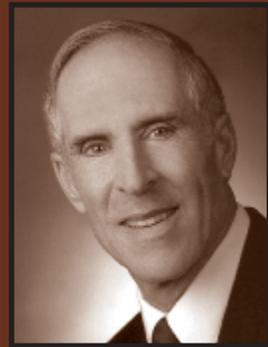
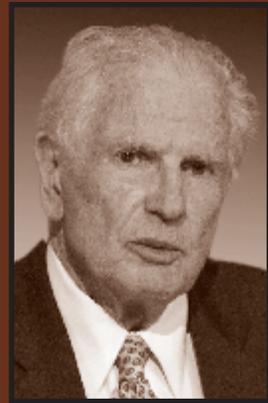


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CALIFORNIA LEGAL HISTORY



JOURNAL OF THE
CALIFORNIA SUPREME COURT
HISTORICAL SOCIETY

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VOLUME 7
2012

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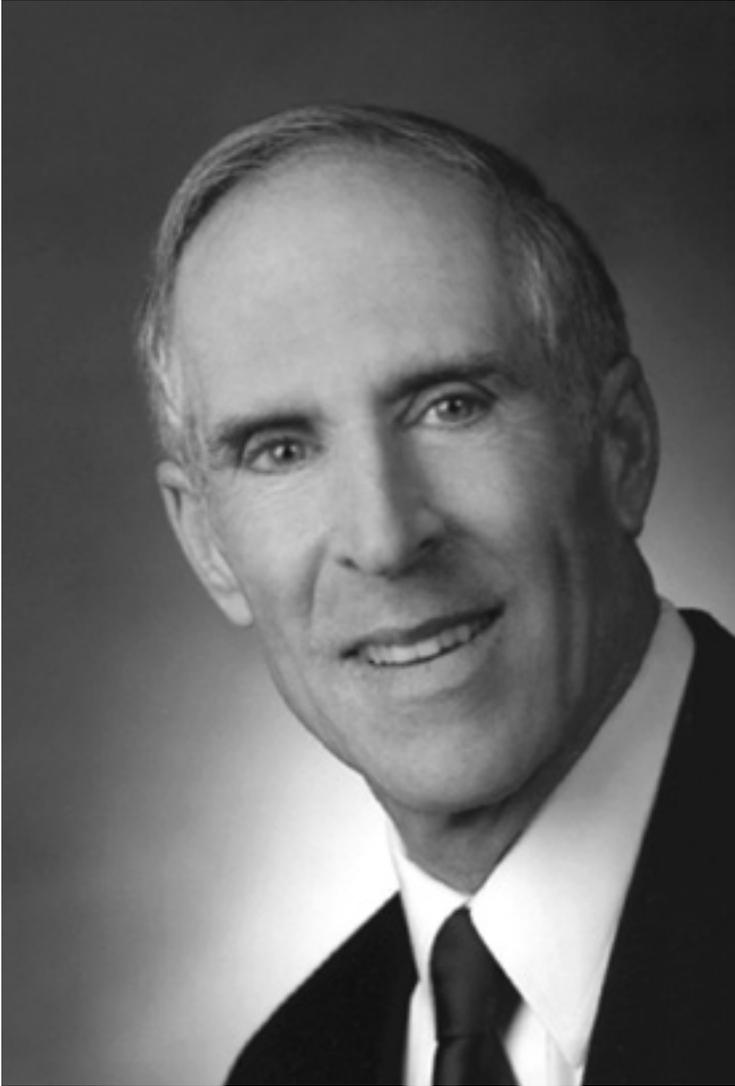
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ORAL HISTORY

JUSTICE
RICHARD M. MOSK

CALIFORNIA COURT OF APPEAL



RICHARD M. MOSK
ASSOCIATE JUSTICE, CALIFORNIA COURT OF APPEAL

Oral History of
JUSTICE RICHARD M. MOSK

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Oral History of
JUSTICE RICHARD M. MOSK

INTRODUCTION

ARTHUR GILBERT*

I have known Richard Mosk for more than forty years. We met in the early 1970s when Richard represented a large conglomerate corporation and I represented a manufacturer of motor homes, a company that his client had acquired. Our mutual clients were involved in a contract dispute that resulted in a lawsuit. Although the litigation was particularly contentious, Richard and I maintained a high level of civility toward one another from which a friendship developed.

We flew together to Detroit to take depositions at the Chrysler motor car factory. On that flight, I gained insight into Richard Mosk, the person. We were adversaries on the case, but friendly travelers. The flight attendant (in those days, the “stewardess”) spilled a large drink on Richard. He handled the incident with aplomb. This led me to rightly predict that, despite our clients’ rancor, Richard and I would develop a strategy to produce a beneficial settlement for them.

The compelling oral history you are about to read reveals the enduring qualities of Justice Mosk, the distinguished jurist and human being. He is the man who worked on the Warren Commission, the man who chaired

* Presiding Justice, California Court of Appeal, Second District, Division Six.

the Motion Picture Association rating system, the man who met world leaders and politicians, the judge who sat on the Iran–U.S. Claims Tribunal at The Hague.

In this brief introduction to the oral history, I will reveal a few of Richard's unique characteristics to demonstrate that even people of profound talent and ability, like Richard, are like all of us, profoundly human.

These days the phrase "eating healthy," whatever its grammatical deficiencies, is *de rigueur*, as Richard counsels his grandchildren in his oral history. Richard has embraced this practice with such ardor and passion that, in comparison, the most famous diet gurus of the day seem like dilettantes. Trial lawyers will learn much about their craft by joining Richard for a meal at a restaurant. His incisive cross-examination of the waiter about the menu will reveal in exacting detail specifically what the waiter does and does not know about ingredients and preparation. And what the waiter does not know, I can assure you he will, before the bill is paid.

A few years ago, Richard and his wife Sandy persuaded my wife Barbara and me to join them and others on a trip around the world in a private jet. The night before we left, Barbara and I went out for dinner. Seated at an adjacent table was past Secretary of State Warren Christopher, a close friend of Richard's. I greeted Mr. Christopher, and told him about our pending trip. A look of apprehension formed on his face, an emotion I suspect he had to mask during international crises. He took hold of my arm and said in a tone he never would have used with difficult foreign leaders, "I hope the chef will be able to accommodate Richard."

Richard's keen interest in healthy food does not detract from his generosity. The foods Richard and I cherish were not always available in far parts of the world, but were for the resourceful Richard. I think it was in Tibet that he miraculously secured bananas and almonds and surreptitiously slipped me half his booty.

He is not sentimental, but it is obvious he is trying to fix up the Goddess of Health and Father Time. If they marry, he would like them to adopt him.

The following oral history is a slow page turner. Slow, because it is engrossing. You will savor the stories Richard relates about his remarkable life and will want to linger on the page. In an engaging style, he reminisces about his friendships and acquaintances with presidents, governors, and ambassadors. He reveals canny political astuteness. He discusses his many

successes with candor and humility. He modestly ascribes to chance many of his accomplishments. If chance has favored Richard on occasion, it was his keen intelligence and extraordinary ability that brought chance encounters to a notable achievement.

After I read this oral history, I called Richard to tell him it was captivating and that I could not put it down. He murmured a barely audible “thanks” and changed the subject.

But on the subject of Richard Mosk, one can say without qualification that he is one of our most respected appellate justices. His opinions are beautifully crafted and shine with lucidity. His style is powerful, yet appropriately restrained. His sense of justice is apparent.

I am fortunate to have known Richard for more than four decades. I admire him for his wit, intelligence, and integrity. For those of you who do not know Justice Mosk, you will get to know him well after you finish the final page of this absorbing oral history.

★ ★ ★

Oral History of
JUSTICE RICHARD M. MOSK

INTERVIEW BY MATTHEW MOSK*

Q: Do you have any recollection of your earliest days?

A: I was born in 1939. My parents were living in Sacramento, but my mother took the train to Los Angeles, where I was born. In 1938, my father had been a young campaign worker for Culbert Olson, a state senator, who was a candidate for governor of California, and Olson won. In the campaign, my father worked closely with Phil Gibson, his law school professor and a top advisor to Olson (later chief justice of California). My father went up to Sacramento initially to be the clemency secretary, and then he became executive secretary, i.e., the chief deputy to the governor. I vaguely recall living in Sacramento. Lore has it that from time to time I crawled around the governor's office in the Capitol. Then we moved back to Los Angeles after my father had been appointed to the Los Angeles Superior Court. My father was the youngest Superior Court judge in California history. Because he was young and therefore politically vulnerable as a judge, several candidates ran against him in 1944. I recall his reelection campaign. I used

* Justice Mosk thanks his son, Matthew Mosk, an Emmy-winning investigative reporter and producer for ABC News, for conducting this oral history interview in November 2011.

to have to lick stamps to put on the envelopes. It was very stressful for him, because in the primary he did not get a majority, and that was ominous for an incumbent. But he went on to prevail in the final election by a large margin.

My grandmother, my father's mother, Minna, who was a wonderful lady, ended up owning a bookstore in Los Angeles. I don't remember her husband Paul very well. He died relatively young of tuberculosis and other ailments.

Q: Do you remember during his campaigns what that was like? Do you remember seeing his name on billboards or campaign rallies or anything like that?

A: I remember some of the literature. He ran on a ticket with Franklin Roosevelt, as a Democrat — even though he had Republican support.

Q: Did he ever bring you with him? Did you ever go up on the riser with him and your mother?

A: I don't recall him doing so. As to my mother's side of the family, her parents lived in Los Angeles — Max and Katharine Mitchell. Max had owned a business, and he took me to visit his father, my great-grandfather, named Barish, who, I'm told, had been married a number of times without



RICHARD MOSK AT THE AGE OF 2 IN 1941 WITH
(LEFT TO RIGHT): HIS FATHER'S MOTHER, MINNA; MINNA'S
MOTHER, ROLLA PERL; AND HIS FATHER, STANLEY MOSK.

getting divorced. I remember Katharine's parents, the Blonds, who lived in a modest apartment in Ocean Park.

Q: They were already also in the United States?

A: Yes. And Max had brought his entire family over from Europe. Some went from New York to Canada, where my mother was born, and then to Los Angeles.

Q: Did they speak English?

A: Yes. I don't remember if Barish did. I think he did speak some. The others did. Max could not write, even though he was running a business.

Q: Do you remember what it was like meeting them? Do you have any recollection of that?

A: No. At the time I suppose, as most grandchildren or great grandchildren, I was not particularly eager to go visit grandparents or great grandparents. But I did go to see them. Just like some of them, I find myself giving unwelcome advice to my grandchildren. I believe my mother and I either lived with them or saw a lot of them when my father enlisted in the Army. When my father was away then, we communicated with him by mail and by recorded phonograph records that were mailed.

Q: Do you want to talk about growing up and what you remember about the Warner Avenue house and what life was like there?

A: My father was sitting as a Superior Court judge (having been reappointed upon returning from the war), and we lived in Westwood on Warner Avenue. I started off at the University Elementary School, which was a lab school for UCLA. I think my father had helped get that funded and established there, probably for my benefit. Then the lab school moved over to UCLA, and Warner Avenue Elementary School was established on the Warner Avenue site, and I went there. I walked to school and played on the playground all the time, something not generally available to kids these days.

My father was quite a sports fan. He took me to the minor league baseball games at Gilmore Field — the Hollywood Stars in the Pacific Coast League — and at Wrigley Field — the Los Angeles Angels — also in the Pacific Coast League. We went to see the Los Angeles Rams and Los Angeles Dons play professional football in the Coliseum and the Los Angeles Bulldogs and Hollywood Bears — minor league football teams — at Gilmore

Stadium. I was a fanatic UCLA rooter. I remember listening to the games on the radio, especially the famous 1947 Rose Bowl. UCLA was undefeated, and wanted to play undefeated Army, but it couldn't because of an arrangement between the Pacific Coast Conference and the Big Ten Conference. So it got the second-rate Illinois team, which proceeded to beat UCLA 45 to 14. Because we did not have a television set, I used to listen to sports events on the radio. I listened to Joe Louis fights and football and baseball games. I heard the Bobby Thompson home run to win the pennant ("shot heard 'round the world") at a recess in Emerson Junior High School with my friend Dick Greene, now a prominent San Francisco attorney.

Q: And you and Stanley shared a lot of your time together through sports?

A: Yes, we went to many athletic and sporting events. He took me to all kinds of sporting events. I remember seeing a Sugar Ray Robinson fight at Wrigley Field, and he even took me to a Mr. America contest and a weightlifting event. We saw soccer, tennis, track and field, and polo — all kinds of sports activities. All this exposure is probably why I got into collecting sports memorabilia, particularly football programs. I also collected stamps and coins and, it seemed, everything else there was.

Q: Comic books.

A: Yes, comic books, which, unfortunately, my mother threw out. She didn't throw the programs away. Somehow they ended up in my uncle's garage, and I retrieved those years later. I continued to add to it, amassing 3,500 programs, some going back into the 1800s. I donated them to Stanford. They will be kept as a collection in the athletic facility under my name. The comic books would probably be valuable today. I read comic books, including classic comic books, which was an introduction to literature.

Q: You have listed here, "father in military." Was this World War II? Do you remember that?

A: Yes. I remember that during the early part of World War II, he was in the Coast Guard Reserve, and he would go out with his binoculars and look for Japanese submarines, or whatever. But as it turns out, I didn't realize it at the time, he desperately wanted to get into the active military because he felt awkward as a young male in public when most young males

were off at war. He was exempt because he was a judge, and his vision was 20/800 or something like that. It turned out that after he was reelected, he was constantly writing his brother Ed, my Uncle Ed, who was serving in the OSS in Yugoslavia and Italy, as to how he could get in. He wanted to get into the OSS, or he wanted to get in the military any way he could.

Finally he went up to see the director of Selective Service in California. The director left him alone to memorize the eye chart, and he memorized it, and therefore passed the eye test. He went into the army as a private — in the Transportation Corps — an odd assignment for someone so near-sighted. Ultimately he was going to get a commission, and he was on the verge of being sent to the Philippines for the Japanese invasion when the atomic bomb was dropped; he could have been at severe risk invading the Japanese islands.

Q: This all happened when you were pretty young. Were you interested in the news, following the war? Do you remember when the atomic bomb went off, how you heard that?

A: I don't remember much of it. Hitler and Tojo were well-known villains. I do remember him being away, and my mother was working. She was trying to earn a living selling ties, and I think she did volunteer work for the Red Cross. We were alone for a period of time. I vaguely recall seeing Lassie or Laddie (son of Lassie) movies — the American dog was up against a German Shepherd during the war. I remember when FDR died. That was a somber moment nationwide.

Q: I remember reading that Stanley grew up with a lot of relatives around him. Did you have a lot of relatives around you? Did your parents take care of their parents?

