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.*

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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 juryman 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

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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

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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 abated[44] 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

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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 juryman 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]

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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

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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

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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

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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

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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,

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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 !he 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.

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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.*

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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.

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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]

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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:

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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

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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 civil[125] 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 statute[134] 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.

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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]

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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. Harrlngton*.[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. Harringtoll 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

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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

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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.