most part the counties used this power to create new roads. The Court ruled in 1857 that when a county was forced to condemn land for a road, the title did not vest in the county until just compensation was tendered.⁷⁶

⁶⁸ Ibid., 290.

⁶⁹ *People v. Alameda County* (1864), 26 Cal. 641.

⁷⁰ *Solano County v. Neville* (1865), 27 Cal. 465.

⁷¹ *Price v. Sacramento* (1856), 6 Cal. 254.

⁷² Cal. Stats. (1854), chap. 41, § 1.

⁷³ *Price v. Sacramento*, 256.

⁷⁴ *Calaveras County v. Brockway* (1866), 30 Cal. 325.

⁷⁵ *El Dorado County v. Davison* (1866), 30 Cal. 520.

⁷⁶ *McCann v. Sierra County* (1857), 7 Cal. 121.

In 1859 the Court went further, allowing damages when Alameda County appropriated land without paying compensation, saying further that the opening of a highway on plaintiff's land was illegal and void, and that the county was guilty of a trespass.⁷⁷ Because the taking of private property was involved in these cases, the Court, in *Curran v. Shattuck*, said that boards of supervisors "must strictly pursue the statute or the proceedings will be void."⁷⁸ Under review in that case was an instance in which the plaintiff had no notice of the action of the Board of Supervisors, "And in such proceeding the person whose rights are to be affected against his will must have notice."⁷⁹ In *Grigsby v. Burtnett*, the Court said that "just compensation" was not what the county wanted to pay; if the landowner objected, the amount of the compensation would have to be adjudicated before title passed to the county, and before the county could enter and use the land.⁸⁰ The Court upheld a statute in 1870, dealing with roads in Santa Clara County,⁸¹ that said that money had to be actually set apart in the treasury before the land could be taken.⁸² Control over roads did not mean or even remotely imply that a county could convert a public highway into a toll road and grant a franchise to collect the tolls thereon.⁸³ The Legislature did pass an act for the establishment of toll roads,⁸⁴ but as with other laws dealing with franchises, no corporation could be given privileges not enjoyed by other similar corporations.⁸⁵

That all statutory provisions had to be followed in land condemnation proceedings applied to the owner of the land to be taken as well. The Court said, "Strict compliance with the requirements of the Act is necessary to accomplish a condemnation on the part of the public, and a like compliance with all the provisions relating to the assessment of damages and their recovery is essential also on the part of the landowner."⁸⁶

⁷⁷ *Johnson v. Alameda County* (1859), 14 Cal. 106.

⁷⁸ *Curran v. Shattuck* (1864), 24 Cal. 427.

⁷⁹ *Ibid.*, 433.

⁸⁰ *Grisby v. Burtnett* (1866), 31 Cal. 406.

⁸¹ *Murphy v. De Groot* (1870), 44 Cal. 51.

⁸² Cal. Stats. (1865), chap. 440.

⁸³ *El Dorado County v. Davison*, *supra*.

⁸⁴ Cal. Stats. (1867–68), chap. 181.

⁸⁵ *Waterloo Turnpike Road Co. v. Cole* (1876), 51 Cal. 381.

⁸⁶ *Lincoln v. Colusa* (1865), 28 Cal. 662.

Thus, in *Harper v. Richardson*, the plaintiff's action for damages over the opening of a road was barred because the action was not brought within the statutory period.⁸⁷ However, the steps prescribed for the landowner to use in pursuing compensation "must not destroy or substantially impair the right itself."⁸⁸

Counties also had jurisdiction over bridges and could arrange for ferry lines, as well as roads. As noted above, the original *Gilman* case decided that a county could even build a bridge across a county line.⁸⁹ The repair and maintenance of roads, bridges, and the like also fell to the county, and again strict compliance with statutory provisions was a prerequisite. In *Murphy v. Napa County*, the Court upheld the refusal of the board of supervisors to pay for repairs on a bridge in the absence of a written contract.⁹⁰ If repairs were faulty, or if the county neglected to have a bridge or highway repaired, the county itself was not liable for injuries occurring due to the lack of proper repairs; any remedy that existed had to be sought against the supervisors or road overseers individually.⁹¹ This view was upheld in *Crowell v. Sonoma County*, with the Court denying any master–servant relationship between a road overseer and the county.⁹²

The government of each county was made up of several county officers, generally a treasurer, auditor, sheriff, and tax collector, and a board of supervisors, with the latter body being the most important. The Supreme Court found the board of supervisors to be a special body, with mixed powers, legislative, executive, and judicial. Its discretion in certain matters had to be trusted, and its judgment conclusive.⁹³ A county was considered to be both a geographical and a political subdivision of the state and subject to the latter's dominion. Thus, an act of the Legislature ordering the board of supervisors to submit to the voters the question of subscribing to \$200,000 worth of stock in the San Francisco and Marysville Railroad Company was considered within the former's powers.⁹⁴ The Court held

⁸⁷ *Harper v. Richardson* (1863), 22 Cal. 251.

⁸⁸ *Potter v. Ames* (1872), 43 Cal. 75.

⁸⁹ *Gilman v. County of Contra Costa* (1855), 5 Cal. 426.

⁹⁰ *Murphy v. Napa County* (1862), 20 Cal. 497.

⁹¹ *Huffman v. San Joaquin County* (1863), 21 Cal. 426.

⁹² *Crowell v. Sonoma County* (1864), 25 Cal. 313.

⁹³ *Waugh v. Chauncey* (1859), 13 Cal. 11.

⁹⁴ Cal. Stats. (1857), chap. 243, § 1.

that the submitting of such a question to the voters was considered to be a mere ministerial function with which an individual could not interfere.⁹⁵ So broad was this power of the Legislature over the counties, that it could even confer extraterritorial jurisdiction. For example, in 1867, the Court upheld the power of the Legislature to grant Sonoma and Lake Counties the authority to “lay out, open, and maintain a road” in Napa County.⁹⁶

An instance of a board of supervisors using its discretionary powers occurred in *El Dorado County v. Elstner*, which involved the examination and settlement of a claim against a county.⁹⁷ Justice Joseph G. Baldwin wrote that in such an instance the board was a quasi-judicial body, in that the allowance and settlement of the claim against the county were an adjudication of the claim and thus conclusive. In *Babcock v. Goodrich*, the Court added that courts would not review a board’s action, unless there were some gross irregularity, such as fraud.⁹⁸ Whether a board, when acting in its judicial capacity, exceeded its jurisdiction could be examined by a writ of certiorari, and a board could be forced to perform a ministerial function by the use of a mandamus.

Where a board had no discretion, it had to follow legislative enactments exactly.⁹⁹ “It is settled in this state that no order made by a Board of Supervisors is valid or binding, unless it is authorized by law.”¹⁰⁰ In *People v. Bailhache*, the Contra Costa Board of Supervisors was authorized to consolidate certain county offices, but such consolidation was voided due to the board’s failure to publish the ordinance of consolidation.¹⁰¹ Two years later the Court voided a contract because the Stanislaus Board of Supervisors did not first advertise for bids as was required by the political code.¹⁰² Even a power left to a board’s discretion was not exempt from legislative control. Boards of supervisors could grant franchises for toll roads, ferries, and bridges. To use the franchising of ferries as an example, the Court said, “The Supervisors have the *general* power to grant a ferry franchise, and to

⁹⁵ *Pattison v. Board of Supervisors of Yuba County* (1859), 13 Cal. 175.

⁹⁶ *People v. Lake County* (1867), 33 Cal. 487.

⁹⁷ *El Dorado County v. Elstner* (1861), 18 Cal. 144.

⁹⁸ *Babcock v. Goodrich* (1874), 47 Cal. 488.

⁹⁹ *People v. Sacramento County* (1873), 45 Cal. 692.

¹⁰⁰ *Linden v. Case* (1873), 46 Cal. 174.

¹⁰¹ *People v. Bailhache* (1877), 52 Cal. 310.

¹⁰² *Maxwell v. Supervisors of Stanislaus* (1879), 53 Cal. 389.

determine when, and under what circumstances, and to whom, it shall be granted.”¹⁰³ But the Legislature, in allowing boards of supervisors to grant such franchises, did not divest itself of the right to make further grants:

These franchises, being sovereign prerogatives, belong to the political power of the State, and are primarily represented and granted to the Legislature as the head of the political power; and the subordinate bodies or tribunals making the grants are only agents of the Legislature in this respect. But the delegation of these powers to these subordinates in no way impairs the power of the legislature to make the grant.¹⁰⁴

The various boards of supervisors were given numerous other statutory powers and duties. They could create offices and raise salaries, if a statute provided for such an office, but they could not pay a salary higher than the statutory limit.¹⁰⁵ Boards of supervisors were the guardians of the property interests in each county, and in that capacity occupied a position of trust and were bound to the same measure of good faith toward the county as was required of an ordinary trustee toward his *cestui que trust*, or an agent toward his principal. In taking care of this property no supervisor was entitled to extra pay for services rendered,¹⁰⁶ but if in the discretion of a board additional aid were needed, such as private counsel, such expense became a legal charge against the county.¹⁰⁷ Of course the hiring of or granting a contract to a supervisor by the board of the same county was a conflict of interest and barred by statute.¹⁰⁸

Of the various county officers the ones who seemed to appear most often in Supreme Court litigation were the tax collector, auditor, and treasurer. It is no coincidence that all three were involved in county financial matters. Tax collectors will be treated in the chapter dealing with taxation, but auditors and treasurers will be discussed here.

The county auditor was charged with drawing warrants for all claims legally chargeable to the county that were allowed by the board of

¹⁰³ Henshaw v. Supervisors of Butte County (1861), 19 Cal. 150.

¹⁰⁴ Fall v. County of Sutter (1862), 21 Cal. 252.

¹⁰⁵ Robinson v. Board of Supervisors of Sacramento (1860), 16 Cal. 208.

¹⁰⁶ Andrews v. Pratt (1872), 44 Cal. 309.

¹⁰⁷ Hornblower v. Duden (1868), 35 Cal. 664.

¹⁰⁸ Domingos v. Supervisors of Sacramento (1877), 51 Cal. 608.

supervisors. If a claim were not “legally chargeable” the county treasurer did not have to pay the warrant, and could not be compelled to do so.¹⁰⁹ Most of the cases involving these two officers were attempts to compel a warrant to be drawn and/or paid. The auditor could not have an order drawn without an order from the board of supervisors, for whom the auditor was a clerk in this respect.¹¹⁰ If the auditor refused to accede to the board’s order, he could be compelled to do so by a writ of mandate.¹¹¹

One problem faced by many county officers had to do with receiving salaries. Pay was relatively poor, and oftentimes salary warrants were not paid due to a lack of funds in the treasury. Henry Eno, as county judge, faced this problem. He acidly noted: “Salary \$1800 payable monthly. Should be glad if I could get it at the expiration of a year. On the first of May \$600 will be due me. Have not received a dime yet — and have so far lived on borrowed money paying 2½ per cent per month.”¹¹²

In the same 1866 letter, he stated that Alpine County was \$22,000 in debt at that time. The reason was all too clear. As the county’s debt rose, the treasurer refused to pay on the salary warrants. Warrant holders either had to wait until the county became solvent or collect as little as fifty cents on each dollar by selling the warrant to a speculator at a discount. Eno decided to force the issue, suing out a writ of mandamus to force the treasurer to pay, and the case eventually reached the Supreme Court in 1867 as *Eno v. Carlson*.¹¹³ The Court upheld the treasurer, who was registering warrants in order of presentation, and paying them accordingly. The Court said there was no redress available, “except by refusal to accept judicial appointments, or resigning them when they may have been accepted, or by appeal to the people.”¹¹⁴

In *Foster v. Coleman*, the Board of Supervisors of Los Angeles County was prevented from creating a debt or liability not provided for by law.¹¹⁵ This case was a taxpayer’s suit brought to prevent payment to a deputy

¹⁰⁹ *Keller v. Hyde* (1862), 20 Cal. 593.

¹¹⁰ *Connor v. Norris* (1863), 23 Cal. 447.

¹¹¹ *Babcock v. Goodrich*, *supra*.

¹¹² Henry Eno, *Twenty Years on the Pacific Slope; Letters of Henry Eno . . .* (Yale Americana Series, no. 8; New Haven: Yale University Press, 1965), 144.

¹¹³ *Eno v. Carlson* (1867), 1 Cal. Unrep. 354.

¹¹⁴ *Ibid.*, 355.

¹¹⁵ *Foster v. Coleman* (1858), 10 Cal. 278.

assessor whom the supervisors had been trying to compensate because his earlier fees had been paid by a warrant which was worth only 40 percent of its face value. Although an attempt at equalization, it was not authorized by law and was thus illegal. Further, a board of supervisors could not put aside part of the county's revenue as a fund for current expenses,¹¹⁶ as it was not authorized to do by law,¹¹⁷ or pay warrants in any order other than that specified by the Legislature.¹¹⁸ The county treasurer could not pay any warrants or the interest thereon unless first audited by the board of supervisors, as the treasurer was not an independent agent with regard to the county's funds.¹¹⁹

The cases discussed indicate the almost second-class status of the counties. Although forced to create counties by the Constitution, the Legislature retained an inordinate amount of power over them, being able to enact a law dealing with almost any aspect of county government, including creating and eliminating counties. One result was that the state often would step in, as with Gilman's bridge, but too often counties had to settle their problems with their very limited powers.

With the state's broad control over the counties clearly constitutional, the Court's role was virtually limited to cases involving individual contests and to seeing that counties did not go beyond the powers granted by the state; this was the situation with municipalities as well.

THE MUNICIPALITIES

As previously noted, that section of the Constitution providing for the division of the state into counties also authorized the Legislature to provide for the establishment of towns;¹²⁰ the Legislature again complied. Like a county, a municipal government was a political subdivision of the state, having as its primary object the administration of governmental functions. But the town, as a municipal corporation incorporated by its inhabitants, could also administer local affairs and business outside the sphere

¹¹⁶ *Laforge v. Magee* (1856), 6 Cal. 285.

¹¹⁷ Cal. Stats. (1850), chap. 42, § 13.

¹¹⁸ *McDonald v. Maddux* (1858), 11 Cal. 187.

¹¹⁹ *People v. Fogg* (1858), 11 Cal. 351.

¹²⁰ Cal. Const. (1849), art. XI, § 4.

of government; a town or city could engage in proprietary activities such as supplying water or other utilities, or operate public transportation lines.

But whatever a municipal corporation did, it was forever subject to legislative control. The Supreme Court summarized the state–municipality relationship when it said: “Municipal corporations possess and can exercise only such powers as are expressly or by necessary implication conferred or delegated by the legislative act of incorporation; and when the legislative charter prescribes the mode of exercising such delegated powers, it must be strictly construed.”¹²¹

Discussing the manifold problems of Los Angeles in the first two decades of statehood, one historian wrote in much the same vein, adding that the city’s legal status hampered the municipal government somewhat: “Los Angeles, which was entitled to the rights of a private corporation, was subject to the authority of the California Legislature which had created and could abolish it and could expand, contract, or otherwise modify its powers. In practice, however, the state seldom interfered — except to limit the town’s tax rate and bonded debt.”¹²²

Some typical problems faced by a city included assessing property for municipal improvements, street maintenance, and the abatement of public nuisances. In *Weber v. The City of San Francisco*, the Supreme Court held that a city, in this case San Francisco, could assess property for improvements in the city, but could not impose a penalty of 1 percent per day for the nonpayment of the assessment.¹²³ The right to abate a nuisance was brought up in *Gunter v. Geary*, as mentioned before, and while the justices themselves disagreed whether the wharf actually constituted a nuisance, they agreed that if it was a nuisance, the city could remove it.¹²⁴

On occasion, a city had need to acquire property either by purchase or by the use of its right of eminent domain. In *DeWitt v. San Francisco*,¹²⁵ the Supreme Court stated that the laws authorizing the San Francisco Board of Supervisors to build a courthouse and jail necessarily implied the purchase

¹²¹ *City of Placerville v. Wilcox* (1868), 35 Cal. 23.

¹²² Robert M. Fogelson, *The Fragmented Metropolis: Los Angeles, 1850–1930* (Cambridge: Harvard University Press, 1967), 27–28.

¹²³ *Weber v. The City of San Francisco* (1851), 1 Cal. 455.

¹²⁴ *Gunter v. Geary*, 462.

¹²⁵ *Dewitt v. San Francisco* (1852), 2 Cal. 289.

of all required real and personal property as well.¹²⁶ In *People v. Harris*, the Court upheld a contract to fix up a building bought jointly by the city and county of San Francisco for their mutual use.¹²⁷ Chief Justice Murray stated: “The right to fit up a building for city or public purposes, and provide suitable accommodations for the transaction of the business of the City, is a necessary incident to the administration of every municipal government, without which it would be impossible to carry out the objects and purposes of the incorporation.”¹²⁸ A city, too, had to pay a just compensation for exercising its right of eminent domain; here also the compensation had to be paid before the owner lost his title.¹²⁹ In a case where the city made part payment, the Court held that this was not sufficient either, and that the property could be reclaimed by the owner.¹³⁰

Whenever the Legislature chose to pass laws dealing with municipal affairs, such enactments had to be followed with great exactitude. This was made explicit in *People v. McClintock*, when the Court said that Sacramento could not purchase a site upon which to erect a waterworks,¹³¹ because the statute authorizing the city to contract for a water supply did not mention a site or a building.¹³²

The powers of municipalities were laid out in their charters. Each charter was in the form of a separate legislative enactment. The only method by which a charter could be changed in any way was by a new law by the Legislature. The charters were considered to be “special grants of power from the sovereign authority, and they are to be strictly construed. Whatever is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld.”¹³³

Under discussion in the case from which this statement was quoted was an attempt by Placerville to pay for a railroad survey from that city to Folsom. The Court did not allow the survey because there was no direct

¹²⁶ Cal. Stats. (1851), chap. 70, § 7; Cal. Stats. (1852), chap. 38, § 7.

¹²⁷ *People v. Harris* (1853), 4 Cal. 9.

¹²⁸ *Ibid.*, 10.

¹²⁹ *San Francisco v. Scott* (1854), 4 Cal. 114.

¹³⁰ *Colton v. Rossi* (1858), 9 Cal. 595.

¹³¹ *People v. McClintock* (1872), 45 Cal. 11.

¹³² Cal. Stats. (1871–72), chap. 491.

¹³³ *Douglass v. Mayor of Placerville* (1861), 18 Cal. 647.

authority for it in the charter.¹³⁴ To allow the survey would have meant considering it to be a municipal benefit like a city street, but the Court refused to go that far.

Varied provisions of state statutes came to the Court for interpretation. An act amending the original act incorporating Marysville said that the city could not take stock in any public improvement without first submitting the question to the voters.¹³⁵ The Court, in *Low v. City*, said the words “public improvement” had to be considered in a limited sense, applying to those improvements normally included in police and municipal regulation. They could not be extended to objects foreign to the purposes of the incorporation of the town; buying stock in a private navigation company was not what the Legislature had in mind.¹³⁶ When the city of Oakland was given full powers over docks, wharves, etc., in its charter,¹³⁷ the city could not grant the exclusive privilege of controlling these and the right to collect fees therefrom, because such an unconditional grant left no power of regulation to the city itself.¹³⁸ The Court went on, in *City of Oakland v. Carpentier*, to say, “These police regulations are essential to the interest of the city, to commerce, its health, possibly, certainly its convenience and general prosperity.”¹³⁹

The cases of *Holland v. The City of San Francisco*¹⁴⁰ and *Gas Co. v. San Francisco*,¹⁴¹ taken together, had much to say about municipal corporations. In the first case, the plaintiff had purchased some land from San Francisco under authorization of an ordinance which proved to be void. Before the sale of the land, the common council passed another ordinance appropriating the proceeds from the sale, and the money paid by the plaintiff was appropriated and used by the city. The second ordinance was held to be a sufficient recognition of the first ordinance, thereby making the sale valid. In its ability to own and dispose of property, the municipality acted like a private corporation, and in such case its discretion could be controlled by

¹³⁴ Cal. Stats. (1859), chap. 93.

¹³⁵ Cal. Stats. (1854), chap. 10, § 1 (special law).

¹³⁶ *Low v. City* (1855), 5 Cal. 214.

¹³⁷ Cal. Stats. (1852), chap. 107, § 3.

¹³⁸ *City of Oakland v. Carpentier* (1859), 13 Cal. 540.

¹³⁹ *Ibid.*, 547.

¹⁴⁰ *Holland v. The City of San Francisco* (1857), 7 Cal. 361.

¹⁴¹ *Gas Co. v. San Francisco* (1858), 9 Cal. 453.

the judicial department. In the second case, the city denied any knowledge of the gas furnished by the plaintiff for lighting the city hall and city fire engine houses. Justice Field said such an answer was unsatisfactory; while the city was not a natural person, its officers and agents could gain the knowledge. In its private character a municipal corporation exercised the powers of a private individual or private corporation. Here, the city used the gas and even put up the meters and gas fixtures, so it could not claim a lack of knowledge.

One case that arose had to do with the power of a municipal corporation to require a license tax from a transport company, even though the latter did only a part of its business in the city. The decision in *Sacramento v. The California Stage Company* stated that Sacramento had this power, as the company had its office and place of business in the city. Even though the larger part of the transportation was out of the city, much of its business was done in the city. Since it received the protection of the local government, it ought to contribute to the support of that government.¹⁴²

A municipal corporation could enter into contracts, but only if the act of incorporation delegated the power to make them. Further, anyone contracting with a municipality was bound to know the extent of the powers of its officers.¹⁴³ In *People v. Swift*, the Court said a city could validate a contract for certain repairs by a subsequent ratification since the charter gave the city both the right to enter into that type of contract in the first place, with the right to validate it by subsequent ratification.¹⁴⁴ A municipality could sue,¹⁴⁵ but any suit had to be in the name of the city or town, and not in that of a municipal official.¹⁴⁶

The idea of “municipal benefit” mentioned above included control over city streets, their repair, and the authority to build bridges. Repairs “to the streets, though, required scrupulous compliance with the charter, as assessments were levied on the affected property owners.”¹⁴⁷ The responsibility for the repairs fell on the city’s council, not on the city, and as with

¹⁴² *Sacramento v. The California Stage Company* (1859), 12 Cal. 134.

¹⁴³ *Wallace v. Mayor of San Jose* (1865), 29 Cal. 180.

¹⁴⁴ *People v. Swift* (1866), 31 Cal. 26.

¹⁴⁵ *San Francisco v. Sullivan* (1875), 50 Cal. 603.

¹⁴⁶ *Leet v. Rider* (1874), 48 Cal. 623.

¹⁴⁷ *City of Stockton v. Whitmore* (1875), 50 Cal. 554.

counties, the individual officers could be sued for an injury, but not the local corporation itself.¹⁴⁸ Control over bridges included the right to grant a franchise for their construction and use,¹⁴⁹ and a business established under a state act was still subject to local taxation.¹⁵⁰

As was the case with the counties, the Supreme Court could do nothing but acquiesce to the state's control over municipalities. The Court's decisions created no landmarks in constitutional law, but were important nonetheless in helping determine the powers of local governments. More often than not the Court was dealing with everyday problems such as interpreting a contract entered into by a city, or an act of the Legislature empowering a municipality to perform some service. As an example of the type of cases faced by the Court, an examination of a series of cases involving San Francisco follows.

SAN FRANCISCO: A CASE STUDY

San Francisco, as the largest and most important city in the state, had a consequently larger share of litigation reach the Supreme Court. Many of the most important of these cases were the result of San Francisco's continuing financial problems, but many also arose from the normal development of a large, metropolitan area, while others dealt with the powers of any ordinary city or town.

The earliest cases could be placed in two groups, each based on a different act of the Legislature. The first group arose from the sale of beach and water lots; the second was from the creation of the sinking fund.

Even before the advent of statehood the city of San Francisco was getting all its revenue from the sale of beach and water lots.¹⁵¹ These sales were void at the time, but were later validated by the Legislature in March 1851.¹⁵² The first case involving this law was *Eldridge v. Cowell* in which the Court held that since the plan of the city extended streets into the tide

¹⁴⁸ *Winbigler v. City of Los Angeles* (1872), 45 Cal. 36.

¹⁴⁹ *Fall v. Mayor of Marysville* (1861), 19 Cal. 391.

¹⁵⁰ *San Jose v. San Jose & Santa Clara Railroad* (1879), 53 Cal. 475.

¹⁵¹ Theodore H. Hittell, *History of California*, vol. III (4 vols., N. J. Stone & Company, 1885–97), 379.

¹⁵² Cal. Stats. (1851), chap. 41, § 2.

waters, it was necessarily anticipated that purchasers would fill the lots until the level depth of water suitable for handling ships was reached.¹⁵³ The defendant's lot had been reclaimed from the water before he purchased it; when the plaintiff later bought the next lot *away* from the water, he bought without *any* riparian rights. By passing the March 1851 law the state recognized the city's plan and constituted an act consistent with her complete sovereignty over her navigable buoys and rivers.

A landmark case in the group of cases dealing with the sale of beach and water lots was *Wood v. San Francisco*.¹⁵⁴ In this case the defendant bought the Broadway Wharf, which had already been laid down as a public street. The sale by the city was void as it could not convert a public easement to a private use. Further, when the city laid out the streets, they were here held to continue on to high water if the front were filled in. This was affirmed in *Minor v. City of San Francisco*.¹⁵⁵ In *Hyman v. Read*, the plaintiff questioned the boundaries covered by the 1851 law. The Court denied any ambiguity, but even if there were, it would construe the law favorably to the city.¹⁵⁶ Thus, all the land within the designated boundaries, whether divided into lots or not, was included.

In spite of the income from land sales, the financial situation of San Francisco was quite bleak. At the 1851 session of the Legislature a series of acts was passed to help alleviate San Francisco's financial crisis by passing on May 1 an act to fund the floating debt of the city and for its payment.¹⁵⁷ The debt at this time was over \$1,500,000; in order to help the situation, the city created Sinking Fund Commissioners to whom it transferred all the city's real property. On the same day the Sinking Fund Commissioners transferred the real property to the commissioners of the funded debt. These moves by the city were tested early in the important case of *Smith v. Morse*, which upheld the sale of much of San Francisco's unsold land to satisfy various creditors of the city.¹⁵⁸ Dr. Peter Smith, one of the principal creditors of San Francisco, won several judgments against the city,

¹⁵³ Eldridge v. Cowell (1854), 4 Cal. 80.

¹⁵⁴ Wood v. San Francisco (1854), 4 Cal. 190.

¹⁵⁵ Minor v. City of San Francisco (1858), 9 Cal. 39.

¹⁵⁶ Hyman v. Read (1859), 13 Cal. 444.

¹⁵⁷ Cal. Stats. (1851), chap. 88.

¹⁵⁸ Smith v. Morse (1852), 2 Cal. 254.

but being unable to collect, got writs of execution against some of the real property of the city, which he himself purchased. The Court held that the transfers of the land to the funded debt commissioners were void, since they would have been void as being fraudulent if done by an individual and were also void when done by a corporation. The city could sell land, but not to create a new department, and take revenues and place them in the hands of the city's own creation. Nor could the sale be blocked by the city claiming the state had an interest in the land; the state could make its own claims if it so wished. Further, since the plaintiff's claims preceded the enactment of the funding law, the latter's provisions were void as to him.

*Thorne v. San Francisco*¹⁵⁹ decided the question as to whether the city could redeem land sold in the executions against it, under the Redemption Act of 1851.¹⁶⁰ The Court said that the land could not be redeemed, as that would make the law retrospective, when laws are to be construed as prospective. If retrospective, it would be an *ex post facto* law, and in contravention of the United States Constitution.¹⁶¹ The Court further held that the provision in the 1855 San Francisco charter, which limited the amount of indebtedness that the city could incur to \$25,000, did not include the previous funded debt.¹⁶² The new charter attempted to provide protection for the new government, and not to interfere with the old debt. If the old debt had been included, being far more than \$25,000, the municipal government in San Francisco would have become a nullity as it would not have been able to contract for necessary expenses.¹⁶³

At the April 1857 term, the Supreme Court had more to say about the 1851 law creating the sinking fund. In *People v. Woods*,¹⁶⁴ the Court said that the 1851 law created a contract between San Francisco and its creditors which could not be changed by subsequent acts. Thus, provisions of the Consolidation Act of 1856, which changed the terms of the earlier law were void.¹⁶⁵ In *People v. Bond*, the Court amplified its views by saying that

¹⁵⁹ *Thorne v. San Francisco* (1854), 4 Cal. 127.

¹⁶⁰ Cal. Stats. (1851), chap. 5, § 229.

¹⁶¹ U.S. Const., art. I, § 9.

¹⁶² Cal. Stats. (1855), chap. 197, § 32.

¹⁶³ *Soule v. McKibben* (1856), 6 Cal. 142.

¹⁶⁴ *People v. Woods* (1857), 7 Cal. 579.

¹⁶⁵ Cal. Stats. (1856), chap. 125, § 95.

the contract created was substantially a trust deed under which the city gave to trustees much of its revenue and property, the trustees to apply these to redeem the city's obligations.¹⁶⁶ In this case, the assessor added the interest to pay the debt to the tax roll, according to the provisions of the Consolidation Act. The Court voided the assessor's action, again saying that the Legislature could not change the terms of the contract, unless, now, the creditors sanctioned such a change. In a suit brought by the city and county of San Francisco to prevent the commissioners of the funded debt from receiving certain moneys, the Court defined the position of the commissioners. In reversing the plaintiffs' injunction, the Court said that the commissioners were not private agents but public officers, and could not be interfered with unless it were shown that they were acting in some way to harm the fund.¹⁶⁷

In 1858 the Legislature passed an act amending the 1851 funding act so that the commissioners could redeem the earlier issued stock in exchange for 6 percent bonds, although the 1851 law had said that the stock had to be redeemed at a price no higher than par.¹⁶⁸ The Court in *Blanding v. Burr* held that this provision was legal since the vested rights were not affected and therefore the creditors under the 1851 law were not being injured.¹⁶⁹ *Thornton v. Hooper* added that while the Legislature could not impair the obligation of contracts, it could enact laws respecting them, here revising the way of giving effect to the purposes of the 1851 law, to reduce San Francisco's debt.¹⁷⁰

Like other municipalities, San Francisco was under a great deal of legislative control. Such was the California experience. The Legislature could provide for the erection of a city hall on a certain site,¹⁷¹ grant the right to lay down and construct a railroad on public streets,¹⁷² and could force the city to pay from its treasury for the extension of certain city streets.¹⁷³ In the latter case the Court restated the constitutional power of the Legislature to

¹⁶⁶ *People v. Bond* (1858), 10 Cal. 563.

¹⁶⁷ *County of San Francisco v. Fund Commissioners* (1858), 10 Cal. 585.

¹⁶⁸ Cal. Stats. (1858), chap. 225, § 3.

¹⁶⁹ *Blanding v. Burr* (1859), 13 Cal. 343.

¹⁷⁰ *Thornton v. Hooper* (1859), 14 Cal. 9.

¹⁷¹ *San Francisco v. Canavan* (1872), 42 Cal. 541.

¹⁷² *Carson v. Central R. R. Co.* (1868), 35 Cal. 325.

¹⁷³ *Sinton v. Ashbury* (1871), 41 Cal. 525.

direct and control the affairs and property of a municipal corporation for municipal purposes.

Under various consolidation acts the City and County of San Francisco were combined, with the Board of Supervisors also functioning much the same as a city council. The board was given certain areas in which it could use its discretion without interference from either the Legislature or the courts,¹⁷⁴ but when it was mandated by the Legislature to perform an act, it had to do so.

The increase in San Francisco's population brought about the introduction of various utilities, such as street railroads, gas for lighting, and especially waterworks. Each of these utilities was amply represented by cases taken to the Supreme Court, but those cases dealing with water companies were both quite complex and quite informative. They shed light on the powers of the municipality, particularly that of entering into contracts; indicate the relationship between the city and the state, primarily the control of the latter over the former; and graphically illustrate the type of problems brought before the Court.

In respect to waterworks, the first two companies making an appearance in the Court were the San Francisco Water Works and the Spring Valley Water Works. The San Francisco Water Works was organized in 1857 under the 1853 act providing for the formation of corporations generally,¹⁷⁵ as amended in 1855,¹⁷⁶ and the 1858 act for the incorporation of water companies.¹⁷⁷ In order to lay its pipes, the company needed some land belonging to Leonard D. Heyneman, and sought to appropriate it by condemnation proceedings. In *Heyneman v. Blake*,¹⁷⁸ the Supreme Court upheld the waterworks' incorporation under the 1853 and 1855 acts as being within the general description of a business organized "for the purpose of engaging in any species of trade or commerce, foreign or domestic."¹⁷⁹ The Court also upheld the corporation's power to appropriate private land

¹⁷⁴ Hall v. Supervisors of San Francisco (1862), 20 Cal. 596.

¹⁷⁵ Cal. Stats. (1853), chap. 65.

¹⁷⁶ Cal. Stats. (1855), chap. 162.

¹⁷⁷ Cal. Stats. (1858), chap. 262.

¹⁷⁸ Heyneman v. Blake (1862), 19 Cal. 579.

¹⁷⁹ Cal. Stats. (1853), chap. 65, § 1; Cal. Stats. (1855), chap. 162, § 1.

under the 1858 act. The 1858 law was amended in 1861,¹⁸⁰ and in *Spring Valley Water Works v. San Francisco* the Court upheld the right of this company, too, to appropriate land necessary for the use of the company.¹⁸¹

The 1858 act concerning water companies said that if one company brought water to San Francisco, the city was entitled to use whatever water it needed to put out fires, and if more than one company became involved in bringing water to the city, each was to give its proportionate share of water to fight fires, “and for other municipal uses,” a phrase not used in reference to only one company. The Spring Valley Water Works took over the San Francisco Water Works in 1865, thus attaining a monopoly as the only company to bring fresh water into the city. It continued to supply the city with water for all its municipal uses for several years, and then limited the city only to water for fighting fires. The city brought suit to restrain the Spring Valley company, but the Court upheld the water company, saying that while the intent of the Legislature was to have the company supply all the city’s water, it could not override the plain language of the statute.¹⁸² The city then brought suit again, this time alleging that an act of the Legislature granting the company’s owners special privileges was unconstitutional because it was a special act.¹⁸³ The Court agreed that the act was unconstitutional, but even under the general law dealing with water companies the company need only supply water for fighting fires or for some other great necessity.¹⁸⁴ In 1877 the Spring Valley company applied to the Supreme Court directly for a writ of prohibition to prevent the San Francisco Board of Supervisors from passing an ordinance ordering the mayor to connect the city’s pipes to those of the company.¹⁸⁵ Speaking for the Court, Justice Elisha McKinstry said:

In my opinion, the writ ought not to issue to arrest any legislation pending before a body authorized by the Constitution and laws to legislate with matters of public interest. Error committed by such

¹⁸⁰ Cal. Stats. (1861), chap. 227.

¹⁸¹ *Spring Valley Water Works v. San Francisco* (1863), 22 Cal. 434.

¹⁸² *San Francisco v. Spring Valley Water Works* (1870), 39 Cal. 473.

¹⁸³ Cal. Stats. (1858), chap. 288.

¹⁸⁴ *San Francisco v. Spring Valley Water Works*, *supra*.

¹⁸⁵ *Spring Valley Water Works v. San Francisco* (1877), 52 Cal. 111.

bodies cannot usually be corrected by resort to this extraordinary writ without great public inconvenience

I know of no way in which it can be shown that the members of the Board of Supervisors threaten (in their official capacity) to pass an ordinance, and it must be presumed that the members of that legislative assembly will fully consider the question of the *power to pass* the order, as well as the merits of the order itself.¹⁸⁶

Justice McKinstry then turned his attention to the last case between the two parties, saying that the unconstitutionality of the 1858 act was the only point really decided there. He went on to say that the water company had as its duty to “furnish water free (to the extent of its means) for the extinguishment of fires, and to the Fire Department, and for all other purposes for which it may be demanded by the authorities of the city and county in discharge of their direct duties as governmental agents.”¹⁸⁷

The company could charge ordinary rates for other city government uses such as schools, hospitals, and the like.

At the same April 1877 term, the Supreme Court heard *Spring Valley Water Works v. Ashbury*¹⁸⁸ and *Spring Valley Water Works v. Bryant*,¹⁸⁹ both cases involving more controversy between the city and the company. In the first of these two cases the company brought suit to compel Monroe Ashbury, the city and county auditor, to endorse a \$92,000 demand allegedly due the company for water furnished for municipal purposes in the forty-six-month period prior to December 1872. The claim was approved by both the mayor and the Board of Supervisors, but Ashbury claimed the approval by the board was irregular on two counts. First, the board did not publish the resolution of approval, and also because the amount approved was indefinite, being a larger sum than was needed, with the company’s demand to be paid from it. The Court agreed with Ashbury that under the act consolidating the city and county governments, the Board of Supervisors erred in both respects. The second case involved an attempt to have the courts review a resolution of the city’s board of supervisors dealing

¹⁸⁶ Ibid., 117.

¹⁸⁷ Ibid., 122.

¹⁸⁸ *Spring Valley Water Works v. Ashbury* (1877), 52 Cal. 126.

¹⁸⁹ *Spring Valley Water Works v. Bryant* (1877), 52 Cal. 132.

with the delivery of water. The Supreme Court said it could only review acts involving the exercise of judicial functions.

In an effort to finally settle the controversy between these parties, Justice McKinstry again referred back to the decision declaring the special law unconstitutional, and stated that that case determined

that corporations in this State, except for municipal purposes, must be formed under general laws, and can exercise no powers except such as are conferred by such general laws. The power to charge tolls or rates for water is a *franchise* conferred on corporations formed under the general laws for the formation of water companies, and can be exercised only in the manner provided for in those laws.¹⁹⁰

The general law dealing with water companies set the method by which rates were to be set. If the mode provided by the statute proved unsatisfactory, the Legislature should be asked to change the general law. This decision was affirmed in yet another case two years later.¹⁹¹

The Legislature did step in by authorizing the city to provide and maintain its own waterworks, and granting the power to condemn and purchase private property for that purpose.¹⁹² The last San Francisco water case in the period under discussion, *Mahoney v. Supervisors of S. F.*, laid down the statutory rules for condemning land, again holding that the city was bound to follow the statute in all particulars.¹⁹³

The *Water Works* cases indicate the extent of legislative control over matters that were purely local in nature but which, because of the power granted the Legislature, became the subject of a state law.

Another group of cases, more than seventy in the thirty-year period from 1850 to 1879, involved nothing more than street repairs in San Francisco. An early example was *Hart v. Gaven*,¹⁹⁴ in which the Court ruled that where an ordinance said owners of lots were responsible for keeping up the streets in front of their lots, the city of San Francisco could perform

¹⁹⁰ Ibid., 140.

¹⁹¹ *San Francisco v. Spring Valley Water Works* (1879), 53 Cal. 608.

¹⁹² Cal. Stats. (1875-76), chap. 234.

¹⁹³ *Mahoney v. Supervisors of San Francisco* (1879), 53 Cal. 383.

¹⁹⁴ *Hart v. Gaven* (1859), 12 Cal. 476.

reasonable repairs, and the lot owner would have to bear the cost, as long as the cost was reasonable under the city's taxing power as established by the Consolidation Act of 1858.¹⁹⁵ These street repair cases, too, indicate the extent of the authority of the state in general and the control of local government by the state. A statement by Justice Augustus L. Rhodes from a street repair case in 1865 will serve to conclude this chapter because the case was typical of cases involving municipalities adjudicated by the court, and also because it spelled out the relationship between state and local government. Justice Rhodes wrote:

The municipal governments, in causing street improvements to be made, act under the authority conferred upon them by the Legislature, the authority being a portion of the sovereignty delegated to them for the purposes of municipal government.

The municipal government, in the exercise of the authority thus conferred, is subject to all the constitutional restraints and limitations imposed on the Legislature, and has no other or greater power than is and lawfully may be conferred on it by the legislative act.¹⁹⁶

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¹⁹⁵ Cal. Stats. (1856), chap. 125, §§ 56, 57.

¹⁹⁶ *Creighton v. Manson* (1865), 27 Cal. 613.

Chapter 8

ECONOMIC ASPECTS OF A DEVELOPING STATE

In the years after 1860, tremendous economic growth took place in the state. The gold mining industry was joined by farming, cattle-raising, manufacturing, and banking, among others, in developing the state's economy. The building of the transcontinental railroad was another important factor, but in a different way. The railroad was expected to bring a new wave of prosperity to the Golden State, but this did not happen. Instead, "[o]ne of the many unexpected and unfavorable effects that the completion of the Pacific railroad had on the economy of California was that it suddenly exposed her merchants and manufacturers to intense competition from those of the Eastern cities."¹ Regardless of its effect on the state, the railroad, even from before its actual construction, caused a good deal of controversy, legal and otherwise.

One specter facing all businesses was that of taxation. Like other attributes of sovereignty, the taxing power had certain limitations placed on it, and questions arose that only the Supreme Court could answer. Whatever the decisions of the Court, they served to provide a legal framework for the state's business interests to use.

¹ Walton Bean, *California; An Interpretive History* (New York: McGraw-Hill Book Company, 1968), 219.

The Civil War brought another challenge to the state's economy, the legal tender notes, or "greenbacks." This paper money, though, affected more than just the state's economy. It brought into focus the question of Union loyalty, challenged the role of California as a hard-money state, and as with other major legal controversies, presented a long string of cases for the Supreme Court to adjudicate.

TAXATION

The 1849 Constitution mentioned the subject of taxation in only one section of one article. The section read:

Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law; but assessors and collectors of town, county, and State taxes, shall be elected by the qualified electors of the district, county, or town, in which the property taxed for State, county, or town purposes is situated.²

With only one section in the Constitution as a frame of reference, the Court was given many opportunities to explain that section and in so doing help to establish an orderly system of taxation in the state.

The ultimate power over taxation was not stated directly in the Constitution, but the Court, in *People v. Seymour*, clearly placed it in the state, with Justice Joseph G. Baldwin writing that the power to lay and collect taxes

is a sovereign attribute. The mode of ascertainment and collection of the tax is a matter of legislative discretion. What the Legislature may do, as a general thing, it may do in its own way, and at its own time. There is a general power to tax; there is no restriction of mode, nor is there any limitation of time by the organic law. Unless restrained by the Constitution, the Legislature have plenary power over the subject.³

The case itself involved the constitutionality of an 1860 act to enforce the collection of delinquent taxes in Sacramento for the years 1858 and 1859.⁴ The

² Cal. Const. (1849), art. XI, § 13.

³ *People v. Seymour* (1860), 16 Cal. 343.

⁴ Cal. Stats. (1860), chap. 172.

state's power over taxation included the authority to provide such a remedy. This taxing power even extended to fixing the fees allowed to tax collectors.⁵

The question of whether or not a tax was “equal and uniform” was brought up on numerous occasions. In *Sacramento v. Charles Crocker*, the defendant paid both taxes on his merchandise and a business license tax as well.⁶ He objected to the license tax, but the Court said the tax was not unequal, because it was a tax on the amount of business transacted, and all businesses paid at the same graduated rate. What violated the “equal and uniform” rule were attempts to exempt the taxable property of a railroad company in a county from paying a school tax lawfully levied on all taxable property in such county,⁷ or to remit part of a tax within a district.⁸ The leading case of *People v. Whyler*, which involved the levying of a tax for the construction of levees in Sutter County, laid down several points as to what constituted uniform taxation.⁹ The levees, the Court admitted, would injure some of the land, and the fact that all the land was taxed at its former value did not make the tax unequal. The tax, being on all property, real as well as personal, was a tax and not an assessment, even though for a local improvement. A tax on real estate alone was considered to be an assessment, and could be levied against only those actually to be benefited by the proposed improvement.¹⁰ But the laying of the assessment had to be equal, which meant in proportion to the benefits accruing from the improvement.¹¹

When the Constitution said that all property was to be taxed uniformly, what was meant to be taxed was private property, and not property belonging to the United States or to California.¹² Property belonging to the United States included land that was part of the public domain, and the fact that the land was being preempted and in actual occupation by a settler made no difference because, until the preemptor completed all the steps necessary to acquire title, the title remained with the United States.¹³

⁵ *Solano County v. Neville* (1865), 27 Cal. 465.

⁶ *Sacramento v. Charles Crocker* (1860), 16 Cal. 119.

⁷ *Crosby v. Lyon* (1869), 37 Cal. 242.

⁸ *Wilson v. Sup. of Sutter Co.* (1873), 47 Cal. 91.

⁹ *People v. Whyler* (1871), 41 Cal. 351.

¹⁰ *Taylor v. Palmer* (1866), 31 Cal. 240.

¹¹ *Doyle v. Austin* (1874), 47 Cal. 353.

¹² *People v. McCreery* (1868), 34 Cal. 432.

¹³ *People v. Morrison* (1863), 22 Cal. 73.

The Court later modified its view somewhat by saying that once a certificate of purchase had been issued, the land could be taxed even though the federal government had not yet issued a patent therefor.¹⁴ The modification virtually involved the use of a “legal fiction” under the 1861 Revenue Act, which said that real estate meant and included “the ownership of or claim to, or possession of, or right of possession to any land.”¹⁵ Said the Court:

The term “claim,” as used in this provision, means something more than a mere assertion by the party assessed that he owns or is entitled to possess the lands described in the list. While the word carries with it the idea of such assertion, it involves also the idea of an actual possession of the land claimed.¹⁶

Later that same October 1866 term, the Court added, “The land itself is not taxed, but the defendant’s claim and right of possession is taxed.”¹⁷ The public property of counties and towns, as subdivisions of the state, could not be taxed either,¹⁸ and assessments, as differentiated from tax, could not be levied either on public property, even if the property would be benefited by the improvement.¹⁹

The state, in its sovereign authority, could, by appropriate legislation, authorize any political subdivision to levy a tax or assessment either for general revenue or for special purposes. Such special purposes included building a bridge in the city of Nevada,²⁰ or for a new county to pay its share of the debt of the county from which it was formed.²¹ The grant of taxing power to a local government certainly did not mean that the power could be abused, as was pointed out in *People v. Kohl*. In that case the defendant paid his property taxes and then sold the land, after which Los Angeles County attempted to collect again from the new owner. The Court held that this amounted to an attempt at double taxation.²² In *People v. Niles*, the Court disallowed

¹⁴ *People v. Shearer* (1866), 30 Cal. 645.

¹⁵ Cal. Stats. (1861), chap. 401, § 5.

¹⁶ *People v. Frisbie* (1866), 31 Cal. 148.

¹⁷ *People v. Cohn* (1866), 31 Cal. 211.

¹⁸ *People v. Doe* G. 1034 (1868), 36 Cal. 220.

¹⁹ *Doyle v. Austin*, *supra*.

²⁰ *Kelsey v. Trustees of Nevada* (1861), 18 Cal. 629.

²¹ *Beals v. Supervisors* (1865), 28 Cal. 449.

²² *People v. Kohl* (1870), 40 Cal. 127.

an attempt by Mendocino County to assess a boat serving Mendocino, but whose home port was San Francisco.²³ The Court also voided a San Francisco ordinance taxing goods outside the city's corporate limits or *in transitu* under a bill of lading, as being in restraint of trade.²⁴

The assessment and collection of property taxes was important to all counties, and disputes occasionally arose which had to be settled in the Supreme Court. A series of tax cases involved the land in Mariposa County granted to John Charles Frémont. In the first of these cases, *Palmer v. Boling*, the Court said that a tax assessment could not be made until after the title had vested in the owner, but once the title did vest, the assessment could be made immediately.²⁵ In *Fremont v. Early*, Frémont tried to restrain the collection of the 1856 taxes because the taxes of 1851 through 1854 were allegedly collected illegally.²⁶ He had paid \$13,800 during those years and wanted this amount set off against his 1856 taxes. Frémont did not prove the illegality of the earlier taxes or the insolvency of the county. Without showing that the taxes had been illegal and that the only way the insolvent county could pay what it owed him was by setting off the current taxes, Frémont's case failed.

Frémont, who seemed to have a plethora of tax problems, also sought an injunction against the former sheriff of Mariposa County to prevent the sale of part of his grant to pay \$8,000 in delinquent taxes. Although the defendant claimed that he was completing some unfinished business of his office by selling land in 1858 to pay 1855 taxes, the Court held for Frémont, noting that the defendant's term in office had ended in October 1855, and his right to finish the business of his term ended in March 1856, when he settled his accounts with the county auditor.²⁷ The delinquent taxes should have then gone on the tax roll of the next year, 1856, to be collected by the new sheriff.

Under the provisions of the 1857 revenue act, the board of supervisors was authorized to sit as a board of equalization to which tax appeals could be brought.²⁸ In spite of the general language used in the statute the Supreme Court limited arbitrary use of the act in *Patten v. Green* when it

²³ *People v. Niles* (1868), 35 Cal. 282.

²⁴ *Ex parte Frank* (1878), 52 Cal. 606.

²⁵ *Palmer v. Boling* (1857), 8 Cal. 384.

²⁶ *Fremont v. Early* (1858), 11 Cal. 361.

²⁷ *Fremont v. Boling* (1858), 11 Cal. 380.

²⁸ Cal. Stats. (1857), chap. 251, § 8.

voided the act of the board of equalization of Sonoma County in raising the valuation of plaintiff's land by one-half without giving him notice.²⁹ Justice Baldwin, speaking for the unanimous Court, said,

We think it would be a dangerous precedent to hold that an absolute power resides in the Supervisors to tax land as they may choose, without giving any notice to the owner. It is a power liable to a great abuse. The general principles of law applicable to such tribunals, oppose the exercise of any such power.³⁰

As with other legislative acts, laws dealing with taxation had to be followed exactly, even to the extent of including dollar signs for each valuation.³¹ Further, in order to bring suit to collect a tax, the suing governmental body had to aver in its complaint that the statute had been complied with in all its particulars.³² One particular not followed on several occasions was that the assessor be elected from the taxed district. This meant that the assessor elected by the city and county of Sacramento could not assess a tax in the city for city purposes alone.³³ The various county and state boards of equalization were also limited to statutory provisions in their actions. In *People v. Reynolds*,³⁴ the Yuba County Board of Equalization added property to the assessment roll although the 1861 revenue act said only the assessor could do this.³⁵ This action of the board's was illegal and was not allowed to stand, nor could a cancellation of assessments be allowed.³⁶

For a number of years, the Legislature had been arranging for the codification of the state's laws, and these codes were adopted at the Legislature's 1871–72 session, with most of the codes to take effect January 1, 1873. The Political Code provided for a three-member State Board of Equalization to equalize the assessments of taxes in the different counties

so as to cause them to approximate as nearly as possible to the equality and uniformity enjoined by the Constitution. It had become

²⁹ *Patten v. Green* (1859), 13 Cal. 325.

³⁰ *Ibid.*, 329.

³¹ *Hurlbutt v. Butenop* (1864), 27 Cal. 50.

³² *People v. Castro* (1870), 39 Cal. 65.

³³ *People v. Hastings* (1866), 29 Cal. 449.

³⁴ *People v. Reynolds* (1865), 28 Cal. 107.

³⁵ Cal. Stats. (1861), chap. 401, § 22.

³⁶ *People v. Board of Supervisors* (1872), 44 Cal. 613.

apparent . . . that when the value of property for the purposes of taxation was to be ascertained and finally determined by the local Assessors, subject only to a limited control by the County Boards of Supervisors, the grossest inequality frequently existed in the valuations in different counties, whereby the requirement of the Constitution that “taxation shall be equal and uniform throughout the State” was practically abrogated.³⁷

The power of the Legislature to create a board with these powers, upheld in the above-quoted case, *Savings and Loan Society v. Austin*,³⁸ was challenged again at the Court’s next term in *Houghton v. Austin*, and with different results. In the latter case the Court held that the section giving the State Board of Equalization the right to fix the rate of taxation was unconstitutional because it was a delegation of legislative authority.³⁹

This section [3696] of the Code attempts to confer upon the State Board the power to add any sum to the amount of tax to be levied by law. We are of opinion that the Legislature cannot commit to the board this power to increase . . . the amount of tax to be paid by the people.⁴⁰

Justice Elisha McKinstry commented that in California the power of taxing the people rested only in the Legislature, and the members of that body could not substitute the judgment of others for their own.

Houghton v. Austin was affirmed by the Court in 1878 in a case challenging the validity of tax sales of land made under the void statute. The Court said that since the tax levy was void, any sales made because of that void tax were also void, and any deeds issued to confirm such sales were nullities.⁴¹

The series of cases having the greatest importance to the banking community, the legal tender note controversy excepted, had to do with solvent debts. Generally stated, banks could be taxed on all money, gold dust, bullion on hand, and all solvent debts, which included all mortgages and other loans and debts due them; credits secured by mortgages were simply regarded as

³⁷ *Savings and Loan Society v. Austin* (1873), 46 Cal. 473–74.

³⁸ *Houghton v. Austin* (1874), 47 Cal. 646.

³⁹ Cal. Pol. Code (1872), §§ 3693, 3696.

⁴⁰ *Houghton v. Austin*, 652.

⁴¹ *Harper v. Rowe* (1878), 53 Cal. 233.

property and taxed as such. At the same time the mortgagor paid taxes on the full value of his property regardless of the debt against it, at least nominally. "As a matter of fact, however, it was usually arranged in agreement between debtor and creditor that the debtor should pay the taxes on both the property and the loan."⁴² The mortgage was not taxed *as such*, but the money secured thereby was.⁴³ A bond, though, could be taxed as personal property, although the Court limited its ruling to state bonds because the United States Supreme Court had already decided that federal bonds could not be taxed.⁴⁴

The first real challenge to the system of taxing solvent debts occurred in 1868 when Andrew B. McCreery, holder of a \$125,000 note on James Lick's "Lick House," claimed that taxing both the money loaned and the property on which the money was lent amounted to double taxation.⁴⁵ The Court said that the question of double taxation did not arise from the facts of the case.

While the defendant held the money, which he afterwards loaned to Lick, he was taxable for that sum, and when he passed the money to Lick upon making the loan, and took Lick's obligation to pay the same, secured by a deed of trust or other adequate security, he certainly did not divest himself of so much property. He possessed the same amount of property that he held before the loan was made. Its form only was changed. And so in all cases of loans. The lender owns the debt, and the debt is property, its value depending on the sufficiency of the security, . . . and the ability of the borrower to pay the debt. The holder of the debt is taxable upon the value of the debt.⁴⁶

The Court added that the borrower *might* claim double taxation if the debt were not subtracted from the taxable value of his property, but such was not the case here.

The Court sidestepped the question again the next year in *People v. Whartenby*, when the lender claimed double taxation.⁴⁷ As against the lender, the Court said, there was no double taxation:

⁴² Carl B. Swisher, *Motivation and Political Technique in the California Constitutional Convention, 1878–79* (Claremont: Pomona College, 1930), 66.

⁴³ *Falkner v. Hunt* (1860), 16 Cal. 167.

⁴⁴ *People v. Home Insurance Company* (1866), 29 Cal. 533.

⁴⁵ *People v. McCreery*, *supra*.

⁴⁶ *Ibid.*, 446–47.

⁴⁷ *People v. Whartenby* (1869), 38 Cal. 461.

The debt secured by the mortgage has been but once taxed, and if the owner of the mortgaged property shall claim that the amount of the mortgage should be deducted from the value of the property, and that he should be assessed only for the remainder, it will be our duty to decide that question when it comes before us; but it is not before us in this case.⁴⁸

Possibly in response to protests by the San Francisco banking community, the Legislature enacted a law in 1870 exempting solvent debts from taxation,⁴⁹ but this law was declared unconstitutional by the Supreme Court in *People v. Eddy*.⁵⁰ The reasoning of the Court was that a solvent debt was property, and the Legislature could not exempt any private property because the state constitution said all property was to be taxed. Finally a property owner brought suit, claiming the amount of the mortgage should have been subtracted from the value of the property, but this argument was not allowed.⁵¹

The new codes that went into effect January 1, 1873, again provided for the taxation of solvent debts,⁵² and set the stage for the key cases of *Savings and Loan Society v. Austin*⁵³ and *People v. Hibernia Bank*.⁵⁴ The first of these cases held the tax on solvent debts to be an instance of double taxation, although the case itself hinged on a procedural point. Justice Joseph Crockett said, “if a debt for money lent and secured by mortgage be taxed, and if the mortgaged property be also taxed, the same *value* and subject matter has been twice taxed, and it presents a case of double taxation.”⁵⁵

The *Hibernia Bank* case involved the solvent debt question directly, as San Francisco banking interests brought the suit. The Court said that credits were not “property” as that term was used in the Constitution, and hence, not taxable. Further, there had to be a basis of valuation, and a solvent debt, being a paper promise to pay money, was not money itself. Such

⁴⁸ Ibid., 464–65.

⁴⁹ Cal. Stats. (1869–70), chap. 424.

⁵⁰ *People v. Eddy* (1872), 43 Cal. 331.

⁵¹ *Lick v. Austin* (1872), 43 Cal. 590.

⁵² Cal. Pol. Code (1872), § 3607.

⁵³ *Savings and Loan Society v. Austin*, *supra*.

⁵⁴ *People v. Hibernia Bank* (1876), 51 Cal. 243.

⁵⁵ *Savings and Loan Society v. Austin*, 491.

a credit or debt was only property in the general sense. If the debt had a value of its own, then the payment of the debt would affect the value of assets in the state, but, “When a debtor pays his debt he does not abstract or destroy any portion of the taxable property of the State; the aggregate of values remains the same.”⁵⁶ This decision left considerable disaffection,

especially by debtors and tax payers, for it was recognized that creditors were still escaping their share of the burden of taxes. Debtors did not now appear to be carrying a double load, as they had done when they had paid taxes on the full value of their property and again on the money loaned to them, but still they and their fellow holders of tangible property had to pay nearly the total tax bill of the state.”⁵⁷

THE LEGAL TENDER CASES IN CALIFORNIA

The question of the use of greenbacks in California was a most vexing problem for the state as a whole, not only financially, but because it raised the possibility of a conflict between the state and the federal government. Although California no longer questioned the judicial primacy of the United States Supreme Court, occasional disputes between the state and the national government still arose from time to time, and the use of legal tender notes, or “greenbacks,” during the Civil War was one such dispute.

By 1862 the financial situation of the United States government was quite gloomy. The suspension of specie payments in late 1861 caused financiers to look elsewhere to solve financial problems. With taxes and loans insufficient to meet the cost of the war, the issuance of paper money became a most tempting and necessary recourse.

On February 25, 1862, Congress passed a legal tender act authorizing the issuance of \$150,000,000 in non-interest-bearing United States notes, which were to be “legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest.”⁵⁸ To ensure negotiability and to prevent depreciation of these notes, the

⁵⁶ *People v. Hibernia Bank*, 248.

⁵⁷ Swisher, *Motivation and Political Technique*, 69.

⁵⁸ 12 U.S. Stat. at L. (1862), 345–48.

government declared them to be legal tender, but they were in fact fiat money, lacking gold reserves and a redemption date. It was expected that the value of these notes would depend on the confidence of the people in the United States. The obvious necessity for the issuance of these notes stilled opposition in the eastern states, but opposition continued on the Pacific Coast, and in California in particular.

Following the discovery of gold, California became and remained for many years a “hard money” state. “This was undoubtedly due to the fact that it was able to produce more than enough gold and silver to satisfy “the needs of its people for a circulating medium.”⁵⁹ There were no banks of issue in California, and the organic law of the state specifically prohibited the creation and circulation of bank notes as money.⁶⁰ The complete text of the act did not reach the state until March 27, 1862. On June 13 the fears of Californians over depreciated currency were realized when the legal tender notes were quoted at discounts of 1 to 2 percent. By June 30 the discount was up to 8 percent; by July 19 they had reached 15 percent, and from that time into the 1870s greenbacks were bought and sold on the street and in the stock exchanges of San Francisco.⁶¹

The first case dealing with legal tender notes to reach the California Supreme Court was *Perry v. Washburn*, decided at the July 1862 term.⁶² At issue was an attempt by the plaintiff to pay taxes owed to the city and county of San Francisco in legal tender notes. The defendant, San Francisco’s tax collector, said that under the California general revenue act of 1861 he could only accept taxes paid “in the legal coin of the United States, or in foreign coin at the value fixed for such coin by the laws of the United States.”⁶³ The lower court held that the taxes could not be paid in greenbacks, and the plaintiff applied to the Supreme Court for a mandamus to compel the tax collector to accept the notes. The Court, in a unanimous decision, with Chief Justice Stephen J. Field writing the opinion, affirmed the district court’s decision: “The Act does not, in our judgment, have any reference to taxes levied under the laws

⁵⁹ Ira B. Cross, *Financing an Empire; History of Banking in California*, vol. I (4 vols.; Chicago: The S. J. Clarke Publishing Co., 1927), 289.

⁶⁰ Cal. Const. (1849), art. IV, § 34, 35.

⁶¹ Cross, *Financing an Empire*, vol. I, 310.

⁶² *Perry v. Washburn* (1862), 20 Cal. 319.

⁶³ Cal. Stats. (1861), chap. 401, § 2.

of the State. It only speaks of taxes due to United States, and distinguishes between them and debts. . . . Taxes are not debts within the meaning of this provision.”⁶⁴ Under this decision the notes could still be used to pay debts and other business obligations, and did not prevent the state’s treasurer, De los R. Ashley, from paying California’s quota of the United States direct tax in greenbacks, which the federal government accepted.

In an attempt to void the chance of being paid with depreciated currency, merchants began the practice of inserting a clause in contracts that provided for payment in gold or its equivalent. “But in the absence of a specific law giving validity to such contracts, they could not be enforced; and many people disregarded their promises and paid their debts with greenbacks at par.”⁶⁵

To ensure the validity of such contracts, Silas W. Sanderson, then a member of the Legislature, authored a bill “providing that contracts in writing for the direct payment of money, made payable in a specific kind of money or currency, might be specifically enforced by the courts, and judgments on such contracts be made payable and collectable in the kind of money or currency specified.”⁶⁶ This bill passed the Legislature in 1863 and was generally known as the “Specific Contract Act.”⁶⁷

At its July 1864 term, the California Supreme Court rendered several key opinions dealing with legal tender, and it passed on the constitutionality of the federal act and the legality of the state act. In *Lick v. Faulkner*, James Lick sued William Faulkner to collect money due as rent on a store in San Francisco. Lick refused to accept the legal tender notes that Faulkner proffered, claiming that the act under which the notes were issued was contrary to the United States Constitution because Congress was not given the power to make such notes legal tender. The Court, with Justice John Currey writing the decision, felt otherwise. Currey first pointed out, “Though the Government of the United States is one of enumerated and limited powers, it is supreme within its sphere of action.”⁶⁸ These powers were for

⁶⁴ Perry v. Washburn, 350.

⁶⁵ Joseph Ellison, “The Currency Question on the Pacific Coast During the Civil War,” *The Mississippi Valley Historical Review* XVI (June, 1929): 56.

⁶⁶ Theodore H. Hittell, *History of California*, vol. IV (San Francisco: N. J. Stone & Company, 1885–97), 347.

⁶⁷ Cal. Stats (1863), chap. 421.

⁶⁸ *Lick v. Faulkner* (1864), 25 Cal. 418.

the purposes stated in the preamble, “But they could not be carried into execution without legislation; of this the framers of the Constitution were aware, and hence Congress was empowered to make all laws necessary and proper for carrying into execution the powers specified.”⁶⁹

The powers to declare war, to raise an army and navy, and to suppress insurrections were granted to Congress by the Constitution, and the power to pass laws to execute these other powers. This particular law was passed as a means of effecting these enumerated powers, and “the Act of Congress upon this particular point was an exercise of sovereign authority within the scope of the powers granted in the Constitution.”⁷⁰

The Court affirmed *Lick v. Faulkner* again that term in *Curiac v. Abadie*⁷¹ and *Kierski v. Mathews*.⁷² In the former case the lower court tried to circumvent the Supreme Court by treating the contest as one in equity, noting that paper money was worth but sixty cents on the dollar at that time. The Court found for the plaintiff, but the Supreme Court reversed the decision and directed a verdict for the defendant, on the basis of *Lick v. Faulkner*.

Had the decision in *Lick v. Faulkner* been different, and the Court declared the federal act unconstitutional, there would have been no need for a state specific contract law. But as things turned out, the federal law was constitutional, and the California Supreme Court had to deal with the state law as well in *Carpentier v. Atherton*.⁷³

In a contract dated April 2, 1864, Faxon D. Atherton agreed to pay Horace W. Carpentier five hundred dollars in United States gold coin, on demand. Some time later Carpentier demanded payment and Atherton offered only legal tender notes for both principal and interest. Carpentier refused the paper money and brought suit on the contract. The lower court held for him, and Atherton appealed to the Supreme Court. Justice John Currey wrote the opinion, holding that the California statute was not in conflict with the federal statute. The latter was paramount in cases involving the payment of money generally,

⁶⁹ Ibid., 419.

⁷⁰ Ibid., 433.

⁷¹ *Curiac v. Abadie* (1864), 25 Cal. 502.

⁷² *Kierski v. Mathews* (1864), 25 Cal. 591.

⁷³ *Carpentier v. Atherton* (1864), 25 Cal. 564.

but as to the contract, which is the foundation of the judgment in this case, it is more than a contract for the payment of money merely. It goes to the extent of defining by what specific act the contract shall be performed. By the admitted and settled rules of law, such a contract can be performed, according to the agreement of the parties, only by the payment of the kind of money specified.⁷⁴

Justice Currey added that the act was merely remedial and created no new rights. Chief Justice Silas W. Sanderson, author of the state law, expressed no opinion.

Another important case decided at the July 1864 term dealing with legal tender notes, *Galland v. Lewis*, declared that the specific contract act was retroactive in its operation.⁷⁵ The case involved a contract executed September 1, 1862, and payable in United States coin on October 15, 1862. The defendant offered the amount due in United States notes February 1, 1863, also before the passage of the state act. In his opinion Justice Oscar L. Shafter wrote that when retroactive laws had been voided, such laws had been in conflict with some vested right. "But when an Act like the one now in question takes a contract as it finds it, and simply enforces a performance of it according to its terms, it is not liable to objection because it may have a retroactive operation by way of relation to past events."⁷⁶

In the *Galland* case the execution of the contract, the due date, and the proffered payment all occurred in the period between the passage of the federal and state acts. At the January 1865 term the Court answered another challenge to the federal act, at least as to contracts executed prior to its passage.⁷⁷ At issue were bonds offered in 1858 and 1859 by a mining company, which attempted to redeem them in legal tender notes. The plaintiff admitted the validity of the federal acts as to the payment of debts,⁷⁸ but questioned whether debts created before February 25, 1862, were subject to satisfaction by the payment of legal tender notes.

⁷⁴ Ibid., 572–73.

⁷⁵ *Galland v. Lewis* (1864), 26 Cal. 46.

⁷⁶ Ibid., 48.

⁷⁷ *Higgins v. B. R. & A. W. & M. Co.* (1865), 27 Cal. 153.

⁷⁸ At issue as well was a second federal act passed March 3, 1863, providing for the issuance of additional legal tender notes. 12 U.S. Stat. at L. (1863), 709–13.

Justice Currey again spoke for the Court, holding the federal act did apply to debts created before its passage, and:

The Acts of Congress under consideration making United States notes lawful money and a legal tender in the payment of debts are not laws, operating retrospectively but *in presenti* and prospectively. No new obligations are created nor new duties imposed by them; neither do they attach new disabilities in respect to transactions or considerations which had transpired before their passage. They simply provide that the notes issued by their authority shall be lawful money, and that such money shall be a legal tender in the payment of debts.⁷⁹

With this decision the remainder of cases dealing with legal tender notes, and they continued until 1878, essentially involved explanations and amplifications of these earlier decisions. The decision in *Perry v. Washburn*, for example, that legal tender notes could not be used for the payment of taxes, was the basis for later holding that the greenbacks could not be used to pay wharfage fees to an agency of the state because such fees were in the nature of public revenue,⁸⁰ and that the notes could not be used to pay a fine, as a fine was not a debt within the meaning of the federal statute.⁸¹

Under California's specific contract law any contract or debt generally payable in money, without specifying a particular kind of money, could be satisfied by legal tender notes. This included a judgment,⁸² the obligation of a judgment creditor,⁸³ and interest on a savings deposit, even though the deposit itself was in gold coin.⁸⁴ It was also necessary that a plaintiff aver in his complaint that a recovery in coin was being sought. The lack of such an averment prevented a judgment in default being paid in gold in *Lamping v. Hyatt*, where the Court ruled that in a default judgment "the Court was therefore not authorized to grant any greater relief than is demanded in the prayer of the complaint."⁸⁵ In another instance the Court said, "The right to the relief given is peculiar and exceptional, and if a party would recover

⁷⁹ *Higgins v. B. R. & A. W. & M. Co.*, 159–60.

⁸⁰ *People v. Steamer America* (1868), 34 Cal. 676.

⁸¹ *In re Whipple* (1866), 1 Cal. Unrep. 274.

⁸² *Reed v. Eldredge* (1865), 27 Cal. 346.

⁸³ *People v. Mayhew* (1864), 26 Cal. 655.

⁸⁴ *Howard v. Roeben* (1867), 28 Cal. 281.

⁸⁵ *Lamping v. Hyatt* (1864), 27 Cal. 102.

money in the form of gold or silver of one who received it for him in that form, the form or kind of money received should be specially averred.”⁸⁶

One method attempted to get around the lack of a specific kind of money was to show the difference between the value of gold and the value of greenbacks. But the Court refused to accept such proof, saying, “‘Greenbacks’ are lawful money — they are a legal tender for all debts — and are therefore necessarily a legal standard for the measurement of values — not of other lawful money, but of all commodities bought and sold, services rendered, etc.”⁸⁷

Another method was to specify gold coin or its equivalent. This was tried in *Lane v. Gluckauf*, where a contract dated August 4, 1863, included the proviso that if the debt were not paid in gold coin then damages were to be paid equal in value to the difference between gold and paper money in the San Francisco market. The complaint also specified alternative remedies of gold and paper, and was upheld by the Court because the intent of the contract was to insure payment in gold, and only if gold could not be obtained, was the payment to be made in notes.⁸⁸ A contract that merely said that gold or its equivalent in legal tender notes was to be paid in satisfaction of the debt was not enough to bring the contract within the provisions of the specific contract act because there was no standard of comparison.⁸⁹ The Court concluded, “In contemplation of law, a dollar in legal tender notes is equal to, and therefore the equivalent of, a dollar in gold coin. In comparing the two kinds of money the law knows no difference in value between them. It recognizes no other standard of equivalents.”⁹⁰

The introduction of the legal tender notes and their rapid depreciation presented questions that the federal government probably never anticipated, but state courts had to answer. One example that should suffice was whether the \$50 line separating a felony from a misdemeanor was to be based on gold or paper currency at the latter’s lesser value. The California Supreme Court settled this matter by saying that the federal act was not involved since that act only created a kind of money to be used in business, and as a tender in the payment of debts. But since no contract or tender was involved here, “The

⁸⁶ *McComb v. Reed* (1865), 28 Cal. 288.

⁸⁷ *Spencer v. Prindle* (1865), 28 Cal. 276.

⁸⁸ *Lane v. Gluckauf* (1865), 28 Cal. 288.

⁸⁹ *Reese v. Stearns* (1865), 29 Cal. 273.

⁹⁰ *Ibid.*, 276.

grade of the offense must be determined by the standard with reference to which it must be presumed to have been fixed by the legislature.”⁹¹

Judicially, California was in line with the rest of the nation since “[p]ractically every State Court which had considered the question had upheld the constitutionality of the [federal] law.”⁹² No California legal tender cases were appealed to the United States Supreme Court, although that tribunal acted on similar cases. At its December 1868 term the United States Supreme Court ruled that paper money was not legal tender for state taxes,⁹³ and that the notes were not legal tender in the settlement of obligations calling specifically for payment in gold or silver coin.⁹⁴

Although California was in line legally,

[a]t the same time it seems plain that the policy of California nullified, to a certain extent, a federal law. To be sure the circulation of the federal notes throughout the state was not actually prohibited. Their use, however, was practically banned by the state laws. . . . As far as California was concerned, the law giving legal tender quality to treasury notes was of little effect.⁹⁵

The legal tender notes may have been of little effect in general, yet California businessmen were able to make large profits by purchasing goods in eastern markets with depreciated greenbacks and selling those goods for gold on the Pacific Coast.

THE RAILROADS

Probably the best-known fact associated with the building of the transcontinental railroad was the financial aid, both in money and land, extended to the railroad companies. What is not as well known is the fact that a goodly amount of largesse was forthcoming from the states as well, and California was certainly not to be outdone, particularly with the “Big Four” being

⁹¹ *People v. Welch* (1865), 1 Cal. Unrep. 221.

⁹² Charles Warren, *The Supreme Court in United States History*, vol. II (2 vols.; Boston: Little, Brown & Co., 1921), 499.

⁹³ *Lane County v. Oregon* (1868), 7 Wall. 71.

⁹⁴ *Bronson v. Rodes* (1868), 7 Wall. 229.

⁹⁵ Joseph Ellison, *California and the Nation* . . . , University of California Publications in History, vol. XVI (Berkeley: University of California Press, 1927), 230.

California residents and active in Republican politics at a time when the G.O.P. was in political ascendancy both nationally and in the state. Of the various states extending aid, California was the only far western state to be in a position to be interested in aiding railroads. In spite of constitutional prohibitions against financial aid to private corporations, California presented rights-of-way, land for terminals, and guaranteed Central Pacific bonds.

The one statute involving direct state aid to be tested in the California Supreme Court was passed in 1864. It authorized the Central Pacific Railroad to issue \$1,500,000 in 7 percent bonds, with the state to pay the interest on the bonds for twenty years; the state was to create a special tax fund through a special 8 percent tax.⁹⁶ A suit was instituted in the name of the people for an injunction to restrain the railroad from issuing any bonds; the petitioner claimed the law violated the provisions of the Constitution limiting the amount of state indebtedness,⁹⁷ and prohibiting both the use of the state's credit to help a private person or institution, and the state becoming a stockholder either directly or indirectly.⁹⁸ The injunction was denied and the law declared constitutional in *People v. Pacheco*.⁹⁹ The Court quickly disposed of the debt limitation problem by citing the cases dealing with the state prison and state capitol, because no specific debt was being created immediately.¹⁰⁰ The principle involved was that of taxation, vested in the Legislature; that power was unlimited.

The Legislature may not only determine the extent to which it will exercise the taxing power, but also for what objects of public interest it shall be exercised, and it may appropriate the moneys raised to such objects

There is in the Constitution of California no limitation on the power of the Legislature to appropriate moneys, either as to the amounts to be appropriated or the objects for which they may be made.¹⁰¹

⁹⁶ Cal. Stats. (1863–64), chap. 320.

⁹⁷ Cal. Const. (1849), art. VIII.

⁹⁸ Ibid., art. XI, § 10.

⁹⁹ *People v. Pacheco* (1865), 27 Cal. 175

¹⁰⁰ See, in chapter 6 *supra*, “Interpreting Other Laws.”

¹⁰¹ *People v. Pacheco*, 209.

The Court said there was no loan or gift of the state's credit contrary to the Constitution because in a case of war there could be no limit to the credit of the state.

If the Legislature may authorize the building of a railroad for military purposes, it may certainly appropriate funds to aid a corporation in the construction of a similar work in consideration of its use for such purposes. The principal end being the advantage to be derived from the use of the road, it matters not that the appropriation incidentally aids an individual, association or corporation.¹⁰²

The power of the Legislature over its political subdivisions, already noted in other instances, also came into play in regard to the railroads. In the early stages of the construction of the Central Pacific's share of the railroad was the problem of finances. The government delayed the issue of the first mortgage gold bonds and the company could not borrow money with only second mortgage security. In addition, California laws making stockholders personally liable for a company's debts made railroad stocks virtually unsalable, and outright borrowing was precluded by high interest rates. California expectations that financial problems would cause the demise of the railroad enterprise were modified however, when Leland Stanford, the state's governor, persuaded the Legislature to aid the company.

Encompassing a period little more than a year in length, the Legislature passed eight acts granting special concessions to the Central Pacific and Western Pacific railroads alone, and other railroads also received favorable legislation. In addition to the act involved in the *Pacheco* case, the Legislature authorized various cities and counties to subscribe to railroad stock. Not all the statutes were challenged in the courts, but enough were so as to keep many lawyers occupied.

One of these laws to be challenged was the bill authorizing the San Francisco Board of Supervisors to take and subscribe a million dollars to the capital stock of the Western Pacific and Central Pacific.¹⁰³ Even in the Legislature there was controversy over the bill, with only half of San Francisco's ten representatives voting for its passage. Controversy did not end with passage, however. One provision of the law was that the people of San

¹⁰² Ibid., 225.

¹⁰³ Cal. Stats. (1863), chap. 291.

Francisco approve the subscription to the railroad bonds. The necessary consent was secured at an election held in May, 1863, but several students of the subject feel that irregular means were used to carry the election.¹⁰⁴

The ordinance passed by San Francisco's citizenry bound the city to purchase \$600,000 worth of stock in the Central Pacific and \$400,000 in the Western Pacific, but Wheeler N. French instituted a taxpayer's suit to prevent the city from purchasing the stock. A temporary injunction was granted by the district court, but on appeal, the Supreme Court upheld the constitutionality of the statute in *French v. Teschemaker*.¹⁰⁵ French's contention was that the enabling statute was void because it relieved the city of any liability beyond the amount subscribed, contrary to the constitutional provisions making stockholders personally and proportionately liable for all corporate debts.¹⁰⁶ The Court turned down this argument saying that the city could not subscribe to railroad stock without the permission of the Legislature, and the Legislature would also determine proportionate liability, since it was not defined in the Constitution.

Those opposing the subscription also turned to the Legislature, which passed an act¹⁰⁷ authorizing the city to compromise with each of the two railroads and thus settle all claims

for cash or other security, in place of bonds claimed by the companies, provided the power to make such compromise should rest in the Board of Supervisors only after and in case said board should be compelled by final judgment of the Supreme Court to execute and deliver the bonds specified in the act.¹⁰⁸

The city enacted a compromise under which it was to give the Central Pacific \$400,000 in bonds instead of buying \$600,000 in stock, and \$200,000 in bonds to the Western Pacific instead of the \$400,000 in stock. The required court order was issued, but the city's officers still refused to deliver the bonds, causing a new writ of mandate to be sought against these

¹⁰⁴ See for example, Stuart Daggett, *Chapters on the History of the Southern Pacific* (New York: The Ronald Press Company, 1922), 31.

¹⁰⁵ *French v. Teschemaker* (1864), 24 Cal. 518.

¹⁰⁶ Cal. Const. (1849) art. IV, §§ 32, 36.

¹⁰⁷ Cal. Stats. (1863–64), chap. 344.

¹⁰⁸ Daggett, *Southern Pacific*, 34.

officials individually; this became *People v. Coon*.¹⁰⁹ The Court granted the mandamus, saying that since the city was a creature of the Legislature, and in the exercise of its legitimate powers could only act by and through its agents. Here the city's agents, the defendants, had to act if all the conditions stated in the act authorizing the compromise were met, and they were. The last condition was an order from the Court, and that order consisted of the final judgment in *French v. Teschemaker*.

As a result of the issuance of the mandamus the city officers signed the bonds, but the city and county clerk, Wilhelm Loewy, either refused or merely failed to countersign them; the bonds ended up with the county treasurer, and the state, as in *People v. Coon*, acting on relation of the Central Pacific, brought suit, seeking a peremptory mandamus commanding Loewy or his successor to get the bonds, countersign them, and help deliver them to the railroad. The Board of Supervisors was to assist him and was made a co-defendant, as the case came up as *People v. Supervisors of San Francisco*.¹¹⁰ Six of the supervisors tried to answer individually, but the Supreme Court said the Board could only answer in its aggregate capacity. The Board and Loewy now alleged fraud in the 1863 enabling election. Governor Leland Stanford had written an open letter at the time of the election to remind the city's inhabitants of the advantages the railroad would bring to the state generally, and San Francisco in particular.

Stanford did not limit his influence to letter writing, for at the trial in the lower court witnesses testified that Stanford's brother Philip, a large Central Pacific stockholder, purchased votes at the polls. This argument was rejected, the Court saying that since fraud had not been found by the lower (trial) court, the matter was now *res judicata*. Failing on this point, the defendants raised other technical matters, but the railroad won the day.

The victory was costly to the railroad, at least in part, as "Stanford and his associates afterward claimed that this action on the part of San Francisco seriously weakened the credit of the company not only in the West but in the financial centers of the East."¹¹¹ The bonds were delivered

¹⁰⁹ *People v. Coon* (1864), 25 Cal. 635.

¹¹⁰ *People v. Supervisors of S. F.* (1865), 27 Cal. 655.

¹¹¹ Harry J. Carman and Charles H. Mueller, "The Contract and Finance Company and the Central Pacific Railroad," *The Mississippi Valley Historical Review* XIV (December, 1927): 332.

to the company April 12, 1865, seven days after the decision in *People v. Supervisors of S. F.*, but also after two years of legal struggles. This two-year delay proved costly to the company; had the bonds been available in 1864 the company would have built its line more rapidly and gone beyond Salt Lake.

The city was the loser in the long run, too. The result was a flat payment by the city with no stock in return, “but since the road later made money and its stocks soared in value, this move cost the city millions in railroad securities.”¹¹²

Due to San Francisco’s prominence in the state, the controversy between it and the railroad probably received more notoriety than the problems of other cities and counties, but these problems were real enough to the local governments involved. As early as 1860, before the passage of the federal railroad act, Butte County appeared in the Supreme Court as a defendant in a taxpayer’s suit to restrain the county from carrying out provisions of two 1860 acts of the Legislature authorizing the county to buy bonds of the California Northern Railroad Company.¹¹³ In *Hobart v. Supervisors of Butte County*, the Court rejected the plaintiff’s contention that the act was not a “law, for the reason that the matter prescribed is not the will of the Legislature, but a mere transfer to the people of Butte County of powers to legislate.”¹¹⁴

The Court reiterated the extensive powers of the Legislature, which were limited only by the Constitution. The act provided for an election before the bonds were to be purchased:

The Legislature frame the law, and fix its terms and provisions; but they declare that this law shall only take effect in a particular event, that event being the assent of the people interested. It is difficult to see upon what principle the Legislature, having the general powers before attributed to it, may not as well make a *local law* depend for effect upon the will of all the voters of a locality or a majority, as upon the assent of a few; and laws are passed everyday which depend for validity upon the acts of individuals.¹¹⁵

¹¹² Norman E. Tutorow, *Leland Stanford: Man of Many Careers* (Menlo Park: Pacific Coast Publishers, 1971), 77.

¹¹³ Cal. Stats. (1860), chap. 122, 164.

¹¹⁴ *Hobart v. Supervisors of Butte County* (1860), 17 Cal. 30.

¹¹⁵ *Ibid.*, 33.

The exact monetary provision of the 1860 acts was that the county would issue bonds totaling one-third of the railroad's expenditures. The county claimed that even though the railroad spent some \$97,000, the work was worth only \$30,000, making the county liable for \$10,000 in bonds. The Supreme Court disagreed, saying that the actual expenditure was the real basis of the county's liability. "Any other basis, besides being uncertain, and leading to embarrassing inquiries, is unwarranted by the express terms and evident spirit of the Act."¹¹⁶ The county now followed the legislative and judicial dictates, but in 1863 the Legislature passed a new act, authorizing the county to issue county bonds to pay for the railroad bonds,¹¹⁷ and in 1866 a further act for the levying and collection of a tax to provide for the payment of accruing interest on the county bonds, and eventual payment of the principal.¹¹⁸ In 1872 the county was called upon to appear again in court, with the Supreme Court ordering the county to increase the tax levy for the payment of the interest and principal.¹¹⁹

Other local governments involved in railroad stocks and bonds to become involved in Supreme Court litigation because of such involvement, included Sacramento's consolidated city and county government, the counties of Napa, Plumas, Santa Clara, and Marin, and the cities of Stockton and San Diego. Although the facts may have differed from city to city or county to county, no new principles of law were involved, although a look at Stockton's involvement might shed further light on the problems faced by a local government in its relationship with a railroad. At its 1870 session, the Legislature empowered the city of Stockton to aid the Stockton and Visalia Railroad, directing the municipal authorities to donate \$300,000 to the railroad, which was to have a permanent terminus in the city, at its waterfront.¹²⁰ Bonds were to be placed in the hands of trustees who were to deliver them piecemeal to the railroad as the work progressed. All went well until the city authorities refused to levy the tax to pay the accruing interest on the bonds, claiming the act was unconstitutional.

¹¹⁶ *C. N. Railroad Company v. Butte County* (1861), 18 Cal. 675.

¹¹⁷ Cal. Stats. (1863), chap. 178.

¹¹⁸ Cal. Stats. (1866), chap. 305.

¹¹⁹ *Robinson v. Butte County* (1872), 43 Cal. 353.

¹²⁰ Cal. Stats. (1869–70), chap. 396.

In *S. & V. R. R. Co. v. City of Stockton*, the Court again stressed the power of the Legislature over local governments, taxation, and internal improvements, and upheld the law.¹²¹ Meantime, the railroad, the Stockton and Visalia Railroad Company, to be exact, sold out its interests to Leland Stanford and friends, who were then in the process of assembling their railroad network. The agreement had been that the railroad was to go from Stockton to Visalia, by which time all the bonds were to be delivered to the railroad company, but the company tried to use a portion of another acquired road, not built by the Stockton Railroad, as part of the road it constructed.

David S. Terry, a former chief justice, acted as attorney for the railroad, but then changed over to the city, whose officials challenged Stanford's group. Terry's biographer has traced the proceedings:

Starting in 1871 the Stockton and Visalia Railroad case wound its weary way through the courts for half a dozen years and then was settled out of court. By the summer of 1872 Terry had become one of the attorneys for the people. . . . The district court's decision favored the city and county, but in 1875 the supreme court reversed the decision and held that the bonds should be delivered to the railroad company. Terry and his associates in the case managed to delay matters until May, 1877, and finally effected a compromise. City and county bonds to the value of \$200,000 were to go to the railroad's representative, and in return \$300,000 worth of bonds and their coupons were to be canceled. The total cancellations amount to \$530,000. Terry and those who had worked with him on the case had saved Stockton and San Joaquin County a very substantial sum of money.¹²²

The county of San Joaquin was also a party to the subsidy for the railroad, but was not involved in the Supreme Court case with the city of Stockton, *Stockton Railroad Co. v. Stockton*.¹²³ In that case the Court said that by purchasing what it did, the railroad was still securing to the people of Stockton the benefits they sought, permanent communication by a railroad from the Stockton waterfront to Visalia.

¹²¹ *S. & V. R. R. Co. v. City of Stockton* (1871), 41 Cal. 147.

¹²² A. Russell Buchanan, *David S. Terry of California; Dueling Judge* (San Marino: The Huntington Library, 1956), 164.

¹²³ *Stockton Railroad Co. v. Stockton* (1876), 51 Cal. 328.

In *Hornblower v. Duden*, the Supreme Court upheld the right of El Dorado County to hire outside counsel to represent its interests in a contested election for directors of the Placerville and Sacramento Valley Railroad.¹²⁴ The county owned 2,000 shares having a nominal value of \$200,000, and “was, therefore, a stockholder, and as such directly interested in the conduct and management of the affairs of the company, and therefore in the selection of its officers. She had precisely the same rights as any other stockholder.”¹²⁵

As a stockholder the county’s interests had to be looked after with the same care as other property, and the Board of Supervisors had the power to use whatever means were necessary. If this case was not a landmark in legal history, it did indicate some of the problems raised by the entry of the railroads and the involvement of local governments in railroad financing.

Railroads were also considered to be “public uses” and were entitled to use the state’s power of eminent domain under the California Railroad Law of 1861.¹²⁶ The Supreme Court held that numerous decisions had already decided that a railroad was a “public use” within the constitutional meaning. It refused to be put in the position of determining the point for each individual railroad, saying such a determination was within the discretion of the Legislature.¹²⁷

Such a condemnation was, of course, a special proceeding, and “[i]t is a rule of universal recognition that in special proceedings, by which private property is taken for public use, the statute must be strictly construed.”¹²⁸ Under the 1861 law, commissioners were to be appointed to appraise the value of the land when it was actually taken, which meant when the title passed to the railroad.¹²⁹ The Court also upheld statutory provisions allowing the commissioners to take into account any benefits accruing to the rest of the owner’s land, or any injury thereto. Only in such a way could a “just compensation be reached.”¹³⁰ In *Southern Pacific Railroad*

¹²⁴ *Hornblower v. Duden* (1868), 35 Cal. 664.

¹²⁵ *Ibid.*, 670.

¹²⁶ Cal. Stats. (1861), chap. 532.

¹²⁷ *Contra Costa Railroad Co. v. Moss* (1863), 23 Cal. 323.

¹²⁸ *S. P. R. R. Co. v. Wilson* (1874), 49 Cal. 396.

¹²⁹ *S. F. & S. J. R. R. Co. v. Mahoney* (1865), 29 Cal. 112.

¹³⁰ *S. F. A. & S. R. R. Co. v. Caldwell* (1866), 31 Cal. 367.

Co. v. Reed, the Court said that it was possible for two railroads laying tracks over the same land to each cause injury to property owners, and each become liable for such injury as it inflicts.¹³¹ The Court also laid down the rule that the railroad could not enter and use the condemned land until title passed to it, while no title could pass until just compensation was given to the land owner.¹³²

Taxation of the railroads also came within the purview of the Supreme Court, which upheld the state's right to tax the property of railroads within the limits of the state.¹³³ In the case of railroad land, also part of the public domain, such land became liable to taxation by the state when all the steps needed to receive a federal patent had been completed.¹³⁴

Cases emanating from federal railroad laws did not reach the state courts of California with great frequency, but conflicts did arise, such as when a railroad line was made to cross a mineral claim. The 1862 Pacific Railroad Act specifically excepted mineral lands from grants by the federal government to the railroads,¹³⁵ but in *Doran v. Central Pacific Railroad Company* the railroad's actual line of road crossed public mineral lands claimed, improved, and mined by the plaintiff.¹³⁶ In such an instance the railroad had priority because title to the land was in the federal government, and as the holder of the paramount title, the government could dispose of the land as it wished. The plaintiff was, as compared to the government, a mere naked trespasser, and could not prevent the entry of the paramount authority or one who enters under that authority. The same reasoning, in essence, was used in *Western Pacific Railroad Co. v. Tevis*, when the Court said the railroad's right of way, as granted by Congress, prevailed against a preemptor who had not yet perfected his claim because until the claim was perfected, the title to such public lands remained in the federal government.¹³⁷ If the United States had already disposed of the land in any way, then a railroad could not enter. One such instance occurred in *Butterfield*

¹³¹ *Southern Pacific Railroad Co. v. Reed* (1871), 41 Cal. 256.

¹³² *Fox v. W. P. Railroad Co.* (1867), 31 Cal. 538.

¹³³ *People v. Central Pacific Railroad Co.* (1872), 43 Cal. 398.

¹³⁴ *Central Pacific Railroad v. Howard* (1877), 52 Cal. 227.

¹³⁵ 12 U.S. Stat. at L. (1863), 489–98.

¹³⁶ *Doran v. Central Pacific Railroad Company* (1864), 24 Cal. 2.

¹³⁷ *Western Pacific Railroad Co. v. Tevis* (1871), 41 Cal. 489.

v. C. P. R. R. Co. when the Central Pacific entered land the property of a holder under a federal military land warrant, and the railroad was liable for damages.¹³⁸

The three sections comprising this chapter indicate, as noted earlier, some economic aspects faced by California as a developing state. The section dealing with taxation involves purely state and local problems, but the sections dealing with legal tender notes and the railroads, while developed from the view of the state, also show California reacting to national concerns.

Generally stated, the decisions were victories for, and beneficial to the business interests of the state, particularly financial groups, who no longer had to pay interest on their mortgages, did not have to accept depreciated paper money, and fully expected to profit from the railroad industry, both through the bonds and from the increased business that was expected to be generated by the railroads. Many of these decisions, seemingly pro-business, left the Court under fire, as claims were made that the decisions were arrived at on the basis of business and not law. Certainly the justices were generally men of property and may have had sympathies for the business community; some of the justices certainly had (Republican) political connections with the Big Four. Another consideration might have been political, as the justices may have been catering to businessmen, many of whom were also political leaders, to ensure their own careers, either continuing on the Court or in other political offices.

There are other more charitable explanations as well. The most obvious one is merely to say that the decisions represented the law as the justices saw it. Another possible explanation was that the justices were influenced by outside considerations, but not personal ones. They may have felt that their decisions would go far in helping California grow and develop financially.

The long-range trend of the opinions presents still another option, the one favored by this author. These decisions involved the continuing constitutional question of legislative authority. The Constitution gave the Legislature a tremendous amount of power, and the Court, unless there was a clearly unconstitutional enactment, was prone to support and even encourage legislative power. It has been noted earlier in this study that although the Court said there were limits on the power of the Legislature, it

¹³⁸ *Butterfield v. C. P. R. R. Co.* (1866), 31 Cal.

still tended to give this power wide latitude. Thus, the Court accepted the judgment of the Legislature about the Specific Contract Act and the various railroad acts, and actually preferred direct Legislative control over tax matters to that by the State Board of Equalization. It may very well be true that members of the Court agreed with these decisions as private persons, but the constitutional question of legislative power was a real legal issue.

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Chapter 9

CALIFORNIA AND THE NATION

Conflicts between the various states and the federal courts can be traced back to the early days of the Republic. In 1794 the United States Supreme Court held that a citizen of one state could sue another state in the federal courts.¹ This conflict was settled by the Eleventh Amendment to the United States Constitution, but succeeding years produced new situations that again placed state and federal authority at odds with one another. The period after 1815, when the concept of states' rights gained prominence, saw several states defy the United States Supreme Court. In the 1850s three states in particular defied the federal courts: Ohio, Wisconsin, and California.

Defiance by the California Supreme Court consisted in the denial of the federal courts' jurisdiction in certain cases and in refusing to accept decisions of the United States courts and other federal bodies as binding on California's courts. Other problems involved the interpretation of the United States Constitution, laws, and treaties, and decisions in cases involving slavery.

¹ *Chisholm v. Georgia* (1793), 2 Dall. 419.

STATE AND FEDERAL AUTHORITY

The first case to reach the Supreme Court involving a possible conflict between California and federal authority was *People v. Naglee*,² which tested the California law taxing foreign miners. This law was passed by the Legislature in 1850 to collect license fees from foreigners who worked the mines in the state.³ The case arose when Attorney General James A. McDougall questioned the defendant's right to collect the taxes, the latter being one of the fee collectors. Justice Bennett, speaking for the Court, said the law was not in violation of the United States Constitution, as a usurpation of defined congressional powers, since the state had the power of taxation over all persons within its territorial jurisdiction, and this held true even if the mining lands were public lands of the United States which the miners were working as mere trespassers or as claimers of a preemption right.

The promise of California attracted people from many countries of the world, and until such time as they became citizens of the United States many of their rights were to be determined by treaties between their native lands and the United States. In the 1850s the Supreme Court acknowledged the federal government's treaty-making powers and the authority of such treaties,⁴ but the question of whether a specific law was indeed in conflict with a treaty still remained.

This conflict between state law and federal treaty was often the key to the legality of anti-Chinese legislation, but in California, in the twenty-five or so years after admission, the most important treaty was the Treaty of Guadalupe Hidalgo, signed May 30, 1848, ending the war with Mexico.⁵

Having decided that foreign miners could be taxed, the Court went on to discuss the provisions of the Treaty of Guadalupe Hidalgo dealing with the citizenship of the native Californians, and to examine the treaty-making power of the United States. By the eighth and ninth articles of the treaty, any Mexican citizen who did not either move to Mexico or declare his intention to retain his Mexican citizenship within one year of the exchange of ratifications, was to be considered as having elected to become a citizen of the

² *People v. Naglee* (1850), 1 Cal. 232.

³ Cal. Stats. (1850), chap. 97.

⁴ *People v. Gerke* (1855), 5 Cal. 381; *Forbes v. Scannell* (1859), 13 Cal. 242.

⁵ 9 U.S. Stat. at L. (1848), 922-43.

United States.⁶ The Court said that the statute was not in conflict with these treaty articles, and all Mexicans who had not declared their intentions to retain their Mexican citizenship were to be deemed American citizens and not subject to the tax. But if this or any state law were to clash with a treaty of the United States, it was not always necessary that the state law had to give way. In presenting a typical states' rights argument, the Court went on to state that the state law would give way only if the power to enact that law had been specifically relinquished by the state to the central government:

If the state retains the power then the president and senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty making department When it transcends these limits . . . it cannot supersede a state law which enforces or exercises any power of the state not granted away by the constitution.⁷

In spite of the authority of the *Naglee* case, some twenty years later the citizenship of Pablo de la Guerra was challenged.⁸ De la Guerra, a member of a prominent Santa Barbara Californio family, had been one of the men to draw up California's 1849 Constitution, and like other members of his family, held various offices. In this particular case he had been elected a district judge in 1869, and the relator questioned de la Guerra's citizenship under the 1848 treaty, saying that an act of Congress admitting California's Mexicans to citizenship was needed. Said the Court: "The question raised would be of very grave import to the people of this State, were it not for the fact that its solution is quite obvious."⁹ Justice Jackson Temple opined that the Treaty of Guadalupe Hidalgo itself had the direct effect of fixing the status of the inhabitants of the territories ceded under the treaty, and under the ninth article the only way in which it was possible to admit the Mexicans into full citizenship was by incorporating the ceded territory into the United States as a state. After such admission into the union, no further act was needed to define the rights of the inhabitants of the ceded territory. Jackson defined the steps more finely by adding that citizenship

⁶ 49 U.S. Stats. at L. (1848), 922-43.

⁷ *People v. Naglee*, 246.

⁸ *People v. de la Guerra* (1870), 40 Cal. 311.

⁹ *Ibid.*, 339.

came with the cession to the United States, and statehood brought political power. “The possession of all political rights is not essential to citizenship. When Congress admitted California as a State, the constituent members of the State, in their aggregate capacity, became vested with the sovereign powers of government, “according to the principles of the Constitution.””¹⁰

The bulk of the cases involving an interpretation of the Treaty of Guadalupe Hidalgo, however, dealt with land grants emanating from the Mexican period, and the problem of these grants was largely assumed by the federal government.

Without mentioning the *Naglee* case the treaty-making power of the United States was upheld by the Court in *People v. Gerke*, where a Prussian citizen had died intestate, and the state claimed that the estate should have reverted to it because there was nobody competent to inherit.¹¹ In supporting the appointment of Henry Gerke as administrator and his sale of part of the estate on behalf of the absent heirs, the Court gave precedence to an 1828 treaty between Prussia and the United States, one of whose articles provided for such a contingency by allowing the heir to sell the property and take the proceeds.¹² In answering the claim of the state that the United States could not make such a provision by treaty, the Court said that before the federal constitution was written the individual states had the power to make such treaties, but by the federal compact “they expressly granted it to the Federal Government in general terms, and prohibited it to themselves.”¹³

A similar treaty with the Hanseatic towns¹⁴ was brought up in *Siemssen v. Bofer*, where the inheritors, again nonresident aliens, attempted to bring an action of ejectment.¹⁵ Chief Justice Murray cast doubt on the *Gerke* case without actually overruling it, holding that the ejectment could not be maintained, but the interest in the property could be sold since the state authorized sales of real estate by parties not in possession.¹⁶ In 1859 *People v. Gerke* was expressly upheld in *Forbes v. Scannell*, where an assignment to a creditor was held valid,

¹⁰ Ibid., 343–44.

¹¹ *People v. Gerke* (1855), 5 Cal. 381.

¹² 8 U.S. Stat. at L. (1828), 378–86.

¹³ *People v. Gerke*, 383.

¹⁴ 8 U.S. Stat. at L. (1827), 366–73.

¹⁵ *Siemssen v. Bofer* (1856), 6 Cal. 250.

¹⁶ Cal. Stats. (1850), chap. 101, § 34.

although it was made in Canton, China, before the United States consul, Oliver H. Perry, under an 1844 treaty between China and the United States.¹⁷

In 1855 one Frank Knowles petitioned the California Supreme Court to become a naturalized United States citizen. The Court denied his petition, which was based on an 1802 act of Congress giving any state court the power to naturalize.¹⁸ In *Ex parte Knowles*, the Court denied its own jurisdiction, saying that it had only appellate powers, and the power to naturalize was one of original jurisdiction.¹⁹ In any event, the California Legislature gave the district courts of the state the power to grant naturalization,²⁰ and the district court was the only state court with this power, as Congress could not confer any judicial power on a state court. But a state court could take the case where a seaman sued his master for past wages, where seaman, master, and ship were all British. Justice Bennett, speaking for the Court, said it was the duty of the courts to foreign nations to protect foreign subjects, especially as the seaman would have had a good case in an English court as well.²¹

It was also possible on occasion for both state and federal courts to have jurisdiction over a matter, and suit could be brought in both courts. In an action for money due on freight it was not enough of an answer to say that there was a suit on the same matter in the District Court of the United States. Chief Justice Murray said, “both actions may proceed at the same time without the fear of any danger of any collision or clashing of jurisdiction.”²²

A direct challenge to federal authority arose when the California Supreme Court denied the jurisdiction of the United States Supreme Court under the twenty-fifth section of the Federal Judiciary Act of 1789,²³ which gave the federal courts jurisdiction over certain classes of cases, as occurred in the 1850s in the cases of *Gordon v. Johnson*²⁴ and *Taylor v. The Steamer Columbia*.²⁵ In the former case the California Supreme Court

¹⁷ *Forbes v. Scannell* (1859), 13 Cal. 242.

¹⁸ 2 U.S. Stat. at L. (1802), 153–55.

¹⁹ *Ex parte Knowles* (1855), 5 Cal. 300.

²⁰ Cal. Stats. (1853), chap. 168.

²¹ *Pugh v. Gilliam* (1851), Cal. 485.

²² *Russell v. Alvarez* (1855), 5 Cal. 48.

²³ 1 U.S. Stat. at L. (1789), 73–92.

²⁴ *Gordon v. Johnson* (1854), 4 Cal. 368.

²⁵ *Taylor v. The Steamer Columbia* (1855), 5 Cal. 268.

denied a writ of error to enable an appeal to the United States District Court. Justice Solomon Heydenfeldt, speaking for a unanimous court, followed a line of reasoning already enunciated by the Virginia State Supreme Court and John C. Calhoun: the twenty-fifth section of the Federal Judiciary Act was unconstitutional and void since it was a patent usurpation of state powers. As there was no provision in the United States Constitution for this section, the Court held that state and federal courts were coordinate tribunals, with jurisdiction attaching to the court first receiving the matter for adjudication. The rule, then, became:

1st, that no cause can be transferred from a State Court to any Court of the United States.

2d, that neither a writ of error nor appeal lies to take a case from a State Court to the Supreme Court of the United States.²⁶

State and federal courts were thus held to be coordinate, and by implication, completely independent of one another. Justice Heydenfeldt expanded his view the next year in the *Taylor* case, which involved the question of admiralty jurisdiction. The Court decided that judicial power over admiralty cases was not exclusive in United States courts, even though they had received jurisdiction to all admiralty and maritime cases from the federal constitution.²⁷ In so holding, the Court sustained statutory provisions giving the state's district courts equal jurisdiction with federal courts in admiralty cases;²⁸ jurisdiction attached to the court first receiving the matter for adjudication because the federal constitution nowhere gave exclusive jurisdiction to federal courts. One historian of the Supreme Court concluded that the reason for the state Court's hostile view was the physical isolation of California in the years prior to the building of the transcontinental railroad.²⁹

The Legislature attempted to counter these decisions by passing an act compelling the state judiciary to comply with the Federal Judiciary Act.³⁰

²⁶ *Gordon v. Johnson*, 374.

²⁷ U.S. Const., art. III, § 2.

²⁸ Cal. Stats. (1851), chap. 5, §§ 317–32.

²⁹ Charles Warren, *The Supreme Court in United States History*, vol. II (2 vols.; rev. ed., Boston: Little, Brown, and Company, 1922, 1926), 257.

³⁰ Cal. Stats. (1855), chap. 73, §§ 2, 3.

However, the Court changed its position before the decade ended. In *Warner v. Uncle Sam*, Justice Peter H. Burnett said the decisions in the *Johnson* and *Taylor* cases were wrong, but he did not overrule them in express terms.³¹ In his view concurrent admiralty jurisdiction could be sustained only if the appellate power of the federal courts extended to the state courts: “The exercise of this original jurisdiction by the state courts, subject to the supervisory powers of the Supreme Court of the United States, would seem to be compatible with the harmony and efficiency of the system and beneficial in its practical effects.”³²

The Supreme Court of California gave formal judicial recognition to the disputed section of the Judiciary Act in *Ferris v. Coover*, although holding that the appellate power of the Supreme Court of the United States was limited to those instances actually mentioned in the section in controversy.³³ Although Chief Justice David S. Terry dissented, Justice Joseph Baldwin, with the concurrence of Justice Stephen J. Field, said that the arguments were all exhausted, and that the doctrine of federal judicial supremacy had long been established. Baldwin went on to say that “there should be a central tribunal having power to give authoritative exposition to the Constitution, and laws, and treaties of the United States, and which should also possess the power to secure to every citizen the rights to which he is entitled under them, seems to us highly expedient.”³⁴ In spite of a vigorous dissent by Chief Justice Terry, California judicially “joined the Union.”

Still other cases arose which involved relations between the state and the federal government, such as whether a state court could enjoin proceedings in a federal court. *Phelan v. Smith*³⁵ said that no such power existed, and in *Ex parte Lewis Crandall*³⁶ the Court enforced the federal act of 1790, which made desertion a crime.³⁷ The Court, in 1857, declared unconstitutional a state law which placed a passenger tax of \$50 on each Chinese brought into California.³⁸ This decision was based on similar cases

³¹ *Warner v. Uncle Sam* (1858), 9 Cal. 697.

³² *Ibid.*, 728.

³³ *Ferris v. Coover* (1858), 11 Cal. 175.

³⁴ *Ibid.*, 179.

³⁵ *Phelan v. Smith* (1857), 8 Cal. 520.

³⁶ *Ex parte Lewis Crandall* (1852), 2 Cal. 144.

³⁷ 1 U.S. Stat. at L. (1790), 131–35.

³⁸ Cal. Stats. (1855), chap. 153.

previously adjudicated by the United States Supreme Court,³⁹ and in *Mitchell v. Steelman*,⁴⁰ the California Statute of Frauds⁴¹ was made to yield to the federal statute with which it was in conflict.⁴²

It seems appropriate here to discuss, briefly, some cases arising from land considerations. In 1852 the Legislature enacted a law providing for the disposal of 500,000 acres of land granted to California under an 1841 act of Congress.⁴³ In *Nims v. Palmer*,⁴⁴ the Court held that the two laws were not in conflict, even though the latter act provided for the location of the land after survey.⁴⁵ “The State had the most perfect right to determine what shall constitute evidences of title as between her own citizens, to all lands within her boundaries.”⁴⁶ In *Gunn v. Bates*, the Court said that since the United States Supreme Court had decided that a conditional grant from the Mexican government conveyed a good title even without performance of the conditions, the California court would not question the rule, although in a partial dissent Justice Terry said he did not agree on all points.⁴⁷ In 1859 the Court went on to say that decisions of the United States Land Commission and United States district courts could be used as evidence in disputes involving land,⁴⁸ and the state courts could not interfere with decisions of the United States Board of Land Commissioners.⁴⁹

With these important questions of federal authority settled, later cases coming before the California Supreme Court involving federal relations still raised points that needed to be settled, not only those dealing with judicial relationships, but the interpretation by the state courts of the United States Constitution, federal laws, and treaties. Corollary to such a study is an examination of the relationship between California and other states of the federal union.

³⁹ *People v. Downer* (1857), 7 Cal. 169.

⁴⁰ *Mitchell v. Steelman* (1857), 8 Cal. 363.

⁴¹ Cal. Stats. (1850), chap. 114, § 17.

⁴² 9 U.S. Stat. at L. (1850), 440–41.

⁴³ Cal. Stats. (1852), chap. 4.

⁴⁴ *Nims v. Palmer* (1856), 6 Cal. 8.

⁴⁵ 5 U.S. Stat. at L. (1841), 453–58.

⁴⁶ *Nims v. Palmer*, 13.

⁴⁷ *Gunn v. Bates* (1856), 6 Cal. 263.

⁴⁸ *Gregory v. McPherson* (1859), 13 Cal. 562.

⁴⁹ *Waterman v. Smith* (1859), 13 Cal. 373; *Moore v. Wilkinson* (1859), 13 Cal. 478.

CALIFORNIA AND SLAVERY

Probably nothing in the period under discussion caused more excitement than the issue of slavery. Even before statehood slaves had been brought into California, many coming with their masters to work in the mines. Many people felt, or at least hoped, that California would become a slave state, but slavery was not permitted in the state constitution,⁵⁰ and the Legislature passed an act requiring all slaves to leave the state,⁵¹ which was broader than the federal Fugitive Slave Act,⁵² as it required slaves brought here voluntarily as well as fugitive slaves to leave the state. Two slave cases reached the Supreme Court in the 1850s, *In the Matter of Perkins*⁵³ and *Ex parte Archy*,⁵⁴ both by use of writs of habeas corpus. In the *Perkins* case, three slaves were brought into California voluntarily before statehood, and once there, the slaves freed themselves, and went into business on their own account. A provision of the 1852 act said that slaves brought here voluntarily before statehood who refused to return to their home state upon demand of their owner, should be deemed fugitives from labor and apprehended and returned to their owners. The Court said that the state law did not limit the federal act, but allowed such cases to be brought to state courts. The state, in so allowing, was also relieving itself of an obnoxious class of persons and was in no way considering the freedom of the slaves.

The *Archy* case, which was not decided until 1857, caused a great deal of discussion and excitement throughout the state. Archy was brought into the state by his master, Charles A. Stovall, who travelled to California for his health and who remained here a short time and then returned to Mississippi. Stovall worked for some time as a teacher, and then decided to send Archy back to Mississippi. He placed him on a steamer, from which the slave escaped. Legal proceedings were then begun.

Justice Burnett wrote the opinion in which he said that the right of property (a slave) went with its owner, and thus Stovall had a right to a slave while travelling, but Stovall changed his status by taking a position as a teacher. By this statement Burnett seemingly laid the way for Archy's

⁵⁰ Cal. Const. (1849), art. I, § 18

⁵¹ Cal. Stats. (1852), chap. 33, § 1.

⁵² 9 U.S. Stat. at L. (1850), 462-65.

⁵³ *In the Matter of Perkins* (1852), 2 Cal. 424.

⁵⁴ *Ex parte Archy* (1857), 9 Cal. 147.

freedom, but gave Archy to Stovall's custody anyway, saying there were circumstances which would exempt Stovall from these rules, and that in the future the rules would be strictly enforced. For whatever reasons Burnett had for this action, Archy eventually gained his freedom as the matter came up before a United States commissioner, who freed Archy, as Stovall changed his story, claiming Archy had escaped in Mississippi.⁵⁵

Justice Burnett's opinion brought about a great deal of adverse comment that was directed toward the Court in general and Burnett in particular. Joseph G. Baldwin is supposed to have stated that the Court "gave the law to the North and the Negro to the South."⁵⁶ The concurrence in the decision by Chief Justice Terry, an ardent pro-Southerner, was not surprising, but Burnett never explained the reason for his decision. One student of Burnett's career claims that Burnett had a record of dislike of African Americans, forever trying to bar them from whatever area in which he resided.⁵⁷

The judicial relations between California and the United States were not atypical of the turbulent decade before the United States. California was not the first state to question federal judicial supremacy, nor was it to be the last. What tended to stimulate such a self-asserting point of view in California was the physical distance from the rest of the nation. California's geographical situation provided not only physical isolation but also a sense of aloneness that created a feeling of independence from the national government. As the decade went on, the slavery controversy tended to involve the state more in national questions, and the Court reversed its earlier stand on the Federal Judiciary Act.

JUDICIAL RELATIONSHIPS

The judicial recognition of the Federal Judiciary Act in *Ferris v. Coover* did not serve to extend a jurisdictional carte blanche to the federal judiciary over actions in California's courts. What the case did decide was, first, that in

⁵⁵ Theodore H. Hittell, *History of California*, vol. IV (4 vols., N. J. Stone & Company, 1885–97), 246.

⁵⁶ J. Edward Johnson, *History of the Supreme Court Justices of California*, vol. 1 (2 vols., vol. 1 San Francisco: Bender-Moss Company, 1963; vol. 2 San Francisco: Bancroft-Whitney Company, 1966), 63.

⁵⁷ William E. Franklin, "The Archy Case: The California Supreme Court Refuses to Free a Slave," *Pacific Historical Review* XX–XII (May, 1963): 153.

certain instances, such as maritime cases, causes could be transferred from state to federal courts, and second, that certain classes of cases could be appealed to the United States Supreme Court. In each such instance, however, the provisions of the Judiciary Act of 1789 and later federal laws dealing with the judiciary had to be followed with exactitude. In discussing an attempt to sue out a writ of error in order to have the United States Supreme Court review the key case of *Hart v. Burnett*, the decision that determined rights to San Francisco's pueblo lands,⁵⁸ Chief Justice Stephen J. Field wrote: "The Supreme Court of this State, whilst admitting the constitutionality of this [25th] section" does not recognize an unlimited right of appeal from its decisions to the Supreme Court of the United States."⁵⁹ Field added that appeals under the section in question were limited to the instances enumerated therein. Thus, he said, "In accordance with the views here expressed, I must, when applied to for a citation, judge, in the first instance, whether the case is covered by the Act of Congress."⁶⁰ In this particular instance Field refused the writ of error, holding that the federal act referred to final judgments, and the case sought to be reviewed was not a final judgment in that sense, but a determination of law to be used by the lower court in the rehearing of that case. In *Tompkins v. Mahoney*, the Supreme Court added that appeals from it to federal courts were limited to the United States Supreme Court and not to a United States Circuit Court even if such court were presided over by a United States Supreme Court justice.⁶¹

Problems of jurisdiction at the trial level might best be seen by examining cases that involved maritime questions. The acceptance of the 1789 Judiciary Act involved the determination that federal courts had exclusive jurisdiction over maritime cases, but this did not prevent such suits from appearing in state courts, but with a different form of action. In *Bohannon v. Hammond* a suit was brought for damages incurred by goods shipped by the plaintiff, and damaged by the defendant, a common carrier.⁶² The defendant contended that state courts lacked jurisdiction because the action was brought on a maritime contract and could only be brought in

⁵⁸ *Hart v. Burnett* (1860), 15 Cal. 530.

⁵⁹ *Hart v. Burnett* (1862), 20 Cal. 171.

⁶⁰ *Ibid.*

⁶¹ *Tompkins v. Mahoney* (1867), 32 Cal. 231.

⁶² *Bohannon v. Hammond* (1871), 42 Cal. 227.

admiralty. The Supreme Court rejected this argument, saying that the Judiciary Act defining jurisdiction of federal courts allowed a common law remedy if the common law could be applied, and a suit like this, seeking damages, was one such instance; state courts “have concurrent jurisdiction of causes of action, cognizable in admiralty, where only a common law remedy is sought.”⁶³ The Court amplified its view the same year in *Crawford v. Bark Caroline Reed*,⁶⁴ where the plaintiff sued to enforce a materials lien under a California statute.⁶⁵ The Court held that the contract breached was a maritime contract, and the courts of the United States had exclusive jurisdiction of proceedings in rem to enforce a lien against the ship. The California statute was unconstitutional insofar as it tried to authorize proceedings in rem for causes cognizable in admiralty. This contract was enforceable in admiralty courts.

The language of the Judiciary Act is not that the [federal] District Courts shall have exclusive, original cognizance of actions to enforce maritime liens, but of all civil causes of admiralty and maritime jurisdiction. The cause of action is the breach of the contract. For this an action lies in admiralty. It is the fact that it is a maritime contract which gives that Court jurisdiction, and not the fact that a maritime lien is to be enforced.⁶⁶

If the case was one belonging to admiralty courts, their jurisdiction was exclusive unless the case fell within the saving clause of the Judiciary Act, which allowed a suit in state courts if there were a common law remedy. “It must follow from this that whenever Courts of admiralty have jurisdiction of a cause of action, whether it afford a remedy *in rem*, or *in personam* merely, that jurisdiction is exclusive, except as to the common law remedy reserved by that Act.”⁶⁷ In determining whether a case was maritime or not, regardless of the pleading, the cause “must relate to the business of commerce and navigation.”⁶⁸ Wharfage fees were not so related.

⁶³ *Ibid.*, 229.

⁶⁴ *Crawford v. Bark Caroline Reed* (1871), 42 Cal. 469.

⁶⁵ Cal. Stats. (1851), chap. 5, § 317.

⁶⁶ *Crawford v. Bark Caroline Reed*, 474.

⁶⁷ *Ibid.*

⁶⁸ *People v. Steamer America* (1868), 34 Cal. 676.

Whether a federal or state court had jurisdiction could also depend on the citizenship of the litigants, as well as the type of action involved. In *Calderwood v. Hagar*, an application for a mandamus to compel removal to the United States Circuit Court for trial, the relator, one of eleven defendants, claimed to be an alien, and the other defendants were not.⁶⁹ The twelfth section of the 1789 Judiciary Act said an alien defendant could ask for such a removal, but the California Supreme Court held that where there was a group of defendants, all had to be aliens, and all had to join in the application for removal. Further, the plaintiff had to be a United States citizen: “It is well settled that the United States Courts have no jurisdiction over suits between alien and alien, but they are confined to actions between citizens and foreigners where their jurisdiction is founded upon citizenship.”⁷⁰

Admitting the jurisdiction of the courts of the United States necessarily implied the acceptance of the decisions of those courts. In *Brumagin v. Tillinghast*, an 1861 case, the California Supreme Court said that a decision of the United States Supreme Court declaring a California statute unconstitutional was conclusive on it.⁷¹ In 1879 the Court went somewhat further, saying, “When our judgment must depend upon a question which may be reexamined by the Supreme Court of the United States on writ of error, we will follow the rule of law laid down by that Court.”⁷²

Relations between California courts and courts of other states and nations also came up for review. In *Taylor v. Shew*, the Court said that an action on a judgment of a court of competent jurisdiction could be maintained in California, even though an appeal was pending in that case.⁷³ The presumption was that the decision of the other court was legal and correct.

CONFLICT OF LAWS

The acceptance of the authority of the United States Supreme Court effectively settled judicial relationships, but still left open the problem of interpreting laws. The most obvious type of situation was one in which a

⁶⁹ *Calderwood v. Hager* (1862), 20 Cal. 167.

⁷⁰ *Orosco v. Gagliardo* (1863), 22 Cal. 83.

⁷¹ *Brumagin v. Tillinghast* (1861), 18 Cal. 265.

⁷² *Belcher v. Chambers* (1879), 53 Cal. 643.

⁷³ *Taylor v. Shew* (1870), 39 Cal. 536.

state law conflicted with a federal law or treaty or with the United States Constitution, but other problems did arise in interpreting laws.

One such instance had to do with federal laws that dealt with the state's courts in some way. In 1855 the Supreme Court of the state denied Frank Knowles' petition for citizenship as being outside of its exclusively appellate jurisdiction, as noted above. The 1862 amendments assigned naturalization powers to the county courts,⁷⁴ and in 1869 the Supreme Court held that such an assignment was compatible with the federal statute.⁷⁵ If the federal government could not confer powers on the state courts, the question then arose whether such courts could nonetheless enforce federal statutes. In *People v. Kelly*, the Court said that for an act to be punishable in a state court the act had to have been contrary to a state law, and such was not the situation in that case.⁷⁶

The conflict between a state law and the United States Constitution, federal treaties, and laws, has been discussed previously in several instances. Many of these, such as the cases dealing with attempts at Chinese exclusion, were examples of the conflict between the state's police powers and federal authority, and were essentially decided on the premise that when the federal government had preempted a sphere of legislation, the state could not enact laws in the same area. This same premise was used to decide cases not involving state police powers, such as state bankruptcy laws. In 1867 the United States Congress enacted a bankruptcy law,⁷⁷ pursuant to the constitutional provision conferring upon Congress the power to establish uniform bankruptcy laws.⁷⁸ The power so conferred, said the California Supreme Court, did not become exclusive until Congress did act. Until such time states could pass laws on that subject, but when Congress did so act, such law was to be considered supreme, and while in force, all state laws on the same subject and in conflict with it were suspended.⁷⁹ However, if the federal law did not prohibit a state from also acting, or expressly withheld federal exclusivity, then state and federal governments

⁷⁴ Cal. Const. (1849), art. VI, § 8 (amended 1862).

⁷⁵ In the Matter of Martin Conner (1870), 39 Cal. 98.

⁷⁶ *People v. Kelly* (1869), 38 Cal. 145.

⁷⁷ 14 U.S. Stat. at L. (1867), 517–41.

⁷⁸ U.S. Const., art. I, § 8.

⁷⁹ *Martin v. Berry* (1869), 37 Cal. 208.

could enact laws on the same subject.⁸⁰ With this rule established, seemingly there could be no more conflicts, but such was not the case. In 1874 the Legislature passed a law authorizing the San Francisco Board of Supervisors to obtain a ship to be used to instruct boys in seamanship.⁸¹ Later the same year Congress passed a similar act, but with certain conditions attached.⁸² The Court held that the board could not accept the ship applied for from the United States because the act of Congress was inconsistent with the state act.⁸³

State laws not only had to yield to conflicting federal laws, but they also had to conform to the federal constitution and to treaties entered into by the central government. As with many state–federal legal controversies a key problem was to find, or pinpoint, the line separating state and federal powers. In particular, California found legislative enactments based on its so-called police powers struck down as being in conflict with the United States Constitution and various treaties. Such was the case with California’s attempt to keep Chinese out of the state. Laws attempting to exclude Chinese immigrants were found to be in contravention of the commerce clause of the United States Constitution. This clause was used to void other state acts as well. One such enactment was an 1858 law that placed a stamp tax on all gold and silver transported from the state,⁸⁴ but the Court said that such a requirement amounted to a tax on exports and was unconstitutional⁸⁵ under authority of the United States Supreme Court.⁸⁶ A similar tax on tickets of persons leaving the state,⁸⁷ was declared unconstitutional on the same grounds in 1868.⁸⁸ Another statute determined to be a usurpation of federal authority was one passed in 1866 authorizing Alpine County to collect a toll on logs floating down the Carson River toward Nevada.⁸⁹ The Court said that the act was an attempt to

⁸⁰ *People v. White* (1867), 34 Cal. 183.

⁸¹ Cal. Stats. (1873–74), chap. 288.

⁸² 18 U.S. Stat. at L. (1874), 121.

⁸³ *Glass v. Ashbury* (1875), 49 Cal. 571.

⁸⁴ Cal. Stats. (1858), chap. 319.

⁸⁵ *Brumagim v. Tillinghast*, *supra*.

⁸⁶ *Almy v. State of California* (1860), 24 How. 169.

⁸⁷ Cal. Stats. (1862), chap. 230, § 416.

⁸⁸ *People v. Raymond* (1868), 34 Cal. 492.

⁸⁹ Cal. Stats. (1865–66), chap. 311.

regulate commerce between the states of California and Nevada, and such power was vested in the United States.⁹⁰

Certain taxes on imports could be deemed constitutional, however. In *Addison v. Saulnier* the Court held that the fee charged by the state gauger for examining certain imported wines was not a tax within the meaning of the state constitution,⁹¹ and that the act authorizing the gauger's examination did not impose a duty on imports, but was merely an inspection law.⁹² It was also possible to tax imported goods for general state and county taxes, if they were taxed like other goods. In the words of the Court: "It is admitted that the state may tax imported goods after they have become incorporated with the mass of the wealth of the state."⁹³

CALIFORNIA AND THE STATES

The first two sections of the Fourth Article of the United States Constitution outline the relative position of one state to another.⁹⁴ Essentially these sections say that each state is to recognize the laws and judicial proceedings of the other states, and citizens of one state are to enjoy the same rights of citizenship in all the other states. Judicial proceedings were discussed in connection with *Taylor v. Shew*, and the same case also used the judicial rule that unless proof was given to the contrary about the law of another state, the presumption was that the law in that state was the same as in California.⁹⁵ Similarly, if a common law rule were brought up, the presumption was that the common law was the basis of that state's laws, and this was applied to all states formed from the original colonies, and states formed from later acquired land, whose populace was formed from the original states.

But no such presumption can apply to States in which a government already existed at the time of their accession to the country, as Florida, Louisiana, and Texas. They had already laws of their own, which remained in force until by the proper authority they

⁹⁰ *C. R. L. Co. v. Patterson* (1867), 33 Cal. 334.

⁹¹ *Addison v. Saulnier* (1861), 19 Cal. 82.

⁹² Cal. Stats. (1852), chap. 58.

⁹³ *Low v. Austin* (1870), 1 Cal. Unrep. 642.

⁹⁴ U.S. Const., art. IV.

⁹⁵ *Taylor v. Shew*, *supra*.

were abrogated and new laws were promulgated. With them there is no more presumption of the existence of the common law than of any other law.⁹⁶

In such an instance, and the case involved Texas law, the Court went on the presumption that the Texas law was the same as that in California, and decided the issue on that basis. As Chief Justice Stephen J. Field explained the situation:

We are called upon to determine the matter in controversy, and are not at liberty to follow our own arbitrary notions of justice. We cannot take judicial notice of the laws of Texas and we must, therefore, as a matter of necessity, look to our own laws as furnishing the only rule of decision upon which we can act; and to meet the requirements that the case is to be disposed of according to the laws of Texas, the presumption is indulged that the laws of the two States are in accordance with each other.⁹⁷

In 1862 the Court was able to summarize this position by saying that the presumption applied to statute law as well as the common law.⁹⁸ The acceptance of laws from another state included territories,⁹⁹ and even mining customs of a territory would be enforced in a California court.¹⁰⁰ Presumably California law would have been used in the absence of proof about territorial laws or mining customs as well.

One thorny problem to be handled in dealing with the relations between states was the matter of fugitives from justice. The United States Constitution states: "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."¹⁰¹

Cases involving extradition came before the Court as habeas corpus proceedings in which the alleged fugitives challenged their imprisonment

⁹⁶ Norris v. Harris (1860), 15 Cal. 253.

⁹⁷ Ibid.

⁹⁸ Hickman v. Alpaugh (1862), 21 Cal. 225.

⁹⁹ Pearson v. Pearson (1875), 21 Cal. 120.

¹⁰⁰ Blodgett v. Potosi G. & S. M. Co. (1867), 34 Cal. 227.

¹⁰¹ U.S. Const., art. IV, § 2.

in California. One such case was *In the Matter of Romaine*, in which the California Supreme Court indicated, without saying so directly, that Congress could not pass a law dealing with fugitives from justice, because this was a matter between the various states themselves.¹⁰² California passed a law extending extradition privileges to territories as well as states, sending the petitioners back to Idaho, then still a territory.¹⁰³ In 1875 the Court upheld a section of the Penal Code¹⁰⁴ that the alleged fugitive had to have a prosecution pending against him in the state from which he fled.¹⁰⁵

One phenomenon of the period after 1860 was the termination, physical and otherwise, of California's isolation from the rest of the nation. The building of the national railroad network essentially ended the physical isolation, and the Civil War did much to end the sense of mental isolation by helping California identify with national problems.

Compared to the decade of the 1850s the judicial relationship between California and the rest of the nation after 1860 was relatively serene. No longer would courts defy the central government, and in a sense, California "came of age" judicially.

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¹⁰² *In the Matter of Romaine* (1863), 23 Cal. 585.

¹⁰³ Cal. Stats. (1851), chap. 29, § 665.

¹⁰⁴ Cal. Penal Code (1872), § 1548.

¹⁰⁵ *Ex parte White* (1875), 49 Cal. 433.

Chapter 10

MINERALS AND WATERS

Gold was discovered on January 24, 1848, and was followed by California's famous rush for gold. This momentous discovery and the beginnings of the great influx of people both took place before statehood and the establishment of a legal system. The result was that the miners had to create their own law, which they did as best they could, but such a procedure was still haphazard and left many important but unresolved legal problems, particularly as the number of miners increased.

In 1849 Henry Gunter paid for some lumber with gold dust, each ounce valued as \$15.50 in payment, even though worth \$16.00 at the time. He later sued for the difference and in *Gunter v. Sanchez* the Court did not allow this claim, as both parties had agreed to the \$15.50 value.¹ “Gold dust is constantly fluctuating in its market value — it is an article of traffic like merchandise, and a payment in it is a payment for just so much as the parties agree, and for no more.”² This was the first case arising from the discovery of gold, and possibly the easiest one decided.

¹ *Gunter v. Sanchez* (1850), 1 Cal. 45.

² *Ibid.*, 49.

The state legislature gave official sanction to miners' rules and regulations adopted by the various mining districts,³ and the state's courts admitted their validity,⁴ but still to come before the Supreme Court were questions dealing with the appropriation of mineral lands and water, the paramount title to the mineral lands, and the conflict between farmers and miners when minerals were found on a piece of land also used for agricultural purposes.

OWNERSHIP OF MINERAL LANDS

For the two-year period between the discovery of gold and California's admission as a state, and the eleven additional years between statehood and 1861, the question as to the ownership of the minerals in ground remained unresolved. Neither federal nor state legislation was enacted to settle this question. It was finally brought before the California Supreme Court, where the justices had to work out a solution. The importance of a solution was stated by Stephen J. Field:

The position of the people of California with respect to the public mineral lands was unprecedented. The discovery of gold brought . . . an immense immigration to the country. The slopes of the Sierra Nevada were traversed by many of the immigrants in search of the precious metals, and by others the tillable land was occupied for agricultural purposes. The title was in the United States, and there had been no legislation by which it could be acquired. Conflicting possessory claims naturally arose, and the question was presented as to the law applicable to them.⁵

The first statement on the matter of the title to the mineral lands by the California Supreme Court appeared in 1853 in *Hicks v. Bell*. The Court said that all minerals found in the state, whether on public or private lands, belonged to the state by virtue of her sovereignty, a conclusion based on English cases recognizing the right of the crown to minerals. Under this ruling the state had

solely the right to authorize them [the public lands] to be worked; to pass laws for their regulation; to license miners; and to affix such terms

³ Cal. Stats. (1851), chap. 5, § 621.

⁴ *Hicks v. Bell* (1853), 3 Cal. 219.

⁵ Stephen J. Field, *California Alcalde* (Oakland: Biobooks, 1950), 103.

and conditions as she may deem proper, to the freedom of their use. In her legislation upon this subject, she has established the policy of permitting all who desire it, to work her mines of gold and silver, with or without conditions; and she has wisely provided that their conflicting claims shall be adjudicated by the rules and customs which may be established by bodies of them working in the same vicinity.⁶

Justice Solomon Heydenfeldt based his opinion on the English common law rule that the gold and silver in the British realm belonged to the crown. Commenting in later years about *Hicks v. Bell*, Stephen J. Field, one of the losing counsel, wrote that the Court ignored the reasoning behind the rule, but adopted its conclusion, and held that “the United States have no municipal sovereignty within the limits of the State, that they must belong in this county to the State.”⁷ By relying exclusively on the common law, the Court did not have to take into account any Spanish or Mexican law that may have conflicted, nor did the counsel for either party mention any but English and United States precedents.

One implication of this decision was that private lands being used for other purposes could be worked by miners without the owners’ permission, and the mineral-seekers were quick to grasp the opportunity.

The *Hicks* decision was upheld throughout the decade of the 1850s, albeit with some modifications as to the right of entry on private lands, until 1859, when *Hicks v. Bell* was seriously challenged in *Biddle Boggs v. Merced Mining Co.*⁸ The case had originally come before the Court in 1857 as a contest between Merced Mining Company and John C. Frémont, with the company mining land on which Frémont was also conducting mining operations, and which he also claimed under a Mexican grant.⁹ The plaintiff company was granted an injunction to prevent Frémont from trespassing on its mining premises, and from working these claims. In so deciding Justices Peter H. Burnett, who wrote the opinion, and David S. Terry refused to comment on whether the minerals belonged to the state or federal government, but said that the company’s mining claim was property and

⁶ *Hicks v. Bell*, 227.

⁷ Field, *California Alcalde*, 105.

⁸ *Biddle Boggs v. Merced Mining Co.* (1859), 14 Cal. 279.

⁹ *Merced Mining Co. v. Fremont* (1857), 7 Cal. 307

was entitled to protection under the law. The rule laid down in *Hicks v. Bell* was necessary to deal with the circumstances in California at that time.

Frémont had his grant verified, a patent was issued, and he leased his mineral rights to Biddle Boggs, who brought suit to eject the Merced Mining Company. Biddle Boggs won in the lower court, and that decision was brought on appeal to the Supreme Court. Among the attorneys representing Biddle Boggs were Joseph G. Baldwin, soon to take his place on the Court, and Solomon Heydenfeldt, who now argued against his earlier position in *Hicks v. Bell* in regard to the right of entry on private lands for mining purposes. At its January 1858 term the Court reversed the lower court, with justice Burnett again writing the opinion and agreeing with his views in the 1857 case. Terry, now the chief justice, concurred, saying that the title to the minerals did not pass to Frémont, but he refused to comment on *Hicks v. Bell*. Stephen J. Field, now a member of the Court, dissented without an opinion.

A rehearing was granted, and the case was reargued at the July 1858 term and again at the October 1859 term. Chief Justice Stephen J. Field and Justice Warner W. Cope now affirmed the lower court in support of Frémont's lessee, Biddle Boggs. Field wrote the opinion, but sidestepped the question of whether the mineral rights passed to the state or the United States, saying he wanted to wait for a full bench; the third member of the Court, Joseph G. Baldwin, had been one of Boggs' counsel, and did not sit for the case. Without deciding the paramount title to the minerals, Field still modified *Hicks v. Bell* extensively. He said that for the sake of argument the minerals belonged either to the state or to the federal government. If the ownership belonged to neither, then the defendant company had no case at all. Assuming the first premise, there had to have been a license for the defendant to enter. But forbearance was the extent of the federal license to mine on the public lands, and such a license could not apply to private lands where the government was ignorant of entries to work such lands. There was no license from the state either. If the United States owned the minerals, it could only do so as a private proprietor, and as such it could not authorize entries on private land for removal of minerals when such entries caused damage to private property.

In 1861 Field had the opportunity to decide the title to the minerals in the cases of *Moore v. Smaw* and *Fremont v. Flower*.¹⁰ The two cases involved

¹⁰ *Moore v. Smaw* and *Fremont v. Flower* (1861), 17 Cal. 199.

the same question of law and were decided as one. The technical question was “whether a patent of the United States for land in California, issued upon a confirmation of a claim held under a grant of the former Mexican government, invests the patentee with the ownership of the precious metals which the land may contain.”¹¹

Both plaintiffs had patents from the United States based on Mexican grants, while both defendants were mining the respective lands. Field, in rendering his opinion, first referred back to Mexican law to note that when the grants were made,

it was the established doctrine of the Mexican law that all mines of gold and silver in the country, though found in the lands of private individuals, were the property of the nation. No interest in the minerals passed by a grant from the Government of the land in which they were contained, without express words designating them. By the ordinary grant of land, only an interest in the surface or soil, distinct from the property in the minerals, was transferred.¹²

This practice of Mexico was, further, but a continuation of Spanish law. An interest in minerals could be transferred under certain circumstances, but at the time of the cession from Mexico to the United State, no gold or silver had been found on either grant. The minerals, then, constituted “at that time the property of the Mexican nation, and by the cession passed, with all other property of Mexico within the limits of California, to the United States.”¹³

The defendants, accepting that the minerals did pass to the United States, offered two defenses, inconsistent with each other, but either one of which, if accepted, would have defeated the plaintiffs. The first of these defenses presented the view that when the gold and silver passed with the cession, the United States held them in trust for the state; when California was admitted the minerals passed to the state. This argument was supported by *Hicks v. Bell*, but, as previously noted, had already been repudiated by the justice rendering that opinion, Solomon Heydenfeldt. The second argument presented was that even if the minerals did become the property of the United States and did not vest in the state, the minerals remained the property of

¹¹ *Ibid.*, 210.

¹² *Ibid.*, 212–13.

¹³ *Ibid.*, 213.

the central government and did not pass with the patents. The reasoning behind this argument was that the act of March 3, 1851, provided for the recognition and confirmation of Mexican grants, and since no minerals passed with the grants,¹⁴ “and if the patents amount only to an acknowledgment of the rights derived from the former Government that interest still remains in the United States.”¹⁵ This argument was also rejected. Field noted that there was no restriction on the operation of a patent from the United States. What passed with the patent was “all the interest of the United States, whatever it may have been in everything connected with the soil, in everything forming any portion of its bed or fixed to its surface, in everything which is embraced within the signification of the term land.”¹⁶

This included the face of the earth and everything under it. The accepted rule was that in regard to its real property within a state, the United States was in the position of a private proprietor, except that it was not subject to state taxation, and a patent from the federal government was subject to the same rules of contraction as applied to a conveyance by an individual; a conveyance by an individual would not reserve the minerals without an express provision. Further, Field said, the United States had never yet reserved minerals from the operation of its patents. In a decision the next year again involving John C. Frémont, Field said that local mining customs, although recognized by statute and judiciary, could not prevail against the paramount proprietor, the United States, “and as a consequence cannot against parties who claim by conveyance from the United States.”¹⁷

The legal effect of the decision in *Moore v. Smaw* was to bar mining on lands belonging to another, and was bitterly assailed. In later years Field wrote that “for holding what now seems so obvious, the judges were then grossly maligned as acting in the interest of monopolists and land owners, to the injury of the laboring class.”¹⁸ Field’s biographer wrote that if the charges of corruption were disregarded, this decision “was determined by the ideas of the judges as to what rule would work best amid the unprecedented conditions of pioneer

¹⁴ 9 U.S. Stat. at L. (1851), 631–34.

¹⁵ *Moore v. Smaw* and *Fremont v. Flower*, 223.

¹⁶ *Ibid.*, 224.

¹⁷ *Fremont v. Seals* (1861), 18 Cal. 435.

¹⁸ Field, *California Alcalde*, 108.

mining and agricultural life.”¹⁹ If the decision barred entry on private lands for mining purposes, it did not prevent entries on the public lands, and in 1866 the United States acted to recognize such entries by providing a method for mining claims to be patented and the miners to receive title to their mines.²⁰

MINING CLAIMS AND MINING CUSTOMS

The wealth of California’s mining areas often times resulted in conflicting claims that came to the Supreme Court for final adjudication, but so complicated were some of the cases that they would reappear before the Supreme Court on several occasions. Each time the Court would decide a point of law and generally return the case to the district court for further action based on the high court’s ruling. A new point of law would then be raised and the case brought back up to the Supreme Court.

One such case has been aptly described:

Year after year, and term after term, the great case of Table Mountain Tunnel vs. New York Tunnel, used to be called in the court held at Sonora, Tuolumne County. The opposing claims were on opposite sides of the great mountain wall. . . . When these two claims were taken up, it was supposed the pay streak followed the Mountain’s course; but it had here taken a freak to shoot across a flat. . . . Into this ground, at first deemed worthless, both parties were tunnelling. The farther they tunnelled, the richer grew the pay streak. . . . Both parties claimed it. The law was called upon to settle the difficulty. The law was glad, for it had then many children in the county who needed fees. Our lawyers ran their tunnels into both of these rich claims, nor did they stop boring until they had exhausted the cream of that pay streak. Year after year, Table Mountain vs. New York Tunnel Company was tried, judgment rendered first for one side and then for the other, then appealed to the Supreme Court, sent back, and tried over, until, at last, it had become so encumbered with legal barnacles, parasites, and cobwebs, that none other than the lawyers knew or pretended

¹⁹ Carl Brent Swisher, *Stephen J. Field; Craftsman of the Law* (Washington, D.C.: The Brookings Institution, 1930), 88.

²⁰ 16 U.S. Stat. at L. (1866), 251–52.

to know aught of the rights of the matter. Meantime, the two rival companies kept hard at work, day and night.²¹

The author, a juror for one of the district court hearings, came away disillusioned with lawyers, courts, and juries.

The greatest difficulty lay in the fact that the bulk of the mines was on public lands; the title to these lands was in the United States, and no legislation had been passed under which the land could be acquired by mining interests under a perfect title. But in order to work a mining claim it was not necessary to have a perfect legal title to the claim. In the mid-1850s, the Court said that prior possession of public lands, and most of the mines were on the public lands, would entitle the possessor to maintain an action against a trespasser, and that this possessory right could become part of one's estate and descend, or in event of the possessor's death, the possessory right could be sold to another by the executor of the estate.²² In 1856 the Legislature enacted a statute holding that unless one using land entered by miners could show a legal title, the presumption would be that the land in question was public land.²³ This statute was upheld by the Court at its October 1859 term in *Burdge v. Smith*.²⁴ The decision was affirmed in *Smith v. Doe* at the Court's next term.²⁵

Of course, the possessory right had to be proved by one seeking to eject a trespasser. To hold differently would have contravened the principle "that a plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary."²⁶ Since in most of these cases the strength of title consisted in the possessory right, prior possession was all that was needed to be shown. What actually constituted "possession" was often open to debate, but in 1851 the Legislature provided that local mining customs should prevail in suits for mining claims in justices' courts, and was soon extended by the Supreme Court to apply to actions for mining claims in all courts.²⁷ In *Attwood v. Fricot*, the Court said: "Mining claims are held by possession, but that possession

²¹ Prentice Mulford, *Prentice Mulford's Story; Life by Land and Sea* (New York: F. J. Needham, Publisher, 1889), 174–75.

²² *Glover v. Hawley* (1855), 5 Cal. 85.

²³ Cal. Stats. (1856), chap. 47, 21.

²⁴ *Burdge v. Smith* (1859), 14 Cal. 380.

²⁵ *Smith v. Doe* (1860), 15 Cal. 100.

²⁶ *Penn. Mining Co. v. Owens* (1860), 15 Cal. 135.

²⁷ *Irwin v. Phillips* (1855), 5 Cal. 140.

is regulated and defined by usage and local, conventional rules.”²⁸ The Court added that mining claims did not need the same degree of possession as did agricultural lands in order to maintain an action for trespass.

Attwood v. Fricot was decided at the Supreme Court’s October 1860 term, and that same term the Court affirmed that decision when it decided the leading case of *English v. Johnson*, which was a controversy over a piece of mining ground in the county of Amador.²⁹ At the trial in the lower court the jury was instructed,

in effect, that possession taken, without reference to mining rules, of a mining claim was sufficient, as against one entering by no better title, to maintain the action; and further, that this possession need not be evidenced by actual enclosures, but if the ground was included within a distinct, visible and notorious boundaries, and if the plaintiffs were working a portion of the ground within those boundaries, this was enough as against one entering without title.³⁰

This instruction was correct; since neither entrant used the mining rules of the vicinage, “The actual prior possession of the first occupant would be better than the subsequent possession of the last.”³¹ The Court approved *Attwood v. Fricot* in that less was required to acquire possession of a mining claim than agricultural lands; for one thing, enclosure was not necessary as the physical marks on and around the claim were enough to establish the boundaries of the claim. Then the Court turned to deal with the instance of the prior possessor not following local rules, and the so-called intruder complying with the local customs, and came up with a compromise of sorts by saying the prior claimant could keep what the local customs decreed even if he had not followed them, or could keep the whole amount, as already indicated, if the second entrant did not follow the customs, either. But in any event, “this whole matter can be, and should be regulated by the miners, . . . who have full authority to prescribe the rules governing the acquisition and divestiture of titles to this class of claims, and their extent subject only to the general laws of the State.”³²

²⁸ *Attwood v. Fricot* (1860), 17 Cal. 43.

²⁹ *English v. Johnson* (1860), 17 Cal. 107.

³⁰ *Ibid.*, 115.

³¹ *Ibid.*

³² *Ibid.*, 118.

Subsequent cases affirmed and broadened *English v. Johnson*. In *Hess v. Winder*, the Court said, “Possession is presumptive evidence of title; but it must be actual. By actual possession is meant a subjection to the will and dominion of the claimant.”³³ The Court did say, too, that the evidence of the right of possession had to be sufficient to give notice to anyone having the right to know this, that the claim was under the control and dominion of a claimant. The possessory right was also sufficient, under the Practice Act,³⁴ for the party in possession to bring suit to determine the adverse claim or title of one out of possession.³⁵ The Court noted in 1871 that in California the subject matter of an action for the recovery of mining ground was regarded as a question of title to real property in fee, even though the ultimate title was in the United States.³⁶

The case of *Attwood v. Fricot* also said that when a mining claim’s boundaries were defined, “and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the entire claim.”³⁷ Some years later the Court laid down the facts needed to establish constructive possession of a mining claim.³⁸ It was necessary to prove that there were local mining customs, rules and regulations in force in the district embracing the claims; that certain acts were required by such mining laws or customs to be performed at the location and working of claims as authorized by such laws; and that the claimant (plaintiff) had substantially complied with these requirements.

The importance of local mining customs in defining possession was also evident in determining when a claim had been abandoned. For an abandonment to be effected, there had to be, by the possessor, some act or other evidence indicating an intent to abandon his claim. In abandoning a claim, the possessor

must leave it free to the occupation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself in any event, and regardless and indifferent as to what

³³ *Hess v. Winder* (1863), 30 Cal. 355.

³⁴ Cal. Stats. (1851), chap. 5, § 254.

³⁵ *Pralus v. Pacific G. & S. M. Co.* (1868), 35 Cal. 30.

³⁶ *Spencer v. Winselman* (1871), 42 Cal. 479.

³⁷ *Attwood v. Fricot*, 43.

³⁸ *Pralus v. Jefferson G. & S. M. Co.* (1868), 34 Cal. 558.

may become of it in the future. When this is done, a vacancy in the possession is created, and the land reverts to its former condition, . . . and not until then, an abandonment has taken place. There can be no abandonment except where the right abates, and ceases to exist. If it be continued in another, by any of the modes known to the law for the transfer of property, there has been no abandonment, for the right, first acquired by the occupancy still exists, although vested in another, and the continuity of possession remains unbroken.³⁹

The claimant to a mine on the public lands could also lose his claim by forfeiture, which in California meant the loss of a right, previously acquired, to mine a particular piece of ground by neglect or failure to comply with the rules and regulations of the bar or diggings in which the mining ground was situated.⁴⁰ However, the Court added in 1868 that for the noncompliance to act as a forfeiture, the rule violated would itself have to so provide.⁴¹ The line between forfeiture and abandonment was unfortunately not always clear, for in another case the Court held that the failure to perform the amount of work required by local mining laws amounted to an abandonment; the Court here did not mention the term “forfeiture.”⁴²

Miners’ rules extended into areas other than possession and abandonment. In 1860 the Court recognized a local custom holding that loose quartz belonged to the claim on which the quartz ledge from which the loose material had been detached was located,⁴³ and the next year said that local mining rules could limit the quantity of ground claimed by location, although such rules could not limit the quantity of ground or the number of claims that could be purchased.⁴⁴ As prevalent as mining rules were, they were of no avail against the United States,⁴⁵ and they could not prevail against locations made before their adoption.⁴⁶

³⁹ *Richardsog v. McNully* (1864), 24 Cal. 344.

⁴⁰ *St. John Kidd* (1864), 26 Cal. 263.

⁴¹ *Bell v. Bed Rock T. & M. Co.* (1868), 36 Cal. 214.

⁴² *Depuy v. Williams* (1865), 26 Cal. 309.

⁴³ *Brown v. Quartz Mining Co.* (1860), 15 Cal. 152.

⁴⁴ *Prosser v. Park* (1861), 18 Cal. 47.

⁴⁵ *Fremont v. Seals*, *supra*.

⁴⁶ *Inimitable Mining Co. v. Union Mining Co.* (1870), 1 Cal. Unrep. 599.

At Court, miners' rules and regulations were allowed to be introduced into evidence whenever possible, even if, as in *Roach v. Gray*, only one of the parties claimed under local customs.⁴⁷ In 1866, in one of the several cases between the Table Mountain Tunnel Company and S. N. Stranahan, the Court held that the statute recognizing local mining customs did not extend to general customs or usages.⁴⁸ This particular case dealt with the size of mining claims, and the Court said that if there were no local custom at the time of location, general customs were admissible in evidence on the question of the reasonableness of the extent of a claim. Any general custom would have to be proved, "but evidence of local usages and regulations varying from each other, are not admissible for this purpose, for they tend to show that the usage is *not* general."⁴⁹

On another occasion the Court noted that local mining rules acquired validity from their customary obedience and acquiescence by the miners following enactment, and not from the enactment itself.⁵⁰ It followed from this that a custom became void whenever it fell into disuse or was generally disregarded, and this was a question for the jury to decide. Further, a custom generally observed would prevail as against a written mining law fallen into disuse. The Court was careful at all times to limit the admissibility of local customs to actions respecting mining claims, and so remain within the provisions of the statute. In an action dealing with damage to a ditch the Court said:

Proof of custom is not admissible to oppose or alter a rule of law, or to change the legal rights and liabilities of parties as fixed by law. A vested right is acquired by the location and construction of a ditch. It is an injury to mine it away, and so recognized by law. The trespass cannot be justified by custom.⁵¹

But within the sphere in which customs could be used, their admissibility as evidence was strongly supported by the Supreme Court.

Local miners' rules and regulations were upheld and interpreted in *Packer v. Heaton*,⁵² where the Court said that a bona fide intent to work a

⁴⁷ *Roach v. Gray* (1860), 16 Cal. 383.

⁴⁸ *T. M. Tunnel Co. v. Stranahan* (1866), 31 Cal. 387.

⁴⁹ *Ibid.*, 392.

⁵⁰ *Harvey v. Ryan* (1872), 42 Cal. 626.

⁵¹ *Hill v. Weisler* (1872), 1 Cal. Unrep. 724.

⁵² *Parker v. Heaton* (1858), 9 Cal. 569.

claim could be considered as work done, in determining whether a claim had been abandoned, and the fact that one partner, or tenant in common, absented himself for a time did not indicate an abandonment.⁵³ In *McGarrity v. Byington*,⁵⁴ the Court said, “The right of a mining claim vests by the taking in accordance with local rules The failure to comply with *any one* of the mining rules and regulations of the camp is not a forfeiture of title.”⁵⁵ In *Dutch Flat Water Co. v. Mooney*, the Court added that when a right of property attached by local custom, it did not necessarily follow that the right could also be divested by local custom when such local custom was different from the general law on the subject.⁵⁶

In 1864 in *Morton v. Solambo C. M. Co.*, Chief Justice Silas W. Sander-son stressed the importance of miners’ rules and regulations, and traced their growth and development.⁵⁷ These customs, he said,

were few, plain and simple, and well understood by those with whom they originated. They were well adapted to secure the end designed to be accomplished, and were adequate to the judicial determination of all controversies touching mining rights. And it was a wise policy on the part of the Legislature . . . to give them the additional weight of a legislative sanction. These usages and customs were the fruit of the times, and demanded by the necessities of communities who, though living under the common law, could find therein no clear and well defined rules for their guidance applicable to the new conditions by which they were surrounded, . . . Having received the sanction of the Legislature, they have become as much a part of the law of the land as the common law itself which was not adopted in a more solemn form.⁵⁸

With or without the use of miners’ customs, rules, or regulations, the tenuous legal title of one claiming a mine still presented certain questions that would not have arisen had the claimant of a mine been able to acquire legal title. It has already been noted that the possessory right could

⁵³ *Waring v. Crow* (1858), 11 Cal. 366.

⁵⁴ *McGarrity v. Byington* (1859), 12 Cal. 426.

⁵⁵ *Ibid.*, 431.

⁵⁶ *Dutch Flat Water Co. v. Mooney* (1859), 12 Cal. 534.

⁵⁷ *Morton v. Solambo C. M. Co.* (1864), 26 Cal. 527.

⁵⁸ *Ibid.*, 532–33.

descend, or be sold by the estate of a deceased owner of a possessory right, but other legal aspects of this right still came before the Court. The Court in 1858 held that the possessory right could be seized and sold⁵⁹ under an execution to satisfy a debt, and the next year the Court said that permanent improvements became part of the claim, as was normal with real estate.⁶⁰ In 1863 the Court further commented that a claim could be sold as could any piece of real estate and the proceeds divided among tenants in common.⁶¹ The Court explained that

Although the ultimate title in fee in our public mineral lands is vested in the United States, yet as between individuals, all transactions and all rights, interests and estates in the mines are treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine.⁶²

For purposes of this case a mining claim may have been considered to be an estate in fee, but not for all transactions. Drawing together the unsettled status of a mining claim as an estate and the use of mining custom was the problem of sale of claims. Under the statute of frauds as adopted in California and most other jurisdictions in the United States, all sales of real estate had to be in the form of a written contract in order to be enforced in a court of law,⁶³ but the California Supreme Court did not always consider a mining claim as real estate within the meaning of the statute of frauds. The case of *Gore v. McBrayer* brought this point to the fore, as the Court said the statute of frauds did not apply to a mining claim on the public lands:

The title to the land is in the United States; the right to mine and to use and hold possession of the claim inures by a sort of passive concession of the Government to the discoverer or appropriator. No writing is necessary to give the miner a title; but whatever right he has originally comes from the mere parol fact of appropriation

⁵⁹ *McKeon v. Bisbee* (1858), 9 Cal. 137.

⁶⁰ *Merritt v. Judd* (1859), 14 Cal. 59.

⁶¹ *Hughes v. Devlin* (1863), 23 Cal. 501.

⁶² *Ibid.*, 506.

⁶³ Cal. Stats. (1850), chap. 101.

unless indeed, the rules or the customs prevailing . . . make a written notice necessary.⁶⁴

Responding to a petition for a rehearing the Court clarified the rule somewhat: “The title is in the Government; if a written contract is needed to divest it the Government would have to execute it. But, subsidiary to the Government’s paramount title is the permissive claim of the locator. This comes from a mere parol fact.”⁶⁵

In another of the *Table Mountain Tunnel Co. v. Stranahan* cases the Court reiterated that the transfer of a mine need not be by a deed; the mere transfer of possession was enough, because

a conveyance by deed would have passed no greater interest than the plaintiff acquired by a transfer of possession. Rights resting upon possession only, and not amounting to an interest in the land, are not within the statute of frauds, and no conveyance, other than a transfer of possession, is necessary to pass them.⁶⁶

The Court went further in *Patterson v. Keystone Mining Co.*, where it held that a bona fide parol sale of a mining claim, accompanied by a delivery of possession was valid as against a later sale by the same seller, even though the second sale was accompanied by a duly acknowledged deed.⁶⁷ It was necessary, though, that the seller be in the actual possession of the claim and be able to deliver the claim to the vendee.⁶⁸

The Legislature took the question of parol sales away from the courts in 1860 when it declared gold claims to be real estate and prohibited parol sales of such mining claims;⁶⁹ in 1863, the 1860 law was extended to include all types of mines,⁷⁰ recognizing the importance of silver and copper mines to the state’s economy. The Court affirmed these acts in 1866, limiting itself to parol sales made prior to their passage, although it continued to enforce the earlier parol sales.⁷¹ The succeeding years saw a virtual

⁶⁴ *Gore v. McBrayer* (1861), 18 Cal. 588.

⁶⁵ *Ibid.*, 589.

⁶⁶ *Table Mountain Tunnel Co. v. Stranahan* (1862), 20 Cal. 208.

⁶⁷ *Patterson v. Keystone Mining Co.* (1863), 23 Cal. 575.

⁶⁸ *Copper Hill Mining Company v. Spencer* (1864), 25 Cal. 18.

⁶⁹ Cal. Stats. (1860), chap. 212.

⁷⁰ Cal. Stats. (1863), chap. 89.

⁷¹ *Patterson v. Keystone Mining Co.* (1866), 30 Cal. 360; *Goller v. Fett* (1866), 30 Cal. 481.

dearth of cases dealing with parol sales until 1876 and the case of *Milton v. Lambard*, which involved an alleged verbal sale that took place in June 1874.⁷² The argument of the plaintiffs was that the act of 1860 was repealed by the codes as its provisions (as well as those of the 1863 act) were not incorporated in the Civil Code. The defendant argued that if a mining claim were considered real estate then a transfer had to be in writing under the provision of the Civil Code dealing with the sale of real estate,⁷³ and if the section did not include mining claims, then the 1860 act was still in force. The Court accepted the defendant's first argument, saying, "A mine is real estate, and an interest therein . . . can be transferred only by operation of law or by an instrument in writing subscribed by the party disposing of the same, or his agent thereunto authorized by writing."⁷⁴

WATER RIGHTS

The need for a readily available supply of water is most normally associated with the needs of agriculturalists and stockmen, but in California water was essential for mining operations as well. In the early days of California mining, water was used to wash away the gravel, and what remained, hopefully, was gold. At some diggings miners even constructed ditches to bring water to arid but gold-bearing claims. In 1849 the miners also began to work the river bottoms by diverting the water to only part of its channel, and mine the exposed part of the channel. Later on, as the search for precious metals moved away from immediate sources of water, series of sluices and toms were used for gold washing, again necessitating large quantities of water. As the gold reserves close to the surface were taken up, deeper gold finds needed to be worked by hydraulic mining methods, and as the term implies, a good deal of additional water was required.⁷⁵ As was the case with the appropriation of mining claims, a system of water appropriation was developed prior to statehood, again based on local customs, and again putting forth the doctrine of prior appropriation.

⁷² *Melton v. Lambard* (1876), 51 Cal. 258.

⁷³ Cal. Civil Code (1872), § 1091.

⁷⁴ *Melton v. Lambard*, 260.

⁷⁵ For the various mining methods involving the use of water, see John Walton Caughey, *Gold is the Cornerstone* (Berkeley: University of California Press, 1948), 159–76.

The decade of the 1850s saw the doctrine of prior appropriation of water affirmed by the Supreme Court starting with the 1853 case of *Eddy v. Simpson*, a landmark case in this area.⁷⁶ The plaintiffs in this case had prior occupancy of the waters being contested by use of a dam and a ditch, were using the water for mining purposes, and brought the suit to collect damages for interference with their alleged rights. The Supreme Court upheld the plaintiffs, the Court holding that the first possessor had the right to the water, and that this right was usufructuary, consisting more in the advantage of using the water, and not necessarily in the water itself. “The owner of land through which a stream flows, merely transmits the water over its surface, having the right to its reasonable use during its passage.”⁷⁷ Once the water left the user’s possession, all right to the water left as well. Two years later, in *Irwin v. Phillips*, the Court tied priority in the possession of water to the right to work the mines;⁷⁸ in both situations prior possession had become the rule.

When a claim to water was not dependent on ownership of the land through which the water ran, that is, the water was on public land, prior appropriation would enable a miner to use the water, and this prior possession had to be real; constructive possession was not sufficient.⁷⁹ In 1857 the Court added still more, saying that the right to water flowing through the public lands did not include the right to divert the water and prevent it from running on someone else’s adjoining land, when such land was occupied prior to the diversion.⁸⁰

An important case dealing with water rights in the mining region was *Bear River Co. v. York Mining Co.*, a case between two companies using the waters of the Bear River.⁸¹ The plaintiffs’ dam and ditch were located seven miles below, and some time before, defendants’ dam and ditch. After use by defendants, the water returned to its natural channel and flowed down for plaintiffs’ use. The plaintiffs sued for damages, claiming that the defendants had materially lowered both the quality and the quantity of the water. The Court held for the plaintiffs, saying that they were entitled to an

⁷⁶ *Eddy v. Simpson* (1853), 3 Cal. 249.

⁷⁷ *Ibid.*, 252.

⁷⁸ *Irwin v. Phillips* (1855), 5 Cal. 140.

⁷⁹ *Kelly v. Natoma Water Co.* (1856), 6 Cal. 105.

⁸⁰ *Crandall v. Woods* (1857), 8 Cal. 136.

⁸¹ *Bear River Co. v. York Mining Co.* (1857), 8 Cal. 327.

undiminished quantity of water so as to fill their ditch to the same height as before defendants' appropriation above; otherwise, by diminishing the flow, plaintiffs' prior appropriation could become worthless.

In *Butte Canal and Ditch Co. v. Vaughan*, the Court said that turning water from a ditch into a natural water course so that it could move downstream to be used again did not constitute an abandonment of the water.⁸² The water could be taken out and used again, so long as the natural waters of the stream were not lessened so as to injure those who had previously appropriated the natural waters. In claiming waters on public lands, notice by appropriate acts, and completion of the ditch were sufficient to all subsequent locators, the title to such water going back to the beginning of the work,⁸³ and in *Parke v. Kilham* the Court said that an action for the diversion of water should be treated as an action for the abatement of a nuisance.⁸⁴

The use of the doctrine of prior appropriation of mines and water was a judicial acknowledgment of the actual procedure practiced by the miners. At the same time the courts were legally bound to follow the common law, and this they did in a manner of speaking. The common law included the doctrine of prior appropriation of minerals, but not of water. The Supreme Court of California was thus left in the position of having to deal with a system of water appropriation that was already in use and accepted by the mining industry.

The common law, as it pertained to water, was that a stream belonged equally to those who had title to its banks, "and that no individual could carry away the stream from that community, nor could any member of the community take unto himself more than a reasonable share of the supply, for use upon his own land only."⁸⁵

This view was obviously contrary to the accepted practice in the gold fields, especially since the waters in question were on public lands, the title resting with the federal government. At first the courts did not know whether to follow the practice in effect or the express (common) law.

The judges, being drawn from the people, inclined to support the public action in appropriating natural resources, while attorneys

⁸² *Butte Canal and Ditch Co. v. Vaughan* (1858), 11 Cal. 143.

⁸³ *Kimball v. Gearhart* (1859), 12 Cal. 27.

⁸⁴ *Parke v. Kilham* (1857), 8 Cal. 77.

⁸⁵ Samuel C. Wiel, "Public Policy in Water Decisions," *California Law Review* I (November, 1912): 12.

naturally, when suiting their cases, urged express law. The courts adopted the attitude, in deference to the legal points, that they would not change the law because of policy — they said they would uphold the law; but they supported the public policy nevertheless by finding a way to say it was the express law.⁸⁶

The solution to this problem was to use common law rules other than those dealing with water, and in effect the appropriation of water became analogous to the appropriation of mining claims also on the public lands. The title to the public lands was, as stated, in the federal government, and anyone appropriating the water would be a trespasser. But among trespassers, the first such had a title sufficient as against all other subsequent trespassers. This doctrine, known in the common law as disseisin, provided that the title of the first appropriator was paramount against everyone but the true owner. This reasoning could be justified as being the common law and also fortuitously coincided with actual practices adopted by the miners. Justice Solomon Heydenfeldt, who had earlier rendered the decision in *Hicks v. Bell*, now rationalized this extension of the common law by saying:

In the decisions we have heretofore made upon the subject of private rights to the public domain, we have applied simply the rules of the common law. We have found that its principles have abundantly sufficed for the determination of all disputes which have come before us; and we claim that we have neither modified its rules, nor have we attempted to legislate upon any pretended ground of their insufficiency.

That new conditions and new facts may produce the novel application of a rule which has not been before applied in like manner, does not make it any less the common law; for the latter is a system of grand principles, founded upon the mature and perfected reason of centuries. It would have but little claim to the admiration to which it is entitled, if it failed to adapt itself to any condition, however new, which may arise; and it would be singularly lame if it is impotent to determine the right of any dispute whatsoever.⁸⁷

This departure from the common law prevented the disruption of mining operations throughout the state, and remained the rule of decision,

⁸⁶ Ibid.

⁸⁷ *Conger v. Weaver* (1856), 6 Cal. 555–56.

with the Supreme Court essentially affirming earlier decisions, albeit with an occasional modification or clarification. Thus, in *Burnett v. Whitesides*, the Court upheld the right of the first appropriator of water to an undiminished amount regardless of the acts of later takers,⁸⁸ but if the first appropriator were to take only a part, someone else could later appropriate the remainder, and such a later appropriation gave the appropriator a right as perfect and as entitled to the same protection as that of the first appropriator to the portion taken by him.⁸⁹

In an 1869 case, the Court affirmed *Eddy v. Simpson* directly, saying, “The right to the water . . . is only acquired by an actual appropriation and use of the water. The property is not in the corpus of the water, but is only in the use.”⁹⁰ As with a mining claim, a water right could be lost by nonuse or abandonment. Said the Court in *Davis v. Gale* of an appropriator’s right:

Appropriation, use and nonuse are the tests of his right; and place of use and character of use are not. When he has made his appropriation he becomes entitled to the use of the quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it.⁹¹

The significance of this decision was that an appropriator of water for one purpose, such as mining, at one place, could send or convey the water to another place, and for another purpose. Whatever the purpose was, it had to be a beneficial use, that is, the water was going to be used directly by the appropriator. Holding water for purposes of speculation was not such a beneficial use, and would void the appropriation.⁹² The Court in *Davis v. Gale* was interested in abandonment, but in *Union Water Company v. Crary* the Court said the “right of the first appropriator may be lost, in whole or in same limited portions, by the adverse possession of another.”⁹³ Such possession had to be “adverse” in the legal sense; it must have been continuous for the entire length of the statutory period and asserted, with

⁸⁸ *Burnett v. Whitesides* (1860), 15 Cal. 35.

⁸⁹ *Smith v. O’Hara* (1872), 43 Cal. 371.

⁹⁰ *Nevada County and Sacramento Canal Co. v. Kidd* (1869), 37 Cal. 310.

⁹¹ *Davis v. Gale* (1867), 32 Cal. 34.

⁹² *Weaver v. Eureka Lake Co.* (1860), 15 Cal. 271.

⁹³ *Crary v. Union Water Company* (1864), 25 Cal. 509.

the knowledge and consent of the owner of land, under a claim of title. In addition, the burden of proving this was on the adverse claimant.⁹⁴

These cases were all based on the doctrine of prior appropriation, which involved the use, not the ownership, of water. In the leading case of *Kidd v. Laird*, the Court reiterated

that running water, so long as it continues to flow in its natural course, is not, and cannot be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared . . . that this right carries with it no specific property in the water itself.⁹⁵

The rights of the first appropriator, “like those of a riparian owner, are strictly *usufructuary*.”⁹⁶ The mention of a “riparian owner” pointed out that the Court was familiar with, even if it did not use, the common law of waters. The riparian doctrine

accords to the owner of land contiguous to a watercourse a right to the use of the water on such land. The use of the water is limited to riparian [adjoining the water] land. The water may be used for . . . beneficial purposes. . . . The riparian right is not based upon use, and in the absence of prescription it is not lost by disuse. No riparian owner acquires priority over other riparian owners by reason of the time of beginning use of the water.⁹⁷

The doctrine of prior appropriation was included in a positive statutory provision in the 1872 code revision,⁹⁸ and remained the law in California until past the period of this study. The doctrine of prior appropriation was tested and found wanting in 1886 in the case of *Lux v. Haggin*,⁹⁹ which “has been accepted as establishing the doctrine that the common [law] rule of riparian rights prevails in California.”¹⁰⁰ There were some earlier

⁹⁴ *American Co. v. Bradford* (1865), 27 Cal. 360.

⁹⁵ *Kidd v. Laird* (1860), 15 Cal. 179–80.

⁹⁶ *Ibid.*, 180.

⁹⁷ Wells A. Hutchins, *The California Law of Water Rights* (Sacramento: State of California Printing Division, 1956), 40.

⁹⁸ Cal. Civil Code (1873), § 1422.

⁹⁹ *Lux v. Haggin* (1886), 69 Cal. 255.

¹⁰⁰ Willoughby Rodman, *History of the Bench and Bar of Southern California* (Los Angeles: William J. Porter, 1909), 96.

instances of the use of the riparian doctrine to decide water cases starting in 1865 with the case of *Ferrea v. Knipe*, but this decision involved two riparian owners who were not engaged in mining.¹⁰¹ The Court said each of the parties was entitled to use the water in question because each was a riparian owner; the question of prior appropriation did not arise.

In the twenty years between *Ferrea v. Knipe* and *Lux v. Haggin*, three other Supreme Court decisions also involved the riparian doctrine; all three were in the two-year period 1878–1879, presaging the decision in *Lux v. Haggin* the next decade.

The first, *Creighton v. Evans*, saw the Court uphold the rights of a riparian owner against one who was not a riparian owner,¹⁰² and in *Los Angeles v. Baldwin* the Court proportioned water between two riparian owners.¹⁰³ The Court, in the third of these cases, *Pope v. Kinman*, reaffirmed that the riparian proprietor had a usufruct in the waters of the stream in question as it passed over his land.¹⁰⁴ In none of these three cases were public mineral lands involved, perhaps indicating that the Court was preparing or anticipating a dual system of water law involving both the riparian and appropriation doctrines that in fact came to pass. Although with *Lux v. Haggin* the Court brought California into what might be called the mainstream of water law, the continued use of the appropriation doctrine was to acknowledge rights already acquired in the early days of statehood. Or, as one scholar has put it, “The Courts of California have recognized the common law rule, but have found that certain extensions and modifications were necessary to render it applicable to novel conditions.”¹⁰⁵

The Court itself found it occasionally necessary to defend its use of the appropriation doctrine against the

notion, which has become quite prevalent, that the rules of the common law touching water rights have been materially modified in this State upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. This notion is

¹⁰¹ *Ferrea v. Knipe* (1865), 28 Cal. 340.

¹⁰² *Creighton v. Evans* (1878), 53 Cal. 55.

¹⁰³ *Los Angeles v. Baldwin* (1879), 53 Cal. 469.

¹⁰⁴ *Pope v. Kinman* (1879), 54 Cal. 3.

¹⁰⁵ Rodman, *Bench and Bar*, 96.

without any substantial foundation. The reasons which constitute the groundwork of the common law on this subject remain undisturbed. The conditions to which we are called upon to apply them are changed, and not the rules themselves When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel . . . without diminution or alteration, it does so because its flow imparts fertility to his land. . . . But this rule is not applicable to miners and ditch owners, simply because the conditions upon which it is founded do not exist in their case. They seek the water for a particular purpose, which is not only compatible with its diversion from its natural channel.¹⁰⁶

Chief Justice Silas W. Sanderson said that controversies between appropriators could be determined in a like manner as controversies between riparian proprietors, that is, by determining whether “the plaintiff’s use and enjoyment of the water *for the purpose for which he claims its use* has been impaired by the acts of the defendant?”¹⁰⁷ Defenses such as Sanderson’s did not convince all California lawyers, however. Gregory Yale, his inability to practice in courts during the Civil War notwithstanding, was a leading member of the legal profession. His conclusion was that there was indeed a departure from the common law, and:

The only principle which can be asserted to justify the past action of the Courts is in the fact that they sustained the state of things found to be extensively existing upon the doctrine of necessity. . . . An attempt to vindicate the Courts, upon the ground that their action was but an application of the common law in modified forms to suit the new conditions of things, would prove a disastrous failure.¹⁰⁸

MINER AND FARMER

Mention has already been made that one implication of *Hicks v. Bell* was to open legally private lands as well as public lands to the gold seekers, who responded

¹⁰⁶ Hill v. Smith (1865), 27 Cal. 482.

¹⁰⁷ Ibid., 483.

¹⁰⁸ Gregory Yale, *Legal Titles to Mining Claims and Water Rights in California* . . . (San Francisco: A. Roman & Company, 1867), 137–38.

with great alacrity. This decision went beyond the possessory act passed by the Legislature in 1852 authorizing a possessor of public land used for grazing or farming purposes to maintain an action for injury to his possession, but the possession was not to preclude any person from mining the land for precious metals.¹⁰⁹ Why did Heydenfeldt go as far as he did? Stephen J. Field stated,

It was the policy of the State to encourage the development of the mines, and no greater latitude in exploration could be desired than was thus sanctioned by the highest tribunal of the State. It was not long, however, before a cry came up from private proprietors against the invasion of their possessions which the decision had permitted; and the court was compelled to put some limitation upon the enjoyment by the citizen of this right of the State.¹¹⁰

The Court limited the full effects of *Hicks v. Bell* in 1855 in the case of *Stoakes v. Barrett*, which nominally passed on the 1852 possessory act.¹¹¹ The Court affirmed the act, saying it only gave the right to mine public, not private, lands used for agricultural purposes. Justice Heydenfeldt, who again wrote the opinion, affirmed *Hicks v. Bell* as to the state owning the minerals, but also affirmed the limitation implicit in the statute by saying, “to authorize an invasion of private property in order to enjoy a public franchise, would require more specific legislation than any yet resorted to.”¹¹²

At the same January 1855 term the Court affirmed an entry on a farm on public lands, but Justice Charles Bryan, in writing the Court’s opinion, used a broader basis than the state’s right to the minerals.¹¹³ He said it had generally been the policy of governments to reserve mineral to themselves and keep them from private ownership. The state of California, by virtue of its police powers, could and did pass a law dealing with the public lands, and the law passed, the Possessory Act, did not protect mineral-bearing public lands from entry. No one, then, using public land for agricultural purposes should be allowed to fence off a large body of minerals for his use;

¹⁰⁹ Cal. Stats. (1852), chap. 82.

¹¹⁰ Field, *California Alcalde*, 106.

¹¹¹ *Stoakes v. Barrett* (1855), 5 Cal. 36.

¹¹² *Ibid.*, 39.

¹¹³ *McClintock v. Bryden* (1855), 5 Cal. 97.

but any miner to enter, was to extract the minerals in the most practicable manner possible, causing as little injury as possible to the agriculturalist.

In spite of these two decisions, the Court did whittle the miners' right of entry. In *Fitzgerald v. Urton*, the Court refused to allow a miner to enter property being used for a hotel.¹¹⁴ The Court said that since the 1852 act had legalized what would have been a trespass under the common law, it was to be construed strictly, "and the Act cannot be extended by implication to a class of cases not specifically provided for."¹¹⁵ Hence, since the act of 1852 only mentioned agricultural and grazing lands, the Court would not extend it to cover other uses.

Responding to complaints by farmers, the "more specific legislation" mentioned by Justice Heydenfeldt in *Stoakes v. Barrett* was passed by the Legislature in 1855.¹¹⁶ This law provided for indemnification to those injured by the working of mining claims under the 1852 act. The next year the Court allowed damages to a farmer for an injury to his property in *Burdge v. Underwood*, but the 1855 law was not mentioned; the Court did affirm the previous series of cases, however.¹¹⁷

In *Martin v. Browner*, one party enclosed twelve acres of land in a mining town, claiming it to be a town lot.¹¹⁸ Defendants' mining operations were not near, nor did they interfere with plaintiffs' buildings. The Court held for the defendants, saying that if a person were to claim such large pieces of land in a mining district, "the consequence would be that all of the mineral lands in a neighborhood might be appropriated by a few persons, by their making a village or hamlet on or near the land so appropriated."¹¹⁹ At the same term as the previous case, the Court affirmed *Burdge v. Underwood* and allowed damages for a ditch dug across the plaintiff's garden and orchard without his permission.¹²⁰

The decision in *Biddle Boggs v. Merced Mining Co.*, which settled once and for all that miners could not enter land to which the agriculturalist had

¹¹⁴ *Fitzgerald v. Urton* (1855), 5 Cal. 308.

¹¹⁵ *Ibid.*, 309.

¹¹⁶ Cal. Stats. (1855), chap. 119.

¹¹⁷ *Burdge v. Underwood* (1856), 6 Cal. 45.

¹¹⁸ *Martin v. Browner* (1858), 11 Cal. 12.

¹¹⁹ *Ibid.*, 14.

¹²⁰ *Weimar v. Lowery* (1858), 11 Cal. 104.

gained a title in fee, still left public lands open to entry. When, in *Burdge v. Smith*, the Court affirmed the 1856 act declaring that unless the user of land being entered by miners could actually show legal title, the presumption would be that the land was public land, the Court provided grist for Charles Shinn's later statement that "the mining-interests were in those days held to be altogether predominant in importance to the agricultural interests, over the entire gold-bearing area."¹²¹

The 1860s seemingly opened with the Court continuing in much the same vein, as it affirmed *Burdge v. Smith* in *Smith v. Doe*.¹²² The unanimous Court, with Justice Warner W. Cope, writing the opinion, said that if the right of entry on public lands for mining purposes were taken away, large tracts of mineral lands could be claimed, resulting in the concentration of mining interests in a few persons. Admitting that the miner had the right to enter, Cope added that protection was to be afforded permanent improvements and growing crops of all descriptions, since they constituted private property, thus in effect limiting entries. He said:

It must not be understood, however, that within the limits of the mines all possessory rights and rights of property, not founded upon a valid legal title, are held at the mercy and discretion of the miner. Upon this subject, it is impossible to lay down any general rule, but every case must be determined upon its own particular facts. Valuable and permanent improvements, such as houses, orchards, vineyards, etc., should, undoubtedly, be protected; as also, growing crops of every description, for these are as useful and necessary as the gold produced by the working of the mines. Improvements of this character, and such products of the soil as are the fruits of toil and labor, must be regarded as private property, and upon every principle of legal justice are entitled to the protection of the Courts. But in all cases it must be borne in mind that, as a general rule, the public mineral lands of the State are open to the occupancy of every person who, in good faith, chooses to enter upon them for the purpose of mining, and the examples we have given

¹²¹ Charles H. Shinn, *Mining Camps; A Study in American Frontier Government*, edited by Rodman W. Paul (New York: Harper & Row, 1965), 260.

¹²² *Smith v. Doe* (1860), 15 Cal. 100.

may serve, in some measure, to indicate the proper modifications of this rule, and the restrictions necessary to be placed upon the exercise of this right. It is the duty of the Courts to protect private rights of property, but it is no less their duty to secure, as far as possible, the entire freedom of the mines, and to carry out and enforce the obvious policy of the Government in this respect.¹²³

That same judicial term the Court held enclosing the land would not prevent an entry either, and the Court, in *Clark v. Duval*, went on to say,

In giving effect to the policy of the Legislature, we must hold that the miner is not confined to a mere right of entry and egress, and a right to dig the soil for gold. Whatever is indispensable to the exercise of the privilege must be allowed him; else it would be a barren right, subserving no useful end. But the substantial thing is a right to use the land upon which he goes, not merely to dig, but to mine and so to use the land and such elements of the freehold or inheritance, of which water is one, as to secure the benefits which were designed. This use must be reasonable, and with just respect to the agriculturalist.¹²⁴

The Court awarded damages to the farmer for actual injury done, and an injunction against the further diversion of his water, but refused damages or injunction for ditches and reservoirs dug by miners that the jury felt to be necessary to their mining operation. Now that the Court said the use by the miners had to be reasonable, and that there were exceptions to the right to enter and use farmlands, the Court was able to state exceptions and limitations, judging each such exception or limitation by the facts of each particular case.

In *Gillan v. Hutchinson*, the Court said the 1855 act was invalid if it tried to give a right of entry if none existed before the act's passage because the Legislature could not take property from one person and give it to another.¹²⁵ Thus, the Court said, the miner's right of entry did not entitle him to dig up an orchard or, in *Rogers v. Soggs*, to cut growing timber.¹²⁶

¹²³ Ibid., 105–6.

¹²⁴ *Clark v. Duval* (1860), 15 Cal. 88.

¹²⁵ *Gillan v. Hutchinson* (1860), 16 Cal. 153.

¹²⁶ *Rogers v. Soggs* (1863), 22 Cal. 444.

One who did enter legitimately under the 1855 act would lose the right if the possessor of the land received a patent from the United States.¹²⁷ In 1863 the Court partially reversed *Gillan v. Hutchinson*, and this became the final word on the subject until the federal government took action in 1866, holding that the 1855 act was clearly constitutional and was merely a regulation of the right to enter under the 1852 possessory act.¹²⁸

Whatever the rights of miners under the 1852 and 1855 acts, the Supreme Court needed to establish the technical requirements a miner needed to plead in court to justify an entry. One entering had to show

at least, first, that the land is public land; second, that it contains mines or minerals; third, that the person entering upon or against a prior possession enters for the bona fide purpose of mining. But this being in the nature of a justification of the entry as against an apparent and prima facie right of the actual prior possessor, must be affirmatively pleaded . . . with all the requisite averments to show a right under the statute, or by law to enter.¹²⁹

The farmer or grazer on his part needed to show his prior possession,¹³⁰ and as late as 1873 the Court was called upon to say what constituted mineral lands for purposes of entries for mining. The Court said,

The mere fact that portions of the land contained particles of gold, or veins of gold-bearing quartz rock, would not necessarily impress it with the character of mineral land within the meaning of the Acts . . . It must at least be shown that the land contains metals in quantities sufficient to render it available and valuable for mining purposes.¹³¹

Controversies between mining and farming interests also involved the appropriation and use of water, and damage to farm and grazing lands as a result of such use. Conflicts over running water were dealt with by the doctrine of prior appropriation, but two cases came before the Court dealing with diversions of water from a farmer's reservoir. In the first of these, *Clark v. Duval*, the 1860 case quoted above, the Court upheld the

¹²⁷ *Fremont v. Seals* (1861), 18 Cal. 433.

¹²⁸ *Rupley v. Welch* (1863), 23 Cal. 452.

¹²⁹ *Lentz v. Victor* (1861), 17 Cal. 271.

¹³⁰ *Ensminger v. McIntire* (1863), 23 Cal. 593.

¹³¹ *Alford v. Barnum* (1873), 45 Cal. 484.

diversion as being a necessary incident to the entry for mining, but in *Rupley v. Welch*, the new five-man Court was not so generous, saying, "The threatened diversion of water from plaintiff's reservoir is a clear violation of a vested right of property, acquired by the plaintiff, by virtue of his prior appropriation of the water, and of which he cannot be divested for any private purposes or for the benefit of a few private individuals."¹³²

The actual use of water by miners was also a potential hazard to farming and grazing interests. In two cases dealing with the same parties, the plaintiff complained of his land being flooded by the defendant's mining. The Court said that the defendant was bound to use his ditch so as not to injure the plaintiff's land regardless of who had the older right or title.¹³³ The miner was liable for damages, a view affirmed by the Court when the case came up again two years later. Now the farmer was also complaining of sediment being deposited on his land, and the miner was again liable.¹³⁴ In *Wixon v. Bear River and Auburn Mining Co.*, the Court, assessing damages against the defendant company for mud and silt that had accumulated on the plaintiff's crops, said that the plaintiff, in enclosing a tract of public land in the mineral region, received a vested right to be protected against one entering for mining purposes, an opinion more attentive to agricultural interests, at least in tone, than *Clark v. Duval*.¹³⁵ The Court extended the liability of miners for damages in 1875 to farm lands to cover mining industries other than gold and silver mining, in this case coal.¹³⁶

On the other side of the coin, a miner sued a farmer for damage done to his claim by the farmer's running water, but since this was not an instance of a miner and farmer on the same parcel of land, the common law applicable to cases between adjoining landholders was used. Since the defendant was irrigating his own crops on his own land, a right which was his,

[a]n action cannot be maintained against him for the reasonable exercise of his right, although an annoyance or injury may thereby be occasioned to the plaintiffs. He is responsible to the plaintiffs only

¹³² *Rupley v. Welch*, 455.

¹³³ *Richardson v. Kier* (1869), 34 Cal. 63.

¹³⁴ *Richardson v. Kier* (1869), 37 Cal. 263.

¹³⁵ *Wixon v. Bear River and Auburn Mining Co.* (1864), 24 Cal. 367.

¹³⁶ *Robinson v. Black Diamond Coal Co.* (1875), 50 Cal. 460.

for the injuries caused by his negligence or unskillfulness, or those willfully inflicted in the exercise of this right of irrigating his land.¹³⁷

Reading the cases dealing with mines and waters gives the impression of a definite but extremely slow change from the viewpoint of allowing miners to do virtually as they pleased to one that realized that there were limitations on the actions of miners in their search for minerals. It would be easy for a critic to say that the Court finally came around to a sounder legal view, but there was more than that involved. The change more likely reflected a general societal change in regard to property rights in California as the rush for gold ebbed and the mining industry became controlled by large companies desiring stability. At the same time other industries developed, and agriculture was one of these, that also demanded stability in property rights. To be sure, all conflicts between miners and farmers did not end, such as the conflict over mining debris in the Sacramento Valley in the 1880s,¹³⁸ but stability was at hand.

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¹³⁷ Gibson v. Puchta (1867), 33 Cal. 310.

¹³⁸ Robert L. Kelley, *Gold v. Grain; The Hydraulic Mining Controversy in California's Sacramento Valley; A Chapter in the Decline of the Concept of Laissez-Faire* (Glendale: The Arthur H. Clarke Company, 1959), 327.

Chapter 11

CONCLUSION

The preceding chapters have presented several areas of interest involving decisions of the California Supreme Court in the period 1850–1879.

The largest group of cases not discussed dealt with land in the state.¹ Many of these cases were decisions involving various federal land laws and were dependent upon decisions of the United States Supreme Court. Another large group of cases treated land grants from the Spanish and Mexican periods, but again these cases involved more federal than state legal issues, although the state was both interested and involved in the outcome. The Federal Land Act of 1851, establishing a Land Commission to settle land-grant disputes in the state, effectively removed most land-grant cases from the state courts.² Even the key question of the title to pueblo lands, decided by the California Supreme Court in *Hart v. Burnett*,³ needed further

¹ For a treatment of land problems in California, see W. W. Robinson, *Land in California; The Story of Mission Lands, Ranchos, Squatters, Mining Claims, Railroad Grants, Land Scrip, Homesteads* (Berkeley: University of California Press, 1948), 291. In addition, Professor Paul W. Gates has a full study in progress on the same subject.

² 9 U.S. Stat. at L. (1851), 631–34.

³ *Hart v. Burnett* (1860), 15 Cal. 530.

affirmation by the federal courts⁴ and Congress.⁵ The cases actually used for the study, then, while admittedly a fraction of those actually decided, are nonetheless quite sufficient as a basis for comment about the California Supreme Court as a whole.

In his conclusion to *California and the Nation*, Joseph Ellison wrote of California:

In many respects California was a typical frontier community; for the problem of the American frontier was essentially one of civilization and Americanization; establishment of government; removal of obstructing agencies; concerting policies for the disposition and appropriation of natural resources We find in California the characteristic needs and demands of the American frontier; and the tendency to emphasize strongly the rights of the people. In a word, we find the typical self-confident, self-assertive, "dissatisfied frontier."⁶

If California was a "typical frontier community," was its Supreme Court, then, a "typical frontier institution?" Frederick Jackson Turner, in his famous frontier hypothesis, wrote, "The peculiarity of American institutions is, the fact that they have been compelled to adapt themselves to the changes of an expanding people."⁷ This expansion was, in Turner's view, westward, and this adaptation took place in successive frontiers. The principal effect of the frontier social environment was to weaken traditional values and controls. Pioneers found themselves in new, volatile societies where customary behavior did not bring customary results. It was thus necessary to find new means to deal with new situations.

It would seem that for the period of this study the California Supreme Court was a typical frontier institution fairly well cut off or removed from the Eastern experience, making innovations to meet new conditions, and rejecting old, established legal formulas. But this was not really the case.

⁴ *San Francisco v. United States* (1864), 4 Sawyer 553.

⁵ 14 U.S. Stat. at L. (1867), 4.

⁶ Joseph Waldo Ellison, *California and the Nation 1850–1869: A Study of the Relations of a Frontier Community with the Federal Government* (Berkeley: University of California Press, 1927), 231.

⁷ Frederick Jackson Turner, *The Frontier in American History* (New York: Henry Holt and Company, 1920), 2.

The Court was, for the most part, in the mainstream of American law. The United States, and California was no exception, followed a system of legal precedents founded on the maxim, *stare decisis et non quieta movere* (to adhere to precedent and not to unsettle things which are settled). This, of course, does not mean that the law is static, for it is not. Decisions were and are modified, reshaped, and at times overruled, where there is sufficient justification for change.

The California Supreme Court recognized that it was a part of a large, great legal system, and this was shown in its decisions. The use of the common law was a real example of this both in its general application and its specific application in mining claim and water cases. Although its somewhat different application in the water cases would, on the surface, seem to negate this idea, the very fact that Justice Solomon Heydenfeldt felt called upon in *Conger v. Weaver* to defend his unorthodox use of the common law in *Eddy v. Simpson* and subsequent cases, stands as proof of the importance of the common law to California jurisprudence.

The use of *stare decisis* was not limited to references to California cases; thus, in *Ward v. Flood*, the Court made reference to the Massachusetts school segregation cases, *Roberts v. City of Boston*; the use of non-California decisions is implicit in the use of the common law. The Court's personnel also showed this reliance on the earlier settled states. Mention has been made of the number of judges from New York and Vermont, but the judges as a whole reached California already learned in the law and steeped in the idea of legal precedent. This was also true of the 1850s period, when men such as Serranus C. Hastings, former chief justice of Iowa's Supreme Court, and Alexander Anderson, one-time United States senator from Tennessee, served on the Court. Hugh C. Murray, California's youngest chief justice, once even refused to use the law of Mexico, which use was required by law for cases having their origins prior to statehood, opting instead for the common law as he had learned it in Illinois.⁸

The question arises, nonetheless, as to how the denial of the jurisdiction of the United States Supreme Court under the twenty-fifth section of the Judiciary Act of 1789 and the questionable use of the common law in water cases, for example, may be equated with the use of precedent and the

⁸ Fowler v. Smith (1852), 2 Cal. 39.

common law. These decisions, it must be remembered, took place in the 1850s, the first decade of statehood. Charles Warren attributed the decision in *Gordon v. Johnson* to the isolated state of California before the completion of the transcontinental railroad increased contact between California and the rest of the nation,⁹ but this was but a partial explanation at most. A closer look at California's early days could provide a better explanation.

After saying that California was a typical frontier community, Ellison added that in many other aspects, however, California was unique because it sprang to full maturity immediately instead of developing gradually as was the case with most communities.¹⁰

The Court was cognizant of the burden it carried. One man who was uniquely aware of this was Peter H. Burnett, California's first governor, and twice appointed to the state's high court.

He wrote in *Bear River Co. v. York Mining Co.*:

It may be said, with truth, that the judiciary of this State, has had thrown upon it, responsibilities not incurred by the Courts of any other State in the Union. In addition to those perplexing cases that must arise, in the nature of things, and especially in putting into practical operation, a new constitution and a new code of statutes, we have had a large class of cases, unknown in the jurisprudence of our sister states.¹¹

Burnett was referring specifically to the water cases when he continued: "Left without any direct precedent, . . . we have been compelled to apply to this anomalous state of things the analogies of the common law, and the more expanded principles of equitable justice."¹² In this last statement Burnett has indicated the nature of the Court in the early days of statehood.

Burnett was not the only justice to make references such as "anomalous state of affairs," or "unprecedented events." The *Supreme Court Reports* are replete with such references, and indicated that the Court was faced with problems, due to the rapid development of the state, with which

⁹ Charles Warren, *The Supreme Court in United States History*, vol. II (Boston: Little, Brown, and Company, 1921, 1926), 257.

¹⁰ Ellison, *California and the Nation*, 231.

¹¹ *Bear River Co. v. York Mining Co.* (1857), 8 Cal. 332.

¹² *Ibid.*

it had trouble coping. That analogies of the common law were used served to acknowledge *stare decisis*, and that equitable justice was also applied indicated that as a viable entity, modifications in the common law, or reshaping of so-called precedents, was necessary to meet the conditions actually found in the state.

Considering the unstable conditions in California before statehood, the general trend of the Court's decisions during its first decade might be considered a quest for stability. This is particularly to be seen in the cases involving land grants and water cases. The rule in *Cohas v. Raisin*, upholding grants by the American alcaldes was a commonsense decision; to have ruled otherwise would have created a great deal of confusion and instability and would have caused much more turmoil over land titles than already existed. This view was enunciated by Chief Justice Murray in the second *Welch v. Sullivan* case. The reasoning in the whole area of water cases was also an attempt at providing stability by accommodating the law to the preexisting conditions in the state. To have decided differently would have virtually ended the system of mining as it then existed in the state.

As part of the attempt to stabilize conditions in the state, the Court also tried to delineate clearly between the branches of government, and within each branch, and between the levels of government. But throughout these cases also runs the concept of the Supreme Court as the literal court of last resort in these matters. This independence by the Court was united with an attempt at consistency. A good example of the Court's consistency was its decision in *Conant v. Conant*, the divorce case the Court felt it could review even though the sum of \$200 or more was not at stake. While citing many precedents from other jurisdictions, the Court was in effect saying that since it could hear appeals from other cases originally heard in the district court, and since divorces also originated in the district courts, it should hear divorce cases as well, even though the Constitution was not explicit on the subject.

The fine work of the Court was accomplished with two handicaps in its composition. The first was in the turnover in the Court's personnel, with thirteen different men, sixteen if the two appearances of Justices Anderson, Wells, and Burnett are counted separately, sitting on the Court in the first decade under discussion. The Court also labored under the handicap of having only three members. This meant that in the absence of any one

justice the two remaining justices would have to reach a unanimous agreement or else a cause could not be decided. Another consequence of the small number of justices was the constant possibility of a decision being overturned by the replacement of only one justice. The decision in *Ex parte Newman* was reversed and Justice Field's views prevailed in 1861 when the Court upheld another Sunday "blue" law¹³ in *Ex parte Andrews*.¹⁴ Instances such as these were rare, which was a tribute to the soundness and consistency of the vast majority of the Court's decisions.

Faced with many problems as it was, the Court proved itself to be human. One characteristic that may be seen in a number of decisions was a possible streak of nativism, a feature not uncommon in the United States as a whole during the 1850s. This nativism was shown in the anti-Chinese and anti-Native American opinions as well as by occasionally ignoring rules of Mexican law which should have been taken into account when deciding several of the early cases. The Know-Nothings were potent in California in the 1850s, even electing J. Neely Johnson as governor in 1855, and this anti-foreign, anti-Catholic movement may have influenced the justices to dismiss certain points of Mexican law as mere formalities or outmoded after the American occupation. Another aspect of nativism was the strong adherence to the individual rights of trial by jury and the writ of habeas corpus, both of which were closely identified with American law, and which were considered to have been unknown in California before the American conquest.

In a very real sense, the Court's second and third decades saw a continuation of this quest for stability, although in a somewhat different way. The Court, in the earlier period, sought bases for its decisions to solve its more vexatious problems. In later years the Court examined its earlier decisions with an eye toward any possible modifications to stabilize matters still further by bringing decisions more in line with the general legal consensus nationally. Again, though, the Court was cognizant of California's problems. When the Court, in *Lux v. Haggin*, acknowledged the common law of waters, it did not destroy rights gained through the doctrine of appropriation. Thus, a modification, and California remained with a new system

¹³ *Cal. Stats.* (1861), chap. 535.

¹⁴ *Ex parte Andrews* (1861), 18 Cal. 678.

of water law. The Court recognized that some of its earlier decisions were at least questionable, if not completely wrong, for in 1858 the Court noted that the use of *stare decisis* as to its own decisions could not protect a decision that was contrary to well-settled principles. “The conservative doctrine of *stare decisis* was never designed to protect such an innovation.”¹⁵

While not a “frontier institution,” the California Supreme Court was still, vis-à-vis the rest of the state government and the populace, an independent body, and this in spite of being an elected judiciary. The Court was independent both in regard to the formulation of its decisions and its powers and duties. The Court established its own preeminence within the judiciary, and pointed out its importance by saying it could hear appeals even if there were no exact monetary value involved in the matter.¹⁶ It enunciated this view in the divorce case *Conant v. Conant* in 1858, and in 1866 in the case of *Knowles v. Yeates* when, in an appeal of an election, the Court referred to itself as a court of “dernier resort.”¹⁷ At the same time the Court was responsive to individual rights and needs on numerous occasions, realizing that exceptions to technical matters could be allowed. In *People v. Lee* the Court agreed to hear an appeal even though the bill of exceptions was signed beyond the statutory period. Speaking for a unanimous Court, Chief Justice Stephen J. Field wrote that the Court would not “inquire into the reasons which may have induced his actions in signing the same after the statutory period, but will presume they were sufficient.”¹⁸ He went on to say that “the statute is in this respect not unlike a rule of Court to be enforced to advance the ends of justice, and not to prevent their attainment.”¹⁹

In the 1860 case of *McCauley v. Brooks*, the Court acknowledged the interdependence of the branches of the state government,²⁰ but the Court was always jealous of encroachments on its prerogatives, and constantly sought to ascertain that such encroachments did not occur. In response to

¹⁵ *Aud v. Magruder* (1858), 10 Cal. 292.

¹⁶ See chapter 4.

¹⁷ *Knowles v. Yeates* (1866), 31 Cal. 88.

¹⁸ *People v. Lee* (1860), 14 Cal. 512.

¹⁹ *Ibid.*

²⁰ See chapter 6, *supra*.

the idea of possible legislative encroachment, the Court, in *Smith v. Judge of the Twelfth District*, said,

We have listened with proper respect to the appeal which has been made to us to protect the judiciary from legislative encroachment. With the unquestioned power of construing and pronouncing upon the validity of the laws in the last resort, the danger is not serious that this department will become the victim of injurious aggressions from the other branches of Government; and we think we have shown no disposition in the past to deny to the Courts the full measure of the powers with which they are constitutionally invested. It may be observed, however, that the protection of the Judiciary from usurpation is not to be sought in forced construction of their own jurisdiction, or in extravagant pretensions to power, but rather in a frank and cheerful concession of the rights of the coordinate department, and a firm maintenance of the clear authority of our own.²¹

An independent judiciary, then, has been part of the history of the California Supreme Court. That history goes on and will continue to do so, so long as there is a Court.

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²¹ *Smith v. Judge of the Twelfth District* (1861), 17 Cal. 547.

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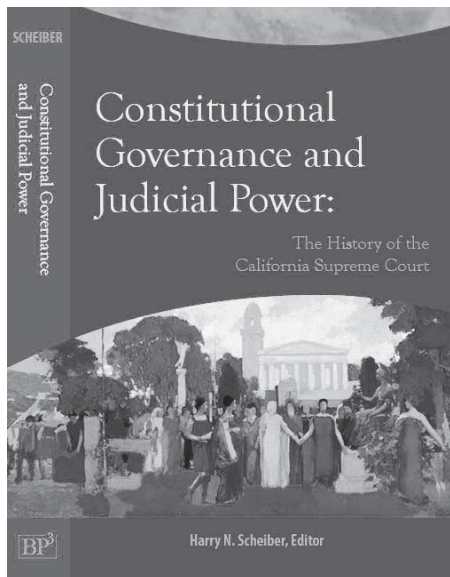
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