A: I was an only child, but my mother's parents and Minna were around, as was my grandfather's brother, Ed Mitchell. We spent some time with him. He was a very wealthy, successful businessman. My Uncle Ed, Stanley's brother, who was away for the war, and his wife Fern were around from time to time. But there was not a lot of family around, although there were many Mitchells. I've seen pictures and films of a lot of Mitchells, but I don't recall them being around that much. I did see my mother's brother Carl from time to time.

Q: You were Jewish in L.A. at a time when there probably weren't too many Jews in L.A., but your family wasn't particularly religious.

A: We didn't celebrate Jewish holidays. We had Christmas trees. I did not have a Bar Mitzvah. On the other hand, my parents insisted that I at least get confirmed, and so I went to University Synagogue, where I was confirmed.

Q: When you were in grammar school, do you remember anything about the politics of the time?

A: In 1948 was the Dewey–Truman presidential race, and I recall that the kids took an interest in it. We saw newsreels all the time. We used to go to the theater and see Harry Truman being hissed during the newsreels. There were two of us — Donald Kaufman and I in grammar school — who supported Truman, and the rest were for Dewey. And we yelled back and forth. It was something that was of interest even to little kids. I don't see that happening today. People aren't as aware. My father threw a birthday party for me, and he played the game Pin the Mustache on Dewey, sort of a take-off on Pin the Tail on the Donkey.

We used to go to day camps. Mine was called Matson Club, and we'd go on outings. I still have friends who went to those after-school and weekend camps with me. During the summers I'd go away to a camp for six or eight weeks, sleepover camps, in Big Bear or Arrowhead. We slept in cabins. My mother said I wrote one time and said I'd only thrown up three times, something like that, and the letter was censored; the camp censor or director wrote on it, "Ritchie is having a great time."

When I was in grammar school there was one black child in the school. His name was Lionel. I was friendly with him, and I remember that he was there because his mother was a maid for a senior partner at a major law firm here in Los Angeles. The partner lived in Bel Air. I would go up and play at their house, and he'd come and play at my house. One time I was having a birthday party. My mother told me that a number of parents called and said, "Do you realize that Lionel is colored?" And my mother said, "No, I didn't; what color is he?" Years later when I was in law school, this same senior partner came to interview students for his firm, and I recounted this story to him. He said, "Yes, and in deference to the fine neighbors of Westwood, we didn't let Lionel come to the party." I said, "No,

no, no, he did come to the party.” And we got into a little argument about that, which was not the best thing to do in an interview. That firm did not hire Jews at that time anyway.

I went to junior high school, and I noticed suddenly there were Asians showing up, Japanese Americans. I suppose they had been around for a few years. I hadn't seen them before. Nobody knew where they came from. Of course they had been off in relocation camps, but nobody knew about that. I don't know where they went to grammar school. I once asked my father why Governor Olson and Attorney General Earl Warren were so supportive of relocation, and why he didn't do anything. He said after Pearl Harbor, everyone was so afraid — they thought every Japanese gardener could be a Japanese admiral. Earl Warren once told me this was his most serious mistake. The kids themselves never talked about it. They were very popular.

We started a pen-pal program, in junior high school, with students in Japan. I started writing to a Japanese boy named Shinzo Yoshida. At first he wrote in Japanese, and I used to have to have the letters translated by the gardener. But he learned to write English, and we'd write back and forth. We actually kept up writing each other for over fifty years.

Q: Do you remember why that was of such interest to you? I'm sure not all kids adopted the program the way that you did, took to it the way you did.

A: I don't know. Part of it may have to do with the stamps; part of it was it was interesting, and I just kept up with it. It became part of my life. I visited him once when I was in college and working on a ship. It landed in Yokohama, and I met him then. And then my wife Sandy and I went over there in the early 1970s and saw him and his family. I guess I always hoped that he'd end up as head of Mitsubishi or prime minister or something like that, but they take a test and if they don't succeed on the test they were diverted into blue-collar jobs. And that is how he ended up. When we were there he must have used up his whole vacation and much of his salary entertaining us. He didn't speak English, but we were able to communicate somehow. He was a wonderful person, as was his family. He died not long ago. We had kept up all these years, and it really struck me. So we went over there to see the family. It was very moving. I still correspond with his daughters once in a while.

Q: Do you remember the content of the letters at all? Were they fairly surface level, back and forth? I assume at the time the purpose of the program was to rebuild relations with the Japanese after the war.

A: I think it was something educational. He would write about his family. It was pretty superficial. As time went on, we'd write about our health, about school, where I was and what he was doing, our marriages, our children, and so forth. I have given all of the letters I had and the Yoshida family had to UCLA Library (Special Collections), which was eager to have them as part of its Asian and Japanese American collections.

Q: Your father was working as a judge, and what was your mother doing? Was she working as well, or was she helping his political career? What do you remember about her?

A: She worked. As I mentioned, she had something to do with ties. She had some business with Jimmie Davis of Louisiana, who wrote or was associated with the song "You Are My Sunshine" and became governor of Louisiana. She finally got into real estate as a broker, and she became one of the most successful brokers in Los Angeles. She never wanted to do it on her own, so she always worked with other people. For example, she worked for Jack Hupp, who had been a USC basketball star, and one of her partners was Betty Reddin, the wife of Tom Reddin, who later became Los Angeles chief of police.

Q: Was it unusual at that time for a woman to be working? Was she a trailblazer in some ways?

A: I don't know about a trailblazer, but there weren't many women doing what she was doing. She was certainly one of the few successful businesswomen in those days. She was involved in the sale of many homes in Beverly Hills and Westwood. She said she could tell you 5 percent of any number — that was the commission in those days. She was also a significant fundraiser for my father's political aspirations. She was interested in politics and had done campaign work for other candidates. My mother was intensely loyal to her friends and family.

We also took some trips when I was young. I think around when I was 10 or 11 we took a cruise to Alaska; we drove to Vancouver, and there picked up the cruise ship. One of my classmates and her family were on the

trip. Years later she married Irwin Barnet, who would become my partner — one of a number of examples of the duration of my contacts. Then with my grandmother and parents — my grandfather didn't want to travel — I flew to New York. We saw Broadway plays. I was very young at the time, but we saw *Call Me Madam* with Ethel Merman and *Guys and Dolls*. Then we took the *Queen Elizabeth* over to London and took an American Express tour of Europe — like *If This is Tuesday, It Must Be Belgium* (movie) type trip.

It was very educational, and it was rigorous for a little kid like me. Sometimes I'd go off on my own. But for the most part I stuck with the tour. Then we took the *Queen Mary* back. I think a fellow named Randy Turpin, who was a boxer, was on the ship. He was going to fight a rematch with Sugar Ray Robinson for the middleweight championship. I was such a Sugar Ray fan. Turpin had upset Robinson in the first fight.

Q: For my kids and future generations it would probably be hard to understand what travel at that time was like. Can you describe a little bit about what traveling on a cruise ship or flying across country was like in the fifties?

A: Actually it was 1951. The flying obviously took a lot longer. There were props, not jets, so they did take longer. I don't remember much about it. As far as the cruise ships were concerned, they didn't offer all the amenities they do today. We did have to sit at the specified tables and dress up. In Europe, we saw remnants of World War II, especially in London — bombed out places. The food in England was still sparse, because they'd been on rations. It was terrifically educational, but I saw more churches and museums than I certainly would want to see.

As a result when I took you and Julie, our children, on trips; we always took half the day for R&R, for something that you liked to do — a zoo or a park or exercise — because I had experienced nonstop museums and churches.

We met the Pope in Rome. My father had arranged an audience with the Pope. So we went out to the summer residence of the Pope, and it was a relatively small group of about thirty people, and the Pope came into the room and most everybody else went down. We did not.

Q: Went down?



WITH POPE PIUS XII AT CASTEL GANDOLFO —
 RICHARD MOSK AT AGE 12 (IMMEDIATELY TO THE RIGHT OF
 THE POPE, AT THE POPE'S LEFT ARM), SUMMER 1951.

A: On their knees, you know.

Q: Which Pope was this?

A: It was Pope Pius XII.

Q: The summer residence?

A: Castel Gandolfo.

Q: This is a drive outside of Rome?

A: Yes. He came around and many people kissed his ring, and we didn't. But he blessed me. I hope it works, just in case. He asked me, "Where do you go to school?" I told him I went to Emerson Junior High School. I had a picture taken, a group picture, taken with him, and I'm right next to him, so you can see me with the Pope.

Q: Do you remember what you thought of him when you met him?

A: I thought it was very interesting. I knew this was a significant figure. I didn't realize that he would later turn out to be a controversial figure. There are books written that he was complicit or at least was apathetic during the Holocaust. The Catholic Church denies that, and I think there's a question about whether or not he's headed toward sainthood.

Q: Was there any discussion in your house about the Holocaust or Nuremberg or any of that, being in a legal family? Do you remember talking about it at all, learning about it? When you were a child, people were just learning what had happened, right?

A: I don't remember much about that. Maybe in the newsreels they had it, but I don't recall anything. Los Angeles was somewhat segregated, not only by race but by religion, and we'll get into that when I talk about law firms.

Back to Los Angeles. We used to go to the UCLA campus. There were few buildings and a lot of land. There was brush, with a stream, and vast athletic fields. We would stage our own track meets, football games and other games there. I was a ball boy for the UCLA baseball team and was able to watch John Wooden when he first began coaching basketball in the old men's gym. Wooden was an exciting coach. He used a fast break. He also had no reluctance to have black players. UCLA had a history of black athletes. USC did not. We also went to many other collegiate athletic events on campus.

After Emerson Junior High School, I went to University High School in West Los Angeles, a public high school. The thing about University High School (Uni Hi) was that it had a diverse student body, and it had the smartest group of people I'd ever been with before and maybe after, at least those in the star classes, which I was in. They would take the better academic performers and put them in certain classes together — the “starred classes.” I finished lower in my high school class than I did in college or law school. It was a really outstanding group, and we had some interesting people. The year behind me was Nancy Sinatra, and in my class was Jack Jones, and so we had some entertainers. Others included Margaret O'Brien (although she went to a Hollywood school, she was technically enrolled at Uni) and Billy Gray, who were in films; and Noel Blanc, who carried on after his father as the voice of Bugs Bunny and other cartoon characters. We had some people

who became very successful. Some became well-regarded doctors, at least one judge besides me, lawyers, academics, and others successful in business.

Q: Do you remember your classes at all, what it was like to be in class at Uni High?

A: Yes. I don't think we took the kinds of classes they do today. I don't think we had advanced calculus or history of Western civilization. But we had fine teachers and they concentrated on the basics. We had hardly any Blacks in the school. We had large Latino and Japanese populations. We took language, but we did not become fluent — at least I did not. Language was not taught well. I regret that. Every now and then a classmate would appear in juvenile court, where my father occasionally sat. At least one wore a Uni High jacket. He must have done well because he told me my father was a great guy. This could have been embarrassing.

Getting into tennis, my father always used to try to get me to play, and he'd take me to the La Cienega Tennis Courts in Beverly Hills. I would watch him play. He tried to get me to take lessons. I finally took some. But I really got into tennis when I began playing with a classmate and old friend, Leslie Epstein, the son of Philip Epstein, who, along with his identical twin, wrote the Academy Award-winning motion picture, *Casablanca*. We started playing every day. We'd go to UCLA; and the tennis coach was J.D. Morgan at the time (later athletic director). He had to shoo us off on many occasions. I never remembered him very fondly as a result. When I was at Stanford, we competed against his teams.

Q: Meaning, you were out on the courts and he'd have to come and kick you off because he needed the courts for his team? Leslie was your high school friend?

A: Yes and yes. Leslie had been in day camp with me earlier, much earlier. He was in my high school class for a year. He became a Rhodes Scholar and is now a highly regarded author and professor.

Q: You and he both took up tennis around the same time?

A: Correct. We started playing at UCLA, and then going to La Cienega, where there's some really good junior players, who became collegiate and tournament stars — e.g., Roger Werksman, Ed Atkinson, and Allen Fox. We would play as much as we could. We'd hitchhike to the courts, and

we'd play into the evening. It was free as long as some adult wasn't using the court.

Q: So you'd finish the school day at Uni High, and describe your journey from there.

A: Somehow we'd get to — when I was at least 14, 15, maybe toward the end of junior high or beginning of high school, we'd hitchhike or take the bus to La Cienega or UCLA, and we'd play.

Q: Put your thumb out and a stranger would pick you up?

A: Yes. In those days it was fine. Parents didn't care. It was a way of getting around. And we would play. Then I started going to tournaments. They had many of them. I started late age-wise, because many of the kids had already been playing tournaments. Roger Werksman was ranked second and Norm Perry, with whom I went to grammar school, was first in the 15-and-under classification in Southern California (second in the country). Ed Atkinson was very highly ranked. Allen Fox later became a Wimbledon quarterfinalist. Most of the kids ended up highly ranked in the United States as juniors and men.

Q: How did you guys do it? You were all at La Cienega; how did you know who was playing whom? Did you do round robins, or what was it like at the park?

A: We'd just play, and we'd play for Cokes and play for balls. The others were very nice to play with me, because they were better than I was in those days. We started traveling to these tournaments. I don't know how we got there, like Ventura or Santa Barbara. The first year I played competitively in the 15-and-under category, I actually ended up being ranked eighth in Southern California. I won the Pasadena tournament, beating at least one nationally ranked player — I believe he was ranked third in the U.S. That was the zenith of my tennis career; I never won another singles tournament in the U.S., although I got to the finals of one, losing to Fox. Roger Werksman and I played in the Dudley Cup doubles for our high school team, and we won.

When we played at the Dudley Cup in Santa Monica I remember Roger Werksman saying, "Mosk, you take care of the alleys and I'll take care of the rest of the court." But we ended up winning it, and my high school

team was loaded with good players. We had many highly ranked players. I won the city doubles championship twice and was all-city. Our team won the city championship all three years I was there. But the competition was not that rigorous. I think L.A. High had the actor Dustin Hoffman playing on the team; I don't think he was a great tennis player.

Tennis in Southern California was ruled by Perry T. Jones, the head of tennis in Southern California. He was nice to me; he always said, "How's your father?" I remember he did not care much for Pancho Gonzales. He was reputed not to be very open-minded. I was told he wrote a letter on behalf of Ron Schoenberg and Tom Freiberg, ranked players, who were going up north to play in tournaments, so they could get housing; he wrote "They're nice boys, even though they are Jewish." He was at the L.A. Tennis Club, which did not allow any Jews or other minorities to become members.

Q: So I don't want to skip anything. We have something here called "McCarthy era." What was that about?

A: During the McCarthy era, I watched the Army-McCarthy hearings on TV, and as a result I stayed away from signing any petitions of any kind. I had this fear that somehow it would come back to haunt me. My Uncle Ed had been Southern California chairman of the Henry Wallace Progressive Party campaign for President in 1948. He was labeled as a leftist, and I think that probably killed his political career, although he was a very fine lawyer, but politically he was dead as a result. I didn't know it at the time, but the FBI was even investigating my father; unnamed sources said he might be a Communist. Later he was accused of speaking at a Soviet-U.S. Friendship Rally. He was sent there by the U.S. Government to sell war bonds.

Q: There was a lot of interest in communism in that part of the family, right? Didn't Stanley have relatives who were interested in it?

A: The family of Fern, Ed's wife, may have been Communist Party members or sympathizers. They were quite leftist, and Ed himself didn't see much wrong with the Soviet Union. He said, "Well, everything has its pluses and its minuses," and he was enigmatic about it. But I think he was somewhat favorably inclined toward progressive, even far-left, views. He represented Russian and Eastern European heirs of Americans in some important and published cases.

Q: But that got dangerous at a certain point.

A: It did. As a young child I also played with a child named Steve Rossen, whose father was Robert Rossen, who wrote, produced and directed the Academy Award-winning picture, *All the King's Men*, and later *The Hustler*, and some really great pictures. But after *All the King's Men* he "named names." In other words, he went before the House Un-American Activities Committee and named names of those who had been in communist or leftist organizations with him; he became somewhat of a pariah. They moved to Europe for a period of time, and then he came back, and he did some wonderful pictures. I spent a lot of time with the Rossens, and I think I was aware of what was going on with them. My mother tells the story that the Westwood Democratic Club used to meet in our house, and Ronald Reagan was a member of the Westwood Democratic Club. She said that many of the members thought that Reagan was a little too far left for them.

Q: Do you remember all this activity in your house, the political activity being around you? Do you remember what that was like?

A: I remember Paul Ziffren who later became Democratic National Committeeman. When people came over I was sent up to my room. We had a number of celebrity weddings in our house. My father would perform them — Hedy Lamarr and other Hollywood stars. All I remember is they used to throw rice around, and I'd have to help clean it up afterward.

Q: I don't want to skip ahead, but I'm curious how Stanford got on your radar, given that you were spending so much time at UCLA and were such a big fan. Did you think about going to UCLA? Your friends Werksman and Perry were going there, and Fox.

A: I don't know how I got interested in Stanford. When it came to applying, it wasn't quite as hard to get into college in those days as it is today, although Stanford and the Ivy League schools were difficult to get into. I applied to Yale because the Yale tennis team would go to Oxford every other year, and I thought that sounded pretty interesting. I applied to Pomona, Stanford, Dartmouth and I guess Berkeley. I think that was pretty much it. Actually, I interviewed with Dartmouth. They have local people do the interviews, and I remember asking an interviewer, "Are there any Jewish quotas at Dartmouth?" And he said, "Well, of course." And I said,

“What do you mean?” He said, “Well, look — if we opened it up to applicants totally on the merits, we’d be inundated with New York Jews.” I guessed it was common, and I didn’t realize it at the time, but basically all the prominent private colleges and universities had quotas against Jews, including Stanford.

But I really tried to get into Stanford. It had a great name, and I thought I could play tennis there. I might have had trouble making the UCLA team. The tennis coach, Robert Renker, was interested in me. The tennis coach called me after I got in and said, “We have a scale here, and in order to get in you have to at least get a 5 (or something like that). And you had a 3.” He said he went over to admissions, and said, “There must be a mistake.” And he said they found a mistake; and so I got in. I really owe getting into Stanford to Bob Renker, the tennis coach. He was very laid-back. He let studies come before tennis. The team was, nevertheless, one of the better ones in the country, although not up to UCLA. By the way, tuition was \$250 per quarter or \$750 a year. Living expenses probably did not exceed \$1,000.

Q: You knew tennis was going to be part of what you did at college. Was there anything else you remember about Stanford that you found appealing?

A: It had a great name, a great reputation, and the tennis aspect. Stanford at that time was mostly an engineering type school. White people from Pasadena — that type — were

RUSS ALLEN'S

PRESS BOX

Great Sports Events on Farm

Last weekend everyone was talking about the Olympics and several fine sports events on **The Farm** were quite possibly overlooked by all Stanford sports fans due to the exciting events at Squaw. **Card** baseball players opened their year with a couple of trouncing wins over **Cal Poly** and **San Jose State**. If **Lee Morsch** and **John Harburt** can keep up the heavy hitting to aid the fine pitching staff the **Indians** may make a **NCAA** playoff yet in the spring.

Perhaps the most impressive **Stanford** victory which unfortunately many people missed was **Jim Jeffries** and company's complete sweep of the **Northern California Tennis Championships**, here Wednesday through Saturday.

Jeffries' impressive wins over **Whitney Reed** — the defending **NCAA** champ — and his teammate **Dick Ogden** may be that faint glimmer of hope which'll end **Southern California's** complete domination of college tennis. Perhaps the most amazing fact was the all-**Stanford** finals in the singles — **Jeffries** vs. **Ogden** — and doubles — **Ogden, Jeffries** against **Dick Gould** and **Noris Karns** who had defeated the touted **Reed, Nick Schauf** combo in the semis.

Yes, the tournament showed some fine, solid play from all seven **Card** entries — **Dick Mosk**, **Gil Ramsey**, **George Bates**, **Gould**, **Karns**, **Ogden** and **Jeffries** may prove to be the best in a long time.

There was some doubt however, whether the strong **Indian** doubles duo of **Gould** and **Karns** would make the semi-finals Thursday afternoon, scheduled to play **Art Kame** and **Gudrun Lloyd** from **Cal**. **Gould** arrived late, about 4:30, with the news that he was the father of a baby girl. **Gould** had just left his wife — the former **Margie Mox** — in the hospital and stormed on the court, a bit haggard but eager to play.

Although the **Cal** opponents graciously agreed to postpone the match till Friday, **Gould** and his confident teammate **Karns** insisted on playing. Needless to say **Gould** played inspired tennis and the **Tribe** duo overwhipped their **Cal** rivals 6-2 in the first set and outlasted them 8-6. **Dick** stayed on his feet till the end.



DICK MOSK
Fine, solid play

“FINE, SOLID PLAY” BY MOSK
ON THE STANFORD TENNIS TEAM,
THE STANFORD DAILY,
MARCH 1, 1960.

predominant, and so I was a little bit of an outlier. People at Uni High who did much better than I did who were Jews didn't get in, and I got in because of the tennis. A number of people from Uni High did get in, including my friend, John Stahler, who played on the basketball team. At Stanford, there were seven men for every four women.

Going back, as part of our interest in tennis, we used to act as either ballboys or linesmen at the Pacific Southwest Tournament, which was probably the most important tournament in the world behind the Grand Slams. We would get to see Pancho Segura, Pancho Gonzales, Frank Sedgman, and all the greats of that era play. I once was removed as a linesman by Pancho Segura, an embarrassing moment (especially for one who was to become a judge), and I was hit in the stomach, accidentally, by the very fast Pancho Gonzales serve. I worked during my summers as a tennis teacher for Carl Earn, a great player who went on the tour with Gonzales at one time. He was at the Beverly Hills Tennis Club. I did qualify to play in the Pacific Southwest Tournament a couple of times. Once I played Alex Olmedo, a Wimbledon champion, in that tournament, on a featured court. He beat me handily, but it was a thrill. I worked on a cruise line in the summer after my freshman year in college. I worked on the *President Wilson*. The owner was a prominent Democrat, so he gave children of some Democratic politicians these jobs, and we worked as pursers, or whatever, and went all over the Far East on this ship. Adlai Stevenson's son worked on a different cruise. The son of Paul Butler, chairman of the Democratic National Committee, was on my cruise.

Q: Do you remember what that was like? Was the job menial?

A: Yes, it was pretty menial, basically in the purser's office. They told us we couldn't fraternize with the passengers, notwithstanding the young women who were there, and we lived in rather cramped quarters as the crewmen did. But it was very interesting. I remember going to Hong Kong, which now is such a great and affluent place, but then to me, at least the Kowloon side, was incredibly slum-ridden. We got off the ship and the rickshaw people would try to take us to the prostitutes. That seemed to be the big industry there at the time. In Manila, the people seemed hostile to Americans, even though the U.S. had liberated the country. I guess there was a history of occupation. In Japan the people could not have been nicer.

Q: Did you have household help, somebody who worked when you were growing up that was a sort of surrogate parent figure?

A: Yes, Louberta. My mother worked. We had a lady who lived there in-house, and she cooked, and in a sense it was like the old South. I mean, she kind of raised me in part. She was black.

Q: What do you remember about her?

A: Well, she was big and robust and very pleasant. I can't remember any conflict at all with her. She was very nice.

Q: Did she work there during the day, spend the night?

A: Yes. She lived in the house.

Q: I understand that Leslie Epstein has referred to you in articles and books, including your designation as the "Penguin."

A: When we were young I was known as "The Penguin." Leslie was known as "The duck," and Allen Fox, who became a great tennis player, was known as "The Pumpkin" — because he had a chipped tooth. Leslie has usually included in most of his published works a character named "Mosk."

Q: Why did they call you "The Penguin?"

A: I guess I looked like a penguin.

Q: "In one article he wrote about all of you in your youth, and he refers to the Penguin as a "Dour little man who waddles around the tennis court slapping at the ball."

A: Yes. (laughs)

Q: So you were explaining how you ended up at Stanford. Do you want to talk about college life?

A: Yes, I loved Stanford, and I loved playing on the tennis team there. As required, I lived in the freshman dorm, and there were some very interesting people in my dorm. One, Steve Schroeder, went on to be a doctor and head of the Robert Wood Johnson Foundation. There were some football players in my dorm. We couldn't join a fraternity until later in our first year or stay in one until our second year. In the dorm, I had a roommate, a fellow named "Kicker" McKenney, who came from, and ended up in,

Pasadena. He was on the track team. He became a lawyer and a member of the Board of Education in Pasadena.

Q: How did they orient you? What do you remember how you started in college?

A: Unlike today, when the mother comes in at the start of the freshman year and makes the bed, my father drove me up and dropped me and my luggage off on the sidewalk outside the dorm. Before that, on the way up he pulled me over to the side and said, "I've never really talked to you much about sex or things like that." He started to talk about protection. I said, "Don't bother. I don't want to hear anything about it." It sort of reminded me of when you were in college, I started to talk to you a little bit about the risk of AIDS in heterosexual sex, and you said, "Don't bother." Later I joined a fraternity, Theta Delta Chi, one of the few that would take Jews, notwithstanding its charter. Unlike other universities, Stanford had no Jewish fraternities. One of my roommates was Steve Sutro, son of the legendary San Francisco lawyer, John Sutro. Steve later became a Navy pilot and was killed in a plane crash. A number of my fraternity brothers became successful investors, engineers, businessmen, doctors, etc. One is still my accountant. The women had no sororities, so they all lived in dorms. One woman in our class was divorced, and for some reason, she lived in separate housing her freshman year.

Stanford had required courses. I was pretty frightened because I'd been admitted on tennis and thought maybe I wasn't as well qualified as all these kids from Exeter, Lawrenceville, and so forth, but I did pretty well. We were graded on a curve.

One thing I tell my classes today, when I was at Stanford, because I was a little apprehensive about grades, except for the required classes, of which there were many, I took classes I could do very easily, or I thought I could do easily — poly sci classes and so forth. I did quite well in my junior year, and then in my senior year after getting into law school and getting whatever honors I received, I decided I'd take classes like music, art and literature, and I found them very exciting, and I did just as well in them as I had been doing. I regretted that I hadn't taken them in the earlier years. I tell students that they should take classes in which they can really learn something and enjoy and not worry so much about the grades. The

grades will come. Although politics was not of great interest at Stanford in those days, there was interest in a debate between Professor Sibley, a foe of nuclear weapons, and Professor Kendall, a strong conservative, who favored them. The subject of their debate was nuclear weapons. Stanford was known as a “Cold War” university. (I believe Sibley was not offered tenure despite student support.) Stanford had the Hoover Institution, which, to many, has been known as having a conservative outlook.

I’d say one of the highlights was playing intercollegiate tennis. I’m proud that I scored a point against each of UCLA, USC and Cal, and I really enjoyed it. The tennis team was a major aspect of my college career. We had a fellow named Jack Douglas, who was the founder of the Jon Douglas Company here in Los Angeles. He made a lot of money with real estate. He was a spectacular athlete, first on the tennis team, and as a quarterback on the football team; he was quite an outstanding athlete and student. Although drafted by an NFL team, he played Davis Cup tennis. I have stayed in touch with some of my teammates. One, Dick Gould, became the most successful collegiate tennis coach in history. A number of others became successful lawyers.

Q: You were renowned for your language skills. How did you manage to survive with language classes and science and math?

A: Struggled.

Q: Do you remember any particular dark moments?

A: No. I worked hard. I studied very hard, and I was ranked pretty high. They used to rank you by year, by men and by those in liberal arts. There were 700 men, 400 women. I did reasonably well in my freshman year, not quite as well my sophomore year, and then when I was able to pick my classes in junior and senior years I did much better — ranking as high as third in the classification. I was able to graduate with honors.

Q: Did you have a system? Did you develop a system for study, a place you always went?

A: I probably did, but I don’t remember it. I know we on the tennis team had to play tennis three hours a day every day all academic year long. One thing I didn’t like about Stanford was the quarter system, in which we were taking mid-terms or tests every two minutes because the quarter was

shorter than semesters. As I said, most of the students were engineer types. We had some good liberal arts courses. We had very good faculty there at the time. Professors Horn, Bunzel and Watkins were all very good political science professors. Thomas Bailey, a well-regarded history professor was there then, I believe. Stanford was conservative but generally apolitical.

In 1959, I brought the chairman of the Democratic National Committee, Paul Butler, up to my fraternity house. He had dinner, but nobody was really that interested. Most were engineering or pre-med students. Butler deserves credit for resurgence of the Democratic Party after Eisenhower.

I invited Alexander Kerensky up there. He had been prime minister of Russia until the Bolsheviks overthrew him, and he was at the Hoover Institution and lectured at Stanford. There was a mild interest in him, but not that much. I remember I was pressing him, "What was Lenin like, what was Trotsky like?" and so forth. He of course had known them. He said, "Let's get off this and let's look at some of those nice-looking women over there." He was renowned for being a ladies' man when he was in the Russian government. I also invited JFK to the fraternity, but received a telegram giving his regrets.

Q: Did you know when you went to college that you wanted to be a lawyer, or did that come later? How did you figure out where your career was headed?

A: I thought about being a political science professor, and I did get a Woodrow Wilson Fellowship to study under Harold Lasswell at Yale. Then one day I saw one of the associate professors, who did not have tenure, crying, and I said, "What's the matter?" Apparently he didn't get tenure. I thought academia was supposed to be nice and pleasant. You don't make a lot of money, but it's at least a nice way of living. If it's going to be a rat race like anything else, I might as well get into the real rat race. And so I decided ultimately to go to law school. I applied to Harvard and Yale and I got in. And I decided between them, and I chose Harvard.

Q: You have listed here Theta Delta Chi Hell Week.

A: Yes, we used to have Hell Weeks.

Q: More than one?

A: Every year for the new pledges. So, one for me, and they were brutal. I remember reading about some kid at the USC Hell Week. They made him swallow a goldfish or maybe a piece of liver on a string and then pull it up. He ended up choking to death. My father then was attorney general. He started going after this hazing. I'd tell the fellows in the fraternity house, "Look, guys, this is risky." You know, they were taking guys out and leaving them in the nude out somewhere. I said, "What if somebody gets killed"? Because my father would be on it, I tried to stay away from it. Hell Week was not frowned upon in those days. Today such hazing is strictly prohibited.

While I was at Stanford my father decided to run for attorney general. He originally wanted to run for the U.S. Senate. Pat Brown was then running for governor and wanted Clair Engle, a congressman, to run for the Senate on the ticket. So my father decided to run for attorney general and had a primary opponent named Robert McCarthy, a state senator from San Francisco. They ran a relatively genteel campaign against each other; they liked each other, and it was a nice campaign, but very, very close. Indeed, the day after the primary election, the headlines were that McCarthy had beaten my father. In fact one of the professors in class said, "Sorry your father lost." It took days before the votes finally came rolling in from Southern California, and my father had eked out a narrow victory. (McCarthy had eight children. When my mother was asked how many she had, she said she had one, but if it would help, she would have seven more.) Then in the final, my father ran against Nixon's protégé, a fellow named Pat Hillings, who was a congressman, and he beat him by the largest margin of any contested race in the country that election, leading the ticket in California. Hillings had noted in his campaign literature that my father was Jewish. That apparently had no effect. I think my father was the first Jew elected to a statewide constitutional (non-judicial) office.

Q: What was it like having your father on the ballot running an active campaign while you were at college?

A: The only time I got active — at least a little bit — in the campaign, was in the summers, and I remember trying to raise some money from somebody. He gave me a \$25 or \$50 campaign contribution, and I brought it home proudly. And my mother said, "You ruined it all; we had him down for \$1,000 and now he's given you \$50, and that's all he's going to give."

So my mother was quite a fundraiser at that time. But in college I didn't pay that much attention. I was interested, but it didn't seem to impact me. I was doing my own thing there.

Q: So you weren't out leafleting or organizing rallies or doing fieldwork for him, anything like that?

A: No, nothing like that.

Q: Hu and Burton?

A: There's some very interesting people that got involved in my father's campaign. Philip Burton who was an assemblyman (later a congressman) and his brother John Burton (later a state legislator and congressman) were very active, and Jackson Hu, a Chinese leader in San Francisco also was. I remember my father rode in the Chinese New Year Parade, and they'd put the name of the driver on the side of the car, and the driver's name was Mr. Jue. (laughs) Los Angeles Supervisor Kenny Hahn was the first public official to endorse my father. He had great support in the Black community. As a judge, he had declared invalid racial restrictive covenants, before the U.S. Supreme Court did so, and thus he was popular in the Black community.

Q: Did Stanley have a machine, an organization? How did he do it?

A: Well, the CDC, the California Democratic Council, which was a liberal group of Democratic clubs all over the state, was backing him at the time. So he did have that. And he'd always been very active politically even though he was a superior court judge. He'd kept his contacts from his days in the Culbert Olson Administration. He was a good campaigner, not a great fundraiser, although my mother was. But in those days, with a few hundred thousand dollars, you could go pretty far. Earl Warren once told me that on his last campaign for governor he spent \$50,000.

Q: So your father was attorney general, and you were headed to law school?

A: During my senior year at Stanford, he was attorney general, and then I headed to law school.

Q: Do you remember his reaction? Did he weigh in on Harvard versus Yale? Did you discuss going to law school with him?

A: In those days parents were much more passive about college and graduate admissions for their children than today. When I applied to college, I did my own applications; I did everything by myself, and if I needed help, I'd go to my parents and say, "Is there anybody you know that has some contacts here or there?" Same thing in law school. Parents were in the background. But they were interested. He took me to interviews at Harvard and Yale law schools.

It's different today when the parents hover over their children and get them counseling and help on test-taking and so forth. In those days we did it on our own basically. So he was interested, but much more passive.

Q: Do you remember what he said when you told him you were making this decision?

A: I think I went to him and said, "Do you have any ideas on how to get me into this place?" I think he helped with whatever contacts he had. But it wasn't like he had gone to either place, so he wasn't like the Bushes at Yale.

Q: Did he express any ambition for you, what he wanted you to do with a legal career?

A: I think ultimately he would have liked to have me run for office. And after law school that was something that came up.

Q: What was that conversation?

A: He said, "Why don't you run for office?" When I came down to Los Angeles, there was an open Assembly seat, and I thought about it. I went around exploring the possibility. There was a fellow named Alan Sieroty and another person who were actively waging a campaign for the seat, and I thought about running. I thought I could maybe pull it off on name recognition alone. My father's name was quite well known. But unlike Jerry Brown, who did do that, capitalized on his name, and started in that type of position, I just didn't have it in me to do it. Maybe I'm just a little too conservative — not in the political sense. I remember John Burton, then an assemblyman, called and said, "You ought to run." He said, "We make \$20,000; you could make \$20,000 a year doing this and still have your law practice" (which was more than I was earning then). He urged me to get into it.

I asked Paul Ziffren, the former Democratic National Committeeman from California, about it, and I said, "Why don't I rely on getting appointed?"

Why go out there and put it on the line?” He said, “All the power is in the elected official, and if you want the power you should run.” Notwithstanding all that advice, I just didn’t have it in me to do it.

I remember, interestingly, when my father was sworn in in January of ’59 that Pat Brown was sworn in at the same time, and I met Jerry who was then in a seminary. He was there in his long black robe. I guess at the seminary they didn’t get out very much or they didn’t do much talking. So the first time I met Jerry Brown was at the swearing in.

Q: So law school.

A: There were a couple events of some significance before we get to law school. In 1959, Kennedy and Nixon both came to speak at Stanford. Nixon was good; he said, “You young men and women, you’re the future,” and the usual incantations. Kennedy, then seeking the nomination, came, and he said, “I have a 6-point [or 10-point] program for Latin America,” and it was a serious adult speech. It was great. I remember meeting him afterward. I went up to him and introduced myself. He said, “I’m going to see your parents in Fresno in a week or so,” and apparently in Fresno he met my mother and said, “I saw your son Richard at Stanford.” That wowed her. I don’t know if this was the reason, but my father came out very early for Jack Kennedy in the primary.

My father took me back to Washington, and we had lunch at the Senate Dining Room with Hubert Humphrey, who was trying to woo his support during the nomination process. I had navy bean soup, which was famous in the Senate Dining Room. I liked Humphrey; I liked him a lot.

I also remember seeing Nixon speak at the dedication of the Sports Arena in Los Angeles. I sat on the stage with my father, and Nixon got up and gave a 40-minute speech without a single note, and without an “uh” or a pause. I really was impressed with his speechmaking ability. I introduced myself, and he was very nice, notwithstanding the fact that he and my father obviously were on opposite extremes politically. He was held in contempt by the California Democratic establishment for his unsavory campaigns. The 1960 Democratic National Convention was held here in Los Angeles, and I worked for the California delegation. My father was involved.

Q: Was he a delegate?

A: He was a delegate, and he had come out for Kennedy, and Pat Brown wanted him to become Democratic National Committeeman from California (the sole one at that time) because, for some reason, he didn't want Paul Ziffren, who was then the Democratic National Committeeman. Ziffren was a friend of my father's, but nevertheless my father ran against him and got the spot. And I remember Pat Brown saying to my father, "Stanley, if there's anything you ever want it's yours." I overheard him say that, and as we go on we'll see whether or not he lived up to that promise. (laughs) Paul Ziffren was justifiably angry as were many Ziffren supporters. He got over it. I remained friendly with the Ziffrens for years. Paul was a leader in the 1984 Olympic Games here and a prominent attorney.

At the Convention as an aide to the California delegation, I was supposed to keep everybody out of a room but somebody knocked on the door and demanded to be let in. He said, "Don't you know who I am?" I said, no. He said, "I'm Sam Yorty." Well, Sam Yorty, as it turned out later, became mayor of Los Angeles, but at the time I thought he was a rather rude fellow. He was a friend of my father's when he was in the California Assembly during the Olson years. He later appointed me to a commission.

During the general campaign, JFK's brother Edward came out to run the campaign in California. He was young and knew no one. So he had trouble navigating out here. When I was in law school, my father's friend, Massachusetts Attorney General Ed McCormack, the nephew of the speaker of the House, ran against Ted Kennedy for an open Senate seat. Ted won because of JFK. McCormack famously suggested that if Ted Kennedy's name was Edward Moore, he would have no chance.

Q: You were impressed with Nixon. Did you ever consider being a Republican? Did that thought ever cross your mind?

A: Never crossed my mind. I was just brought up as a Democrat and was always a Democrat. By the way, looking back, aside from Watergate, Nixon was not a bad President. He believed government could solve problems. Maybe there were more opportunities in the Republican Party, because not too many people with my background were active in it.

Q: Anything else you remember about the Convention? Do you remember the speeches, do you remember Kennedy getting the nomination? What that was like?

A: Yes. I remember it was Wyoming that gave him the final votes. Sen. Lyndon Johnson was a candidate; I remember seeing him there, as was Sen. Symington. There was a movement for Adlai Stevenson, especially from a lot of the Californians. Pat Brown was a favorite son but pledged to Kennedy, and some of his delegates were trying to bolt for Stevenson. So, when Pat Brown was nominated as a favorite son, he was roundly booed; it was very embarrassing for him.

Speaking of that, I went to a football game, a Cal–Stanford game, and Pat Brown was introduced and was booed by the fans primarily because of the Chessman case. Caryl Chessman was the “red light rapist” at Mulholland Drive in Los Angeles. He’d go up and take women out of cars where they were getting the view with a boyfriend and then rape them. He didn’t kill anybody but was sentenced to death. He moved the victim, so that was the kidnapping element, which in those days, resulted in a possible death penalty. Chessman was on death row for a long time and kept appealing his death sentence. He wrote a book and was regarded to be quite literate. The question was whether his death sentence should be commuted. My father, as attorney general, on behalf of the people of California, was trying to fend off all the legal challenges.

When it came to commuting his death sentence, my father supported Pat Brown — another favor for the governor. Pat Brown tried to get it commuted, and he was off and on. Finally he did it. But the Supreme Court, which was required to approve such a commutation if a person had prior felonies, with a 4-to-3 decision did not approve it. So Chessman was executed. The whole event led to considerable dismay with Pat Brown at the time.

I might add that any politician who is introduced at a sporting event risks being booed. My father was booed when he was introduced at a boxing match at the old Olympic Arena.

Q: We didn’t talk about this when we were talking about you growing up, but I think when anybody reads this or watches it, they know L.A. as an enormous, sprawling, megalopolis with ten million plus people, maybe more. What was L.A. like when you were growing up and when Stanley was a Superior Court judge? Can you describe it a little bit?

A: It was paradise at the time far as I was concerned. There wasn't that much traffic. I pointed out you could hitchhike and take buses. I never had to go out of the area; I never was in the San Fernando Valley, and rarely downtown.

Q: What was in the San Fernando Valley?

A: Not much. I don't know. I never was out there. There were some people living out there, but it was not a sprawl. Probably vacant or farm land. The first freeway was built in the fifties — the Pasadena Freeway. We had the Red Cars, which were street cars, and they ultimately were taken out by virtue of a supposed anti-trust violation by some industries, tire or concrete or car. It was a shame; we had the largest urban rail system in the world at that time. Now admittedly there were problems with them, but still they were great. You didn't have the traffic, the crime, and the weather was good, but smoggy in those days, a lot of smog. I used to play in these tennis tournaments against people who came from out of state and suddenly their chest would start hurting, and they thought they were going to have a heart attack. I was used to it — just smog in my lungs. I wasn't thinking about cancer or anything like that. I didn't wear sunscreen.

I should mention that not only was getting around easy, but also there seemed to be no shortage of open playgrounds and parks. As I mentioned, we used to go over and play at UCLA, which at that time only had four or five buildings and plenty of land. Playgrounds at the schools were left open. They did not have organized activities like today; it was free play so to speak.

Also, I was able to ride my bicycle to Emerson Junior High School, so it was a much easier time. There were no malls and no multiplex theaters.

Q: You've made a lot of references to Hollywood and movie stars that were circulating in Stanley's orbit. Did that affect your worldview in any way? Do you remember how you looked upon Hollywood and the movies?

A: When I was teaching tennis, Carl Earn, a well known tennis professional, for whom I was working, would have me teach various people — some of whom were Hollywood stars or celebrities. I taught Dean Martin's kids at his house, Lorna Luft and Louis Jourdan or his kid, and I played at Dinah Shore's court and Ginger Rogers's court; and Gilbert Roland was at the Beverly Hills Tennis Club, where I taught and was a member. There were a

number of Hollywood people at the tennis club. The Ephrons were there. I knew Nora, who became a great success as a writer and moviemaker. I was a little more blasé about movie stars because I had access to them, and it didn't make that much difference to me. It was obviously a little boost when you see some of them. I remember one time my father and I had dinner with Frank Sinatra and a group, and Frank Sinatra invited me to come out to the lot the next day. I went out there, and he was making a picture with Gina Lollobrigida. He was very nice, and showed me around. I remember somebody passed by, one of the actors, and Sinatra said, "Hasn't that guy got a great face?" I said, "Well, I guess so." It was Charles Bronson. My father had movie stars in his court, and my mother probably sold them houses. My father's cases included portions of the Charlie Chaplain paternity case and the Joe DiMaggio–Marilyn Monroe divorce. As I mentioned, some came over to the house to be married. By the way, Carl Earn was a great tennis player. He had gone on tours with Pancho Gonzales and Pancho Segura. I played Carl many times, but he was too good for me, even though he was quite a bit older.

Starting in the late fifties, we'd go to the Rose Bowl every year with Earl Warren, who was chief justice — and go to a party in Pasadena where he was and get to the game in a motorcade with motorcycle escorts.

My father had known Chief Justice Warren in the Olson Administration. Those in the Olson Administration hated Republican Attorney General Warren because he was the political enemy. Warren had been a partisan conservative and even a red-baiter. Warren ran against and beat Olson. But when my father went off to war, Warren held his judicial seat open, and then reappointed him when he came back, which was a pretty noble thing to do. He could have just appointed a Republican, but he held the seat open. In any event, my father always said he regretted every vote he cast against Warren. (My father had tried to help Jimmy Roosevelt in his losing campaign to Warren.)

Once, when I went to the Rose Bowl with Warren, Nixon was the grand marshal of the Rose Parade. Nixon announced he was going to change sides at half-time because he was vice president of the whole country, and he didn't want to show any favoritism. I said, "Chief, you're Chief Justice of the United States, but you're such an unabashed rooter for the Pacific Coast Conference team. What about Nixon?" He said, "Look, if that guy can't pick

a side in a football game, we're in real trouble." He hated Nixon because of the way Nixon had sabotaged him at the '52 convention. I believe Chief Justice Warren would have made a great President. He had good judgment and was principled and decent. Harry Truman has said that when he was running for reelection against Dewey and Warren, and Truman came to Sacramento, Warren greeted him because he felt the President deserved such respect. Truman thought highly of him. He said Warren should have been a Democrat. As to Warren's love of sports, he said to me that when he read the newspaper he always read the sports page first to read about man's accomplishments; and then he read the first page to read about their failures. I have read the sports page first since I was a child.

Q: Was it jarring to leave all of that when you went to law school? Was law school your first experience living in icy cold, snowy . . .

A: Yes. I went back and had no overcoat whatsoever, and I started noticing, "It's getting a little chilly around here," and so I went to Jordan Marsh department store and bought the cheapest overcoat it had. In those days we wore a coat and tie or a coat to class every day. Law school was a great experience.

Q: Harvard Law School is a notorious system for the "Paper Chase." Can you describe what that was like? Did you know what you were getting into? You knew that was what it was going to be like?

A: Once again, as with Stanford, I was scared stiff, and so I studied very hard. We had about 500 students. There were about twelve women in my class, including Janet Reno; and in surrounding classes at the time we had Elizabeth Dole (then Liddy Hanford), later a cabinet member and U.S. senator; Pat Schroeder, later a congresswoman; and Liz Holtzman, later a D.A. The women who came then were quite successful. We were divided into four sections, so there were about 125 people in each section; they were big classes. Each class was for the year, with one three-hour test at the end of the year. You really didn't get to know the professors very well, but they were great professors in our first year, but more authoritarian than now — we did not give evaluations of them. I once asked a professor a question after class because my notes were confused, and he said, "What do you want me to do, certify the authenticity of your notes?"

Q: Did you want to get called on, or were you afraid to get called on?

A: I didn't want to get called on, but I put up my hand from time to time. Indeed, in one property class involving conveyances, our textbook asked about a conveyance. It gave a citation to the yearbooks, which are old, thirteenth to sixteenth centuries. I went into the rare book collection and looked it up. So the professor said, "What kind of a conveyance transaction do you think this is?" I put up my hand and said, "It's a covenant to stand seized." And I heard people hissing. The professor absolutely ignored me, because it ruined his class. At the end he said, "Yes, it's a covenant to stand seized, as he said up there." Charles Haar taught property, John Dawson taught contracts, Louis Jaffe taught torts, and Richard Baxter, who later went on the International Court of Justice, taught criminal law. They were great professors, great teachers.

I was very fortunate in that we'd have study groups like they had in the motion picture, *The Paper Chase*. The group I was in all did spectacularly well. Richard Blake, Steve Banner and Charles Normandin all ended up on the *Law Review*, and I guess they dragged me with them. I didn't make it to the *Law Review*, but I did pretty well. So I was pleasantly relieved that I could make it through law school. When we got there, they ranked the students based on their grades from one to five hundred. It changed so that only those in the honors area were ranked. We were graded on a curve with numbers. I recall being 75 places ahead of someone else with the difference being a few decimal points. Some of my classmates became well-known professors — Jerry Frug and Charles Nesson. Pete du Pont became governor of Delaware. Pierre Leval and Diarmuid O'Scannlain became federal Court of Appeals judges. Sam Heyman, Roy Furman, Loren Rothschild, Steve Banner, and Bill Kartoizian were highly successful in the business world. John Bohn, also from Stanford, became head of the Import-Export Bank. Justice Steve Breyer was in the class ahead of me at Stanford, and because of study abroad, the year behind me at law school. I was on the Griswold Moot Court team. Erwin Griswold was the dean and known for being gruff. I did get to know him. I also had a brief meeting with former Harvard Law School Dean Roscoe Pound, who was quite old. He had served as the first dean at the new UCLA law school. He did not speak well of the UCLA law school because, he said, it used a political science professor to teach constitutional law. I also was in a trust class in which Austin

Scott (*Scott on Trusts*) gave a lecture. He also was very old at the time. I took labor law from Derek Bok (later president of Harvard) and I took classes from Braucher and Kaplan, both of whom were experts in their fields and went on to be on the Massachusetts Supreme Judicial Court.

Q: How did you let off steam in law school?

A: By going outside, I guess. (laughs) During the spring I started playing tennis with Alan Goldman who had played on the Harvard team, and I also learned squash, and started playing squash there. In my second year and third year we lived in houses. We lived in a dorm the first year, and second year I lived with Bill Kartoizian among others — kind of a famous guy at Stanford — a ribald and very popular cheerleader. Stanford students actually brought him back from Harvard one weekend to lead cheers at a game. My third year I roomed with Richard Blake (was a partner in Simpson, Thatcher in New York), Robert Falk (now an investment banker with Apollo) and Harold Parkman (was a partner in a prominent Mobile, Alabama law firm), who somehow took a role in getting me together with your mother Sandy.

Q: Wasn't there some competition for how many dates you could go on, something like that?

A: No, I think I set the record for number of dates that didn't go anywhere.

Q: First dates without second dates?

A: That's true. (laughs)

Q: What were these dates like? Do you remember any of them?

A: Oh, yes.

Q: What was the worst date you went on?

A: I can't say — various women came from schools such as Wellesley, Radcliff, Harvard Graduate School, and Lesley College, which was right across the street from us — a little teachers college. I don't remember too much about them. Once on a double date with me at Wellesley, Richard Blake had a blind date with the daughter of the famous poet, Phyllis McGinley. He ended up marrying her — Patsy.

Q: How did you meet, where did you find these?

A: Mixers or referrals.

Q: You guys would all steel your courage and go out together to these mixers and then introduce yourself to people?

A: Yes. These were pretty awkward events.

Q: I see some things here I don't fully understand — Miss Paraguay?

A: One summer I was teaching tennis, and one of the guys at the club said, "Do you want to go to a Miss Universe party?" They were having the Miss Universe or comparable contest there in town. I said, "Sure, why not?" So I went, and all these contestants were around. I gathered the way to get anywhere was to say that I was a Hollywood producer or director. In any event, I offered to teach Miss Paraguay tennis, and I did teach her tennis. Then I asked her out. (I was correctly warned that dating a tennis pupil led to a non-paying pupil.) She said, "I can't go out without my mother (a dueña), who has to accompany us." I said, "Well, we're going to the Hollywood Bowl; do we have to get a ticket for Mom, too?" She said, "Yes." So I got a ticket for Mom, and finally I said, "When do we get rid of Mom?" She said, "Not until we get engaged."

The sad thing about Miss Paraguay is what happened to her. I didn't pursue it too far — she was very pretty and spoke very well; she'd gone to an American college and so forth. I guess having grown up under that system, she sort of broke loose. And she ended up living with people or getting married a couple of times. I don't think it ended up well for her — at least up to the time I last heard about her.

Q: Do you want to tell the story of how you met Mom?

A: In my third year, after running through all these women, I noticed there were three attractive ladies eating at Harkness Commons, which is where we ate. We used to say the food there is in the shape of chicken because everything there was tasteless. So I noticed these three, and there was one whose looks I particularly liked. I stalked her a little bit to find out who she was. I asked for her name, and the name I got was one of the other ladies'. So when I picked her up, it was the wrong one. But, I figured what the heck. But we didn't get along all that well, and that sort of ended. I was mentioning this to my roommate, Harold Parkman, and he said, "I'll call the one you are interested in and explain it to her." I was reticent. So Harold called

up Sandy and said, “You know, my roommate here would like to take you out, but he took out one of your roommates by mistake, and would you mind?” And she said, “No.” And so that’s how it occurred. She was going to the Harvard Graduate School of Education, having graduated from Brown with her identical twin sister.

Q: Do you remember where you took her?

A: Usually I took her back to our place to watch television. That was about it. I didn’t have a lot of money. Maybe a movie at best. I broke her in for what was going to happen for the next fifty years.

Q: A lot of television at home.

A: That’s right.

Q: You’re not a particularly romantic person, but at some point you must have realized you wanted to marry her.

A: We got along and stayed in touch, and she came out one summer.

Q: Came to L.A.

A: To L.A. She was traveling, and I told her to get out to Los Angeles — why doesn’t she abandon the other girl she was with and get out to L.A. and stay for a few days because my parents were out of town. So she did. And then when I went into the military, we corresponded, and she visited me in Amarillo. I visited her at her house in Worcester, Massachusetts, and ultimately we got engaged. We were married when I was in Washington.

Getting back to law school, in my second year, Richard Blake and I decided to go to Los Angeles where we had summer jobs. We drove through the South to see what it was like, because at that time, it was just prior to the sit-ins. So we went through the South, and on the way I insisted that we stop at Dayton, Tennessee, the location of the Scopes trial, the famous trial on evolution. They had a little sign in front of the courthouse saying, “This is the place where the Scopes Trial took place that William Jennings Bryan won.” (See *Inherit the Wind*.) Well, he did technically win, but it destroyed him. I sent postcards from Dayton, Tennessee, saying, “You’ll never make a monkey out of me.”

The South was shocking to see — the “White only,” “Colored only” signs. I remember going to a gas station, and they wouldn’t let a black man drink out of the drinking fountain. They handed him a cup. Meanwhile,

they'd let their dog drink out of the drinking fountain. I purposely got on a bus to see the Blacks sitting in the back of the bus, and it was quite a sight.

Q: What made you and Blake do this? Do you remember how that came about?

A: I think we were just interested in seeing another part of the country rather than driving straight across the farmland.

Q: The Civil Rights Movement hadn't really begun yet?

A: It was about to begin, I think.

Q: And you guys were aware of that?

A: Yes. My Uncle Ed, not then but later, participated in some of the sit-ins down south.

On another matter during that time, in my father's 1962 reelection campaign, Harry Truman came out to speak at a fundraiser in San Francisco for my father. I picked him up at the airport in my Plymouth, and he came off without any Secret Service or anything else, just a bag over his shoulder. I put him in the back seat of my Plymouth, and I drove him in to town. I asked him lots of questions: "What did you think of Eisenhower?" I remember him saying, "That son of a bitch." I said, "Why is that?" He said, "You know, he didn't defend George Marshall when McCarthy went after Marshall, who had been Eisenhower's patron. Eisenhower didn't have the nerve to stick up for him." So he didn't think well of him. And he'd say, "Let's go get a bourbon." So Truman was fun to drive. It was great to be there alone with an ex-President.

I also had the opportunity to meet Indira Gandhi and her son Rajiv, both of whom became prime ministers of India. We had dinner with my parents and Justice Douglas's son. There were benefits to being my father's son. I went to see Mort Sahl perform, and he welcomed me backstage in San Francisco. He later turned into a manic Kennedy assassination conspiracy theorist. I also became friendly with British Law Lord Kenneth Diplock, a great jurist, and Sir Denys Roberts, the attorney general and chief justice of Hong Kong (the last non-Chinese to hold the post). I think Denys served in high legal and judicial positions (attorney general and chief justice) in Gibraltar, Bermuda, and Brunei.

Q: Tell me about the military — Air Force JAG and Amarillo.

A: While in law school, because we were concerned about the draft, and at that time there were the Berlin and Cuban crises, a number of us went to the Air Force to see about getting into a JAG unit. They put us through a physical, and I had no trouble with push-ups and so forth. I remember these big guys with ducktails came in on motorcycles and couldn't do a push-up; they were so out of shape. Later we all got letters saying, "Sorry, we can't take you, we could only take 20 percent of the people that applied." None of us Harvard Law students had ever been rejected from anything before, and we were amazed. How did we not qualify in the top 20 percent of Air Force JAG applicants?

Later when I was in the military, I went to the JAG office to see who these supermen were and asked the fellow, "Where did you go to law school?" He said he went to Washburn Law School in Kansas or some similar place. I said, "Where'd you finish in the class?" He said, "Well, not very well." I figured the Air Force knew what they were doing; they were taking people who would stay, not people who would just be in for a few years and then get out. Maybe that is why we were rejected.

Also in the second year summer, law firms didn't have many summer associate programs, but Pacht, Ross, Warne and Bernhard hired me for the summer. It was excellent training. Law schools didn't have the clinical programs, and I think correctly so because they taught us how to think like lawyers; that was the object, not to show us how to draft a complaint or how to deal with a client. They correctly believed we'd learn that on the job. I did learn that summer under Roy Aaron and Clore Warne how to research and draft memos, and it was a good learning experience.

A: What led you to Amarillo?

Q: Before that, in my third year in law school, we began interviewing law firms. My father had even mentioned to Justice Bill Douglas that I was applying to law firms; he said, "Why doesn't he apply where my clerk is at?" And I believe Douglas sent a letter suggesting me. So it wasn't until later that I found out that most of the downtown firms were not hiring Jews, or not many of them. Only the Jewish firms were available to most of us. If that happened today, there would be a great deal of agitation. But in those days, we were resigned to it. Also, the elite Los Angeles clubs — California Club, Jonathan Club, Los Angeles Country Club and others, along with

the law firms, would not allow Jewish members. They were also politically conservative. My father said when Jack Kennedy's helicopter landed at the Los Angeles Country Club across the street from the Beverly Hilton Hotel, my father said to Kennedy, "Mr. President, I hope you notice that the only ones applauding you here are those who consist of the hired help." Fortunately, all that has changed.

I ultimately was offered a job at the Los Angeles firm of Mitchell, Silberberg & Knupp, which was a big entertainment firm and was Jewish and Gentile. (It even had a woman lawyer — a rarity for law firms.) It was the third or fourth largest firm in the city. But I had decided to do a clerkship. I had applied to Mathew Tobriner on the California Supreme Court, a great labor lawyer, who was put on the Court by Governor Pat Brown. I got the job, but I had to defer a year because I decided I'd go in the military and get it out of the way. (My classmate Loren Rothschild took my place.) I had applied for a Knox Fellowship, which would have taken me abroad, and missed by one. I was admitted to the London School of Economics anyway. But I decided I'd get the military out of the way and not defer another year. I was a year ahead of myself. So I was a little young, and thus vulnerable to the draft. I couldn't make it to 26, which was the cut-off time, unless I took another year in school, which I decided not to do. Most of my contemporaries avoided the draft by staying in school until age 26.

Q: What was happening in the world at that time? What year are we talking about?

A: In 1963, it was just pre-Vietnam. We'd had the Berlin Airlift. There was a call-up. And they had the Cuban Missile Crisis. So, I went up to see the director of Selective Service in California, who was the same person who had gone out of the room and let my father memorize the eye chart to get him into the army in World War II. I sort of said, "How do I get out of this?" He said, "Wait a minute, your father fought hard to get in, and you're trying to get out?" He sort of shamed me into enlisting, which I did. I enlisted in the Air National Guard for a six-month program. I did basic training at Lackland Air Force Base in San Antonio.

Q: What was that like when you first arrived? Do you remember when you first got there?

A: I remember the drill instructor took away all my pills. (laughs) Which was fine; I got along without them. But I was in pretty decent physical shape. I wasn't happy there particularly. I mean it was . . .

Q: This was basic training?

A: Basic training. The same process men had long gone through.

Q: So you were thrown in with whom?

A: They were all types — some with higher education and some 18-year-olds, draftee-types. But here I was out of law school and I'm being yelled and screamed at by some recent ROTC college graduates and sergeants who were career military. But we had some interesting people. We had a person in my unit who was one of the Disney Mouseketeers, a fellow named Tommy Cole.

Q: Had you ever held a gun before you went there?

A: I don't remember if I had. We learned how to shoot. I never really could take the rifle apart and put it back together again. I remember whenever there was any kind of a religious holiday, I always put up my hand, whether Catholic, Protestant, Jewish, whatever, in order to get out of the routine for a brief period. I was a clerk typist at Amarillo after basic training, and learned how to type well. But it was cold. It was 20 below zero there. Lloyd Hand, who was a friend of my father's and Lyndon Johnson's chief of protocol, arranged for me to meet a fellow named Wales Madden, who was T. Boone Pickens's lawyer. He was very nice; he and his family took me to the country club on weekends. I also met my cousin Dave Rousso at the Amarillo base where he was serving.

I volunteered for the basketball team, exaggerating my credentials — and I think I was exposed early. I did volunteer in the Legal Office there, and remember they called me in one time. I thought, "What did I do now?" They gave me a telegram saying that "You passed the bar examination." I had taken the bar exam before leaving for the military, and so I was sworn in there by an officer at the Air Force base.

Q: In this day and age people don't normally enlist in the military. What was going on? Why did you feel it was important to do this?

A: There was a draft as a starter, and I was exposed. The other thing is, I did have some political ambitions, and I thought having a military record, not having ducked it, would be an asset. As it turned out, Bill Clinton got elected President even though he dodged the draft, and most of my contemporaries didn't go. Jerry Brown certainly didn't go, and it didn't seem to matter. The same is true for Vice President Cheney. As a matter of fact, my father said, when he got out of the military he thought having a military background would be an enhancement to his career. The American Legion and other organizations would seem to have been influential. But it never really was a big thing. If you were a war hero like Kennedy or Bush (Bush 41), it apparently made some difference. Otherwise, it didn't.

Q: What year were you in Amarillo?

A: I was in Amarillo in '63. I was there at the time the Kennedy assassination took place.

Q: So what do you remember about that?

A: I remember it having occurred and being transfixed to the television set and watching Jack Ruby shoot Oswald. It was pretty traumatic. The jets on the Air Force base scrambled. They didn't know what this meant and that is why they did so.

Q: What do you mean? What did they think?

A: Well, the perpetrator could have been the Russians, the Cubans. Nobody knew who was responsible for this.

Q: Was there anything unique about being in Texas at this time?

A: No, we were pretty isolated.

Q: And how did the appointment to the Warren Commission staff come about?

A: I saw they were going to form a commission to investigate the events. I was going to work at the law firm between when I got out of the service and the clerkship. So I wrote the chief justice. Initially, the general counsel, J. Lee Rankin, wrote me and said they were not hiring. Apparently the chief or Rankin wrote back and accepted me. But the letter never got to me. So the chief called, or he saw my mother and he said, "How come your son

hasn't responded to me?" So I never got the letter at the Amarillo Air Force Base. Maybe they didn't like Earl Warren.

I was accepted basically to be the equivalent of a young associate in a law firm, which the Warren Commission staff loosely resembled. When I got out of the military, I had to do some weekend duty in Van Nuys, and I recall I had to fly back to Washington immediately to join the Warren Commission staff. I didn't realize they would pay for me, so I was going to fly back to Washington in my uniform with orders cut so I could go for free. I went out to the Air Force base for my meeting on Sunday, and I was going to take a red-eye on Sunday night. Sunday I go out to the base and they say, "Mosk, you're going to do KP." I said, "I'm flying back to the Warren Commission; I don't want to get my uniform dirty in KP" (Kitchen Patrol). My plea went unheeded. When I got into KP, they said, "Pots and pans." And so I was pretty grimy. But I got on the plane. I flew the red-eye, and 9:00 the next morning I walk into the Supreme Court, and there I am with the chief justice of the United States. Quite a change from hours earlier when I was doing pots and pans. He told me, "Richard, our only client is truth." So that's how I started.

Q: When you started, were there assumptions about what had happened?

A: Yes, they had a report from the FBI that had identified Oswald as the assassin — he had been arrested. The FBI also reported on Ruby's shooting of Oswald. It was a skeleton report on everything that had happened and concluded that they couldn't find any evidence of a conspiracy. So that's how it started out.

By the way, when I went to Washington I had no place to stay, so I stayed with Fred Wertheimer, an acquaintance from the Harvard Law School, who is well known for having been in Common Cause, and promoting the disclosure and limits on financing election campaigns. He is married now to Linda Wertheimer of NPR. The Warren Commission was an impressive group of people. It had J. Lee Rankin, who was the former solicitor general, as general counsel. The senior counsel came from around the country, including Joe Ball from California, Bert Jenner of Jenner and Block in Chicago, Leon Hubert from Louisiana and Bill Coleman — the great civil rights lawyer. Norm Redlich of NYU, and Howard Willens from the Department of Justice, were sort of administrators.



WITH CHIEF JUSTICE EARL WARREN — RICHARD MOSK, SHORTLY AFTER HIS TENURE AS A STAFF MEMBER OF THE WARREN COMMISSION, WASHINGTON, D.C, MID-1960s.

Q: Tell us more about it. I think the names aren't going to mean that much to most people.

A: These were prominent attorneys. Under them they had what you'd call the junior partners; these were people who were about in their mid-30s who'd been on the Harvard and Yale law reviews. They were the best and the brightest from big firms. I was the first person comparable to an

associate. I was the youngest at the time. Later came John Hart Ely (later constitutional scholar and Stanford Law School dean), who was available after military service because his draft board rejected a request by the chief justice to defer him for a clerkship with the chief justice. He had the same role as I had. The lawyers became prominent attorneys, judges and professors. I was able to work for all of them, although generally my assignments came from the deputy general counsel, Howard Willens.

Q: Everybody had convened in Washington on this mission to do what? What was going to happen?

A: The idea was to investigate and determine the facts surrounding the events of November 22, 1963, and the few days thereafter.

Q: And how did they do that? What did they do to divide up the labor?

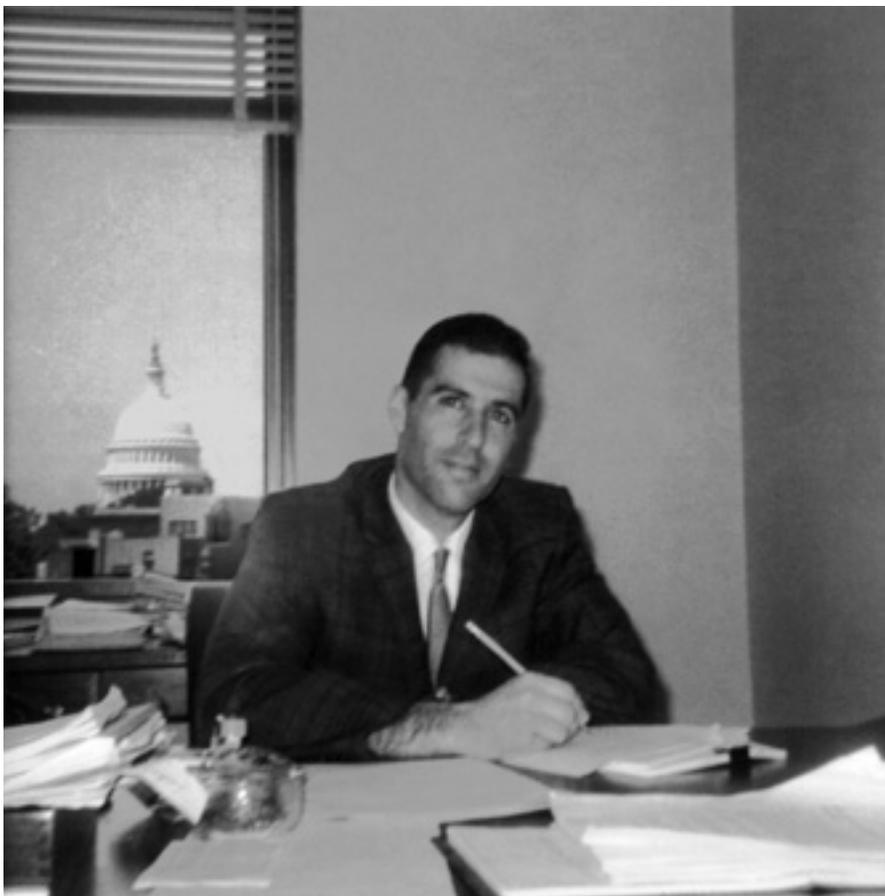
A: They divided into subjects. Dave Slawson (later a USC law professor) and Bill Coleman were basically to deal with foreign issues. Bert Jenner and Mel Eisenberg (later a Boalt Hall professor) were to concentrate on Oswald and domestic matters; Leon Hubert and Bert Griffin (later an Ohio judge) were to concentrate on Ruby. We all had to get top-secret security clearances, and mine took forever. I couldn't imagine why. I had never done anything remotely questionable. I hadn't signed anything. (Growing up in the McCarthy era caused me to shy away from anything remotely or potentially suspect.) I suspected it was probably because of my uncle or my father. But it finally came through. With Norman Redlich who was the NYU law professor, the FBI came in and said to Warren, "Do you realize that he wrote that taking the Fifth Amendment should not be considered evidence of guilt?" And Warren said, in effect, "So what." This became somewhat controversial, but Warren insisted that was not going to be a disqualifying factor. Vestiges of the McCarthy era remained.

Q: So everybody had been given different assignments. What was your assignment?

A: I was thumbing through my papers just to see what I worked on, and I first worked on the ability of the Commission to administer oaths and to issue subpoenas. I worked on Oswald's marksmanship, his finances and his biography. I worked on some odd matters, like the Dallas newspaper in which there was an ad just before the assassination that said "Running

Man, please call me. Lee.” It looked kind of suspicious, so I looked into it; and turned out that was just a little promo for a movie called “Running Man” starring Lee Remick. I put together all the books Oswald checked out of the library and possessed. If he read them, he was well read.

I worked on the passport issues: Did the State Department violate any laws in connection with Oswald and his repatriation? Commissioner Gerald Ford seemed interested in the State Department. I worked on legislation for making it a federal crime to assault or assassinate a President or a federal official, which became a recommendation of the Commission. Because the staff was heavily composed of lawyers, I was given a number



RICHARD MOSK AT HIS DESK IN WASHINGTON, D.C., AS
A STAFF MEMBER OF THE WARREN COMMISSION, JUNE 1964.



IN HIS OFFICE AS A STAFF MEMBER OF THE WARREN
COMMISSION — RICHARD MOSK WITH SECRETARY ELAINE
JOHNSON AND FELLOW STAFF MEMBER JOHN HART ELY
(LATER DEAN OF STANFORD LAW SCHOOL),
WASHINGTON, D.C., JUNE 1964.

of research projects dealing with evidentiary issues, which probably didn't make much difference in this type of investigation. I suppose someone could question the value of evidence that normally was not admissible in evaluating issues if Oswald had been tried. Or those evidentiary issues might also be relevant to whether Oswald would have been convicted. But in hindsight, those legal questions were of little consequence. I also summarized transcripts of testimony. I opined on copyright issues regarding the Report and dealt with the printer. I worked on the history of presidential protection. I analyzed Oswald's proficiency with respect to rifles and his finances.

In dealing with Oswald's finances to see if he had any unknown sources of income that might suggest payment for the shooting, I found every possible expenditure he made and used some Labor Department statistics for normal expenditures for such items as food. Then I collected information on all of his income. The balance sheet came out with the expenses and income only a few dollars apart. This suggested he had no unknown sources of income that might indicate a conspiracy. I had to cite authority for each piece of information. At one point, I was attempting to obtain Oswald's subscription to *Time* magazine, and I called someone in circulation. I said I was calling from the Warren Commission, but he continued to ask what business I was calling from. When I asked for a copy of Oswald's subscription order, he asked, "Where does he live now?" This suggested that our mission was not as widely known as I had thought. I also worked with the cryptologists in connection with seeing if any documents had microdots in them.

Q: What does that mean?

A: I guess there's a way of communicating through using microdots. So we wanted to see if any of Oswald's materials had them. I prepared some of the attorneys for witnesses. So it was a full range. I roamed through all areas. My office mate was John Hart Ely. He died not too long ago, but he has written some important books.

Q: Did you interview witnesses? Like what kind of people?

A: All kinds. I remember there were a couple of ladies from Solvang, California, who traveled to the Soviet Union. In those days the Russians wouldn't allow anybody to take photographs. They tried to stop it. These

ladies were in Minsk on vacation, and one took a photograph of the other in front of a church. In the picture, right behind one of the ladies, was walking none other than Lee Harvey Oswald. Apparently the authorities here would ask people for copies of their pictures they took in the Soviet Union (because the Soviets prohibited picture-taking at least in certain areas), and I don't know how our government did this, but they found one of these photographs with Lee Harvey Oswald. So we could pinpoint his whereabouts at that time.

So I talked to the ladies about when they took the photograph and where were they, and so forth.

Q: Do you know which agency had the photograph? How did that come about?

A: I do not recall.

Q: That's an incredible thing that they would have somebody's vacation pictures.

A: Yes. I don't know. I don't know how they did it. That was my recollection. They went through their pictures and found it.

Q: What did the ladies think when you called them and said, "We have your vacation picture with Lee Harvey Oswald?"

A: I don't recall their reaction. They were cooperative.

One of the problems I had was that I had these weekend National Guard meetings. I had to go once a month. I tried to get out of those because I was working on weekends at the Commission, and they required me to go to meetings at Andrews Air Force Base in Maryland while I was at the Commission doing work for the federal government. My father even wrote Walter Jenkins who worked for President Johnson, and said, in effect, "This is ridiculous." Jenkins replied, "We just can't do anything about it." I went to see Senator Richard Russell who was on the Commission. I saw his assistant, and all he said was, "We'll have the meetings deferred, but you'll have to make them up when you go back to California." So I did that, because I worked quite hard there.

As a matter of fact, when I got married, I flew down to Worcester, Massachusetts, late Friday to get married on Saturday, and we drove back that night. I was back in the office on Monday. I remember my mother saw

Warren at some point and said, "I'd just like you to know, Richard is really working hard. He didn't even take a honeymoon; he left on Friday and came back Monday." And Warren said, "Well, who let him off for Saturday?" After I left, Warren wrote my father that I had done good work for the Commission.

By the time I started getting in, late into July, I owed the Air National Guard all these weekends, and I said, "I can't stay any longer." I had to leave, much to my chagrin, and get back and start making up the meetings in California. As a result, I missed the tail end of the Commission activity, when apparently all of the cite checking was being done by U.S. Supreme Court clerks that had to come over to the Commission. Stuart Pollak (now a California Court of Appeal justice) came over earlier. I did make one trip back to Washington to help out on certain matters prior to publication of the Report.

Q: Okay. The other thing we wanted to touch on was, once the Warren Commission finished its work, what your impressions were of their findings, of your findings.

A: They weren't my findings. They were the findings of the Commission itself, which was composed of Earl Warren and Republican leaders and Democratic leaders in Congress and other luminaries. I had no reservations or doubts whatsoever as to the conclusions of the Report. We did have a so-called "devil's advocate," not intentionally, but one of the members of the staff, Jim Liebler (later a UCLA law professor), did try to poke holes in things. By the way, the chief justice ordered Jim Liebler to shave off his beard, which he refused to do. But essentially I thought the Commission Report would allay any suspicions. It didn't dawn on anyone that the doubts would continue to be so strong.

There were suspicions. There were those on the left who thought it was the oil people, or people on the right thought it was Communists. There were people who thought it was Russians, Cubans, the Mafia, and so forth. But I saw no evidence that the conclusions of the Warren Commission were not correct.

For a while, people seemed to accept the Report. But suddenly books started coming out. Mark Lane, who had been a New York legislator, started writing books. And pretty soon for some reason people bought into



RICHARD MOSK AT THE VETERANS OF FOREIGN WARS BUILDING — LOCATION OF THE WARREN COMMISSION OFFICES (ACROSS CONSTITUTION AVENUE FROM THE SUPREME COURT), WASHINGTON, D.C., SPRING 1964.

conspiracy theories. They couldn't believe the Report. The problem was that it was so hard to accept that the leader of the free world, a man like John Kennedy, could be brought down by such an insignificant person. There had to be more to it. And then when you had the Ruby thing added to it, that certainly spawned a number of suspicions.

Q: The "Ruby thing" being him killing Oswald?

A: Yes.

Q: Oswald's travels to Russia, the grassy knoll. You've certainly pored over all these theories. Were there any that raised new suspicions on your part?

A: No. If you're a lawyer, you realize that in even the simplest intersection case some people see that the light was red, and some people will see it was green, and you just have to put the facts together and see what's most likely. The fact that some people say the light was red, doesn't mean the light was red, because the light being red, has to also be consistent with all the other facts. So the fact that somebody saw somebody on the grassy knoll is simply inconsistent with the physical evidence and all of the other evidence that came in.

As I said, as years go on, the conspiracy theorists have poured out hundreds of books and articles, including some on the Warren Commission itself. I understand there will be many more for the fiftieth anniversary of the assassination. Vince Bugliosi, in his book *Reclaiming History*, did a masterful job in the multi-volume work analyzing the evidence and concluding that the Warren Commission had the correct result. There were decisions that may have contributed to the conspiracy theories, such as not disclosing the autopsy photos to some who should have seen them. The CIA did not disclose attempts on the life of Castro. Sometimes the chief justice made a few decisions with which we disagreed. But none of these decisions detracts from the soundness of the conclusions. Had we looked at the actual autopsy photos or known about the attempts on Castro, there is nothing more that we or anyone else could have done. The wounds and Cuba were thoroughly investigated. The Commission has many accomplishments in addition to its findings: legislation, presidential protection, forensic advances, the procedures it utilized, and providing a rich source of material for historians. I have sent all my papers to the National Archives in Maryland. My material will be kept together as a collection.

Q: Well, the movie, the Oliver Stone movie, *JFK*, which basically tried to give credence to some of the conspiracy theories, that got under your skin a little bit, right?

A: He and I debated in a magazine, and he more or less suggested that we were all part of the conspiracy, which I felt was over the top, as were his theories.

Q: That was a great moment for you to acknowledge that you've been participating in this conspiracy.

A: (laughs) That's right. Art Hoppe, a writer for the *San Francisco Chronicle*, once did a satirical article about the Madison Square Garden filled with all the conspirators planning on what to do next. It's sort of the same idea. I was upset that the studio that did the movie *JFK*, to promote the movie, sent the conspiracy material to schools as if it consisted of historical fact.

Since the movie *J. Edgar* has just come out, it reminded me that not only did Hoover investigate my father during the forties and later on in trying to find Communists, communism, and so forth — but with respect to the Warren Commission, he was fairly hostile because of the suggestion that the FBI didn't do everything perfectly. Also, there was one agent apparently who had been tracking Oswald and sort of lost contact with him.

Q: An agent had been tracking Oswald before the assassination?

A: Before the assassination. He went to see Oswald, and didn't follow up with him, so there was some criticism of the FBI in that regard. In any event, it's come to my attention recently that Hoover put out a missive that agents were supposed to dig up whatever negative information they could on any member of the staff, which included me. Whether they got any negative information, I don't know. I've never sent away for my materials under the FOIA. I'm sort of afraid to do so, but we'll let you do that.

Q: I will.

A: Let me add as to the assassination, the night before Oswald had asked his estranged wife to reconcile and to look with him the next day for an apartment in Dallas. She refused. If she had said "Yes," there would have been no assassination. And if a postal inspector had not shown up at the last moment to question Oswald at his holding cell delaying his transfer, Oswald would have been gone when Ruby showed up. These improbable events dispel the idea of any well-planned conspiracy.

Q: So you were then back to California

A: Yes. Before that, I forgot to mention that when I was in Washington I did go to see Warren Christopher, who was then deputy secretary of state. He had been looking for an assistant, and he had already selected somebody. But his advice to me was, "I know you'd like to get involved in government,

but the best way to do it is to go back to your community, build up your name and your reputation, and then you'll have a better opportunity than floating around on the Hill."

I'm not so sure that's right. It seems to me that as time has gone on, many people who held government staff jobs have moved up the chain in Washington politics and government. It may be harder as an outsider.

Q: We brushed by your getting married. Do you want to talk about that further?

A: We were married in Worcester, Massachusetts. It was snowing, and some of my friends were eager to watch UCLA play for the NCAA basketball championship — Wooden's first. Sandy's father was a prominent cardiologist in Worcester and helped bring the University of Massachusetts Medical School to Worcester. We drove back, and Sandy got a job at the Democratic National Committee. Stanley helped get that for her. She was a receptionist there, but she met a lot of very interesting people. Through that position, we met John Anderson, later a prominent San Francisco attorney who has been a friend ever since.

Q: And was she working in the Watergate Hotel, Watergate Office Building?

A: Wherever the DNC was at that time. I do not think the Watergate Office Building had been completed by then.

Q: '64 Senate?

A: That was a sad story. My father was the leading candidate for the U.S. Senate because incumbent Senator Clair Engle had gotten a brain tumor, and likely couldn't run again. President Kennedy indicated he would support my father. Alan Cranston, who was the controller, wanted to run. Pat Brown was supporting Cranston, probably because his aide, Hale Champion, wanted to be appointed controller.

Now you remember Pat Brown said at the Convention, "Anything you ever want, Stanley." And worse than just the lack of support, however, is a recent tape unearthed at the Lyndon Johnson Library that has a phone call from Pat Brown to Lyndon Johnson saying, "You know, I got Stanley Mosk out of the race. And you know how I did it." And Johnson said "Yeah," and Pat said, "I don't want to talk about it on the phone." And he did it by, I guess, circulating or spreading rumors about my

father and drying up his financial support by inducing contributors not to contribute. And ultimately even though my father was leading in the polls by a wide margin, he decided to pull out of the race.

But in any event, to the disappointment of many, he decided not to run. My father got even by inducing Pierre Salinger, Kennedy's press secretary, to run against Cranston and issuing an opinion that he could legally do so. Salinger won the primary but lost to the actor George Murphy.

Q: He was forced out.

A: He was forced out essentially.

Q: Hardball politics?

A: Yes, it was. Then when Pat Brown appointed him to the California Supreme Court, it was as associate justice and not chief justice. My father was quite angry about that because I think Brown had promised him the next spot, which was the chief justice spot. He was certainly well qualified to be chief justice, having had administrative experience as attorney general and judicial experience as a trial judge. So Pat did put him on the Court, but whether it was a deal or whether, as many suspected, he did it to get rid of him so that he could put his friend Tom Lynch, who was the district attorney of San Francisco, in as the attorney general, I don't know, but the latter was probably a more likely rationale. FBI reports show Pat Brown even said some negative things about my father to agents. In later years I asked my father, "Aren't you really angry at Pat Brown for the way he's treated you?" And he said, "Well, how can you dislike Pat Brown?" I said, "Well, I could." Nevertheless, I maintained a friendly relationship with Pat. We had lunch a number of times before his health deteriorated. But that was Stanley. He got along with people, and he didn't hold grudges, and he just took it as it came. He wasn't quite so forgiving in his views about Pat's son.

Q: You and Jerry Brown were clerking together around this time, right?

A: Yes. At the clerkship for Justice Tobriner, Jerry Brown was one of my co-clerks, as were two others, one of whom was shared with Roger Traynor. At that time it was really a great Supreme Court — like the 1927 Yankees. They were one of the great state courts: Traynor, Tobriner, Mosk, Peters, Sullivan. And we had some fine clerks: Jerry Frug, my law school classmate, who became a professor at Harvard Law School was clerking for Traynor.

And Steve Uman, a well-known lawyer, Washington lawyer, and Rhodes Scholar also clerked for Traynor. Roger Traynor was a highly respected justice around the country. We had some really outstanding people at the time; most clerks were recent law school graduates, who would clerk for a year. Now, generally, there are permanent or career clerks — in the state system. Traynor had a splendid career clerk who really knew the law. My father inherited as a permanent clerk Peter Belton, a Harvard Law School graduate who was confined to a wheelchair because of polio. I remember Jerry Brown as an affable fellow, but was known for keeping unconventional hours.

Q: Do you remember any of the cases you worked on?

A: Yes. There were many criminal cases involving a case called *People v. Dorado*, that was authored by Justice Tobriner, and was the forerunner of *Miranda*, which requires that a suspect be advised of his rights prior to an interrogation. This rule had been enunciated in *Dorado* by the California Supreme Court. I remember adding a footnote in the case alluding to the fact that this had been the practice of the FBI and military for quite some time, so it wasn't like it had inhibited law enforcement.

Q: That's always been controversial, right?

A: It has been controversial. In fact, at the time there was a case in which the police did not comply with these requirements because the arrest took place prior to *Dorado*, but the person was caught practically red-handed, confessed, and then got on the stand and, in effect, confessed. Justice Tobriner held that the conviction nevertheless had to be reversed because the testimony or the confession on the stand was the product of an illegal interrogation. I remember going to him and saying, "Is there no limit to this? I mean, all the evidence is overwhelming. Do you really have to reverse in a case like this?" And he said, "Yes, we must stick by the rules," and we argued a little bit about that. The "harmless error" concept apparently was not as widely used then. The evidence was the product of an interrogation to which *Dorado* applied retroactively.

Q: Now you're a judge, and you've seen a lot of these cases go by. What do you think? Would you do it the way Tobriner did it, or do you think that he was wrong?

A: We now have a concept of “harmless error,” and maybe that would have been harmless error beyond a reasonable doubt. I’m always a little concerned, as is Justice Scalia, about the “harmless error” rule because we put ourselves in the place of the jurors in many instances. In many of these cases, because *Dorado* applied retroactively, the warnings hadn’t been given, and thus a number of cases were reversed. That generally just meant a retrial. Defendants did not go free.

I had a really great experience and a terrific relationship with Justice Tobriner. I think he was one of the great jurists and a great human being. My father came on the Supreme Court at the time I was clerking, and that was interesting because he now was down the hall. I remember one case came through called *Manjares v. Newton*. It was about a Latino family that lived outside of some town; and the school bus didn’t quite go far enough to pick the children up. The family had moved there so that their kids could go to a good school, but they didn’t have the wherewithal to drive the kids to school. The mother worked. So they brought a lawsuit in which they claimed they should be able to get transportation to the school, and that there’s no reason why the bus couldn’t go an extra distance to pick them up. That appealed to me, and it seemed to me, why not? So I recommended the Supreme Court hear the case, and Justice Tobriner agreed, and the Court took it over. Ultimately my father wrote the opinion in favor of the family. I thought it has been an overlooked case, but it was meaningful at the time.

Q: So you had brought it in, and he . . .

A: Wrapped it up.

Q: (laughs) He was working down the hall. A lot of what you’ve described there was some distance between you and your father, but now you were working in the same office essentially.

A: Distance, you mean geographically?

Q: Geographic or he was working and you were in school. Did you get to know him in a better, a different way in this period of time?

A: There was certainly nothing other than geographic distance between us. I’d lived with him for many years. (laughs)

Another interesting case we had was called *Ballard v. Superior Court*. A dentist was accused of sexually abusing his patient. He said it was totally untrue, and he said the woman had psychological problems and she should be compelled to submit to a psychiatric exam because it was just his word against her word.

I had recommended, and Justice Tobriner agreed, and the Court agreed, that in the discretion of the trial court, she could be compelled to submit to a psychiatric exam. And if she decided she didn't want to, then the defense could comment upon that to the jury. Later on, the women's groups and others disagreed with that proposition. I guess I could understand why. Ultimately it was legislatively overturned.

I remember sharing a car ride with Governor Deukmejian — a very nice man — when he was attorney general, and I talked to him about it because he had been in favor of overturning the case. I said, "Why?" He said, "You wouldn't compel a bank teller to submit to a psychiatric exam in a bank robbery case, would you? Why should you do it in this type of case?" I do think there's a difference, but I can understand the concerns. (My California Supreme Court — Tobriner — papers are with the Supreme Court library.)

Q: So after the clerkship, what was your next move?

A: It was to Mitchell, Silberberg & Knupp.

Q: You'd been holding them off for a while.

A: Yes, I had. I had an offer from Gene Wyman to join his firm. Roz and Gene Wyman had been very active politically and in my father's campaign. Roz had been a well-regarded Los Angeles city councilwoman. Gene Wyman started up a very successful firm. I asked, "Gene, what would happen if you got hit by a truck?" — because he brought in all the business. He said, "The firm would be in big trouble." It so happened some years later he did die of a heart attack, unexpectedly. But the firm nevertheless thrived. I remember Chuck Manatt asked me about coming with him and a fellow named Tom Phelps, and they had a little office out in the Valley. I thought about it, but it was a little risky. That firm ended up as Manatt, Phelps & Phillips, a very successful law firm. Chuck Manatt became chairman of the Democratic National Committee and later an ambassador. Those were two opportunities I passed on. I was also offered a job as an in-house counsel

to United Artists Theatre Circuit in San Francisco at almost twice my pay. I am told everyone there ended up quite wealthy. I recommended my classmate Bill Kartoizian for the job, and he took it. He did quite well.

Mitchell, Silberberg & Knupp in those days was the most prominent entertainment law firm in the world. It represented studios. In fact, it had an office out at Columbia Studios, having a lawyer on site. It also represented talent and agents. Conflicts didn't seem to bother anyone in those days. They had a young lawyer named Abe Somer who brought in all the big recording stars, plus he represented recording companies. And there was Lee Phillips, who also represented recording stars. So it had a huge entertainment practice. A prominent entertainment lawyer was Eddie Rubin, who later became president of the State Bar. He had gone to Duke Law School with Richard Nixon and had been friendly with him. He and I had adjoining offices for many years. His son is now a colleague on the Court of Appeal. The firm also was well regarded for commercial litigation, headed up by Arthur Groman, a great litigator, for whom I did much of my work. Interestingly, Silberberg was a major Republican figure. He had not supported my father when he ran for attorney general, but did not oppose him. As attorney general, my father could hire the attorneys for some major institution. My father took the business away from Mitchell, Silberberg & Knupp and gave it to the Pacht firm. Silberberg was furious. But they hired me anyway.

I mentioned the Air National Guard. When I was in San Francisco, I found I could join the United States Naval Reserve as a JAG officer. As Vietnam was heating up, I thought if there was a big call-up, I would have preferred to have gone in as a legal officer in the Navy than as a clerk-typist in the Air National Guard. So I joined the Naval Reserve, and when we came to Los Angeles we used to meet at the county courthouse for lunch. I recall I had an order that in the event of an emergency, I was supposed to report to Yokohama in ten days. Someone else had to get to Hawaii in thirty days, and another was to report to Pasadena in ninety days. At least this was the essence of the orders. Maybe I exaggerate, but that is my recollection. We did fly to Washington in a DC-3 to be sworn in before the U.S. Supreme Court and the U.S. Court of Military Appeals. In those days, admission to the Supreme Court was done personally. Chief Justice Burger swore us in. Chief Justice Warren was noted for being most gracious at

these ceremonies. Burger was also. I greeted Dean Griswold, who then was solicitor general, as he waited to argue.

Q: Back to your law practice.

A: As far as Mitchell Silberberg was concerned, it was, first of all, great training. No letter could go out without the approval of a partner, even for an extension of time. In those days, there was no lateral movement among law firms. If you did good work, a partnership was likely. I did work for studios, talent, and agents. I did work for Steve McQueen. He wanted to defeat the motorcycle helmet proposed law because he was a big motorcyclist and he felt that motorcycle helmets interfered with his motorcycle driving. I made an arrangement for McQueen to testify in front of a legislative committee with Jesse Unruh, the well-known speaker of the Assembly (an ally of my father), and I was about to go up with McQueen, and he said, "I don't feel like going." After all that effort.

I did some work for Paul Newman. He wanted a stoplight at Coldwater and Heather where he lived, and so we worked on getting him a stoplight there.

Q: And did you succeed?

A: Yes, there's a stoplight at Heather and Coldwater now. The name "Paul Newman" didn't hurt any.

As time went on I was very fortunate to represent some other interesting people. I did work for Armand Hammer, who was the head of Occidental Petroleum. I remember Hammer saying, "Hurry up, Richard, I have to go see Ceausescu of Romania." I said, "Well, right now you've got to deal with me, Mr. Hammer; we've got to prepare you for this deposition." And Armand Hammer also would say, "Well, Richard, what do you want me to say?" I'd say, "Well, Mr. Hammer, let's start with the truth and then we'll work from there." (laughs)

Q: He was an oil magnate?

A: He came to California. He'd made money somewhere. I believe he did a thriving business with the Communist regime in Russia. He came to California, bought a small oil company, Occidental Petroleum, and built it into a behemoth. I did work for him on some matters. He had some dispute over his Ankeny cattle that he owned. When we went to Russia, I had

a letter of introduction from Hammer. That got me into the Gold Room at the Hermitage Museum in Leningrad, without the usual authorizations from a consulate. I worked on and successfully argued the appeal of the *No Oil* case. Occidental wanted to drill in the Pacific Palisades. A group called “No Oil” opposed it. This case involved an Environmental Impact Report. Ultimately, No Oil defeated the project with an initiative.

I also did work for Norton Simon, who was the prominent businessman/art collector, and who established the Norton Simon Museum. We had a case involving an eleventh-century Nataraja statue that was taken out of a temple in India by a bronze cleaner, and a replica was made and put in its place. The original floated around in Indian homes for a while, and then ultimately was sold to the Norton Simon Museum. The Indian government came after it and said that it wanted the return of this statue. It was a fascinating case because of the choice-of-law issue.

Q: What did you argue? How did you argue that case?

A: We argued that the Indian government was complicit in the sense that the statue had resided in government officials’ houses, we thought; and also that the statute of limitations had run. There were interesting questions of which law applied because could it be Indian law, California law where it was purchased, New York law where the transaction took place, or London where it was actually physically located for bronze cleaning.

Q: Where did they bring the case?

A: In California and New York. We settled, with Simon getting the best of it I think. The Norton Simon Museum agreed to return the statue in ten years. In return, the dealer gave the Museum about four or five very valuable pieces, Indian pieces, probably stolen too for all I know. Then in ten years, Simon called me and said, “Do we really have to return this?” I said, “You did make a deal.” I told him he should bring it back with his famous wife, the actress Jennifer Jones. He did allow its return.

I did some work for Ed Kienholz, the artist. He was married to Chief Tom Reddin’s daughter, Nancy. In the sixties he had done a work called “Back Seat Dodge ’38,” which depicted a couple making love in the back seat of a car. The L.A. Board of Supervisors kicked up a fuss about it so that it had to be removed from the Los Angeles County Museum of Art. Years later, the Museum asked for Kienholz’s permission through me to include

that work in a publication. It is now well accepted. I also supplied him the law books for his piece depicting the United States Supreme Court. We went up to his compound or colony in Idaho once.

Another memorable client was Jack Kent Cooke. We represented the Lakers and the Kings, which he owned, and I also did work for the National Hockey League. There were some very interesting cases. One was brought by a young hockey player who'd lost his eye. In Canada, as you well know, hockey players didn't really get too much education, they just play hockey. This kid, a talented and up-and-coming player, had lost one of his eyes because of a hockey stick, and he wanted to continue to play. Indeed he was good enough to be drafted by the Buffalo Sabers of the National Hockey League. The League had a rule that said no one-eyed hockey players; they didn't want a kid going blind in front of 16,000 people and millions on television. We prevailed on that. We also had . . .

Q: You prevailed with the League, kept him from playing?

A: Kept him from playing. It's an ethical dilemma. It's like the football players today — should they be able to play with five concussions?

Q: Would a case like that, did that go to a jury, or can you describe how the case unfolded?

A: We got a summary judgment, and it went up on appeal, and we prevailed on appeal. The case was an anti-trust case.

We had another one about the San Francisco Seals. They wanted to move to Vancouver, and the League wouldn't let them. We were able to prevent that move. The court held there was no antitrust violation. Later authorities seemed to go the other way, at least with the Oakland Raiders.

A league started up called the World Hockey Association and brought an anti-trust case against the National Hockey League, whom we represented. So those were very interesting cases. We also did work for the Lakers.

I did some work for some NBA basketball players, Jim Chones and Bob McAdoo, who got into squabbles with their agent, a fellow named Al Ross. I did work for Computer Sciences that had the off-track betting agreement with the City of New York, and I did work for Bechtel. On behalf of Cooke, who was promoting the Ali-Norton heavyweight championship fight, I defended the fight against a number of attempts to enjoin it. Later, I met Ali at an event.

Q: So you were spending some time circulating with people like Jack Kent Cooke or Armand Hammer, these extremely wealthy, successful business-people. What was that like? Did you form impressions of them, or were there any takeaways for you about people who were very wealthy?

A: I found that they are risk-takers. Also, they are bold, they're bright, but most importantly they are risk-takers. When Norton Simon negotiated, he would change positions; he was a moving target. It was almost like he was irrational, and it made it very difficult for the opposition to negotiate with him because they didn't know where he'd end up. I thought it was a very effective way of negotiating, assuming you have the cards to do it. People like Hammer, Cooke and Simon also took a keen personal interest in their cases. They didn't delegate everything. I think they appreciated my calling them all the time at all hours to give them updates. I recall going to an NHL Board of Governors meeting. I knew Cooke would ask what the odds were of winning the case. I was told to say a bit over 50 percent because Cooke liked to be positive, but I should leave enough of a cover in case we lost. When he asked what the odds were for winning, I was carried away and said between 65 and 75 percent. He then asked, "Which is it, Richard?" Also, once, when I was at a hockey game, the usher came up to me and said there was a phone call. I couldn't imagine how anyone would find me or what emergency had occurred. It was Cooke asking that I demand a long-delayed ruling from a federal judge. I told him such a demand was not likely to lead to a desired result.

We also represented a number of people in the music industry — Earth, Wind and Fire for example, a great group. The firm did work for the Beatles and I think for Mick Jagger.

Q: You were working for a music band, and did they come into the law firm to meet with you? Did you meet with them, or were you only dealing with the business manager?

A: Occasionally I got to meet with them. I remember Barbra Streisand; her deposition was taken, and I had to go prepare her and sit with her in her deposition. The lawyer asked the most outrageous questions knowing I would object. I think he wanted to burden her with multiple depositions. Thus, I did get to meet and deal with the actual stars sometimes. Often it was through their agents. I did work for Robert Wagner. He told me once

that a certain actress was so bad that when she played Anne Frank in a play, as the Nazis came, the audience yelled, "She's up in the attic." Once I read scripts for a new Perry Mason TV show to make sure the stories did not diverge too far from legal principles. It was difficult to accomplish this for a show that ran for less than an hour.

Q: Did you like this kind of practice? Were you mostly out of the courtroom? Most of the work was done . . .

A: Yes, with business litigation very few matters actually went to trial. It was pretrial activities. You can't really call yourself a trial lawyer in that kind of a practice. I did try some cases. The first case I ever tried as a new associate was a Municipal Court case; it involved Teledyne. It was a \$5,000 case, but Mitchell Silberberg allowed me to try the whole matter in the Municipal Court. They had a partner sitting with me during the trial. It was great training.

Q: What was the outcome of your first case?

A: I won. (laughs) Although I was a litigator, I was able to get involved in other areas. I handled a Franchise Tax matter for the NHL; a few family law cases; a public offering for an aerospace company owned by a former tennis pupil of mine — Leo Wyler; some labor matters; an occasional bankruptcy case; and some administrative matters. I did some pro bono work, including after the Watts riots, but never had any trials from such activities.

Q: Did you feel at the time like this is what you wanted to be doing with your career, or did you feel like there were more things that you wanted to do that you were planning for or thinking about?

A: I always had the feeling that I'd like to do something different at least every five-to-ten years. You only go through life once. One problem with private practice was the intra-firm intrigue. A pie had to be divided among a bunch of highly driven people. All these people had always succeeded; now the measure of success was compensation. So even if the discrepancies in pay seemed trivial, they were not to the lawyers. Also, litigation had its moments of stress. The cases we had went on for years and involved the expenditure of considerable sums. Thus, there was pressure for a result that justified that amount of time and expenditure. In addition, you deal with

a person, the opposing lawyer, who is trying to prevent you from getting what you want. It is competitive — sort of like at a tennis match. Opposing lawyers could be unpleasant, but not all of them. I became friendly with a number of opposing counsel, such as my now colleague, Justice Arthur Gilbert. The idea there was civility among lawyers in the past is a bit of a fiction. When I was a young associate, I asked a partner how he felt about an attorney who had opposed him for years in one case. He replied, “hatred diluted only by contempt.”

I did some appeals, some in the California Supreme Court. One involved the Industrial Welfare Commission rules. I represented the National Association of Theatre Owners, whose president was Bill Kartzonian. I had a few other cases that went up on appeal. I liked appellate work. I was always looking for something else, however. I tried to become a district attorney. When a district attorney had retired, died or left, the Board of Supervisors picked a successor. The first time, I thought maybe I could pull it off, with three Democratic supervisors. I was one of the finalists. I don't think it was ever in the cards. I was very young and inexperienced.

Q: What year would this have been? Do you remember, roughly?

A: Probably was in 1971, something like that. I was a finalist for the same position a few years later. Then, too, I thought I had a chance.

Q: This kept to your theory that it would be better to get appointed to something than to try to . . .

A: Get elected, yes. I remember going up to Earl Warren because he knew some of those supervisors, and seeing if he could weigh in. He knew them from the days when he was governor. I went up to the Fairmont Hotel, and I asked him, and he said, “No, Richard, I'm not going to contact them. They're just a bunch of crooks anyway.” (laughs) So, he was an outspoken guy.

Q: You note in here that it was during this period that you met your good friend Ken Reich, the newspaper reporter. Do you remember what the context of that first meeting was?

A: Yes, we represented the homeowners association in Westwood, and they were fighting with UCLA over parking on the streets. Ken was covering it for the *L.A. Times*. There were some funny things: some of the neighbors were complaining that condoms were thrown on their front lawn, things like that.

So that's how I first met Ken, and I found Ken always to be fun-to-be-around, a little quirky but fun. We stayed friendly until he passed away a few years ago.

Q: You meet a lot of people in daily life but not all become lifelong friends. What was it about that connection, do you think, that you ended up being so close with him?

A: I don't know. We just kind of hit it off; I enjoyed listening to him. He used to call me up every time some new story broke to let me know about it. Generally, journalists are interesting people. They should be knowledgeable in many fields, and they cover matters that are by definition newsworthy. You, as a journalist, would agree. Ken covered politics, earthquakes, Olympics, and so forth. Incidentally, my father was interested in journalism when he was young and, for the most part, admired journalists. He had many journalist friends throughout his career. He also was friendly with newspaper owners, including Otis Chandler, the Ritter family, and the McClatchy family. Similarly, I have always enjoyed knowing journalists. I knew Tom Brokaw, the NBC anchor, when he worked for local television, and I knew various *Los Angeles Times* reporters, many of whom I met through Ken Reich.

Q: You talked about arguing before the Supreme Court and your interest in appellate work. Were there any issues created? Did any of the opposing counsel object in any way to having an attorney named Mosk before a court that had a justice named Mosk?

A: No. My father would always disqualify himself in those situations.

Q: Right. But you knew all the justices, and he knew all of them.

A: Yes, I knew some of them. I remember my father argued before the U.S. Supreme Court in *Arizona v. California*, an important water case, and he said when he was sitting in the front row waiting to appear, he got a note from one of the justices, either Goldberg, Brennan, or Douglas, saying, "How about dinner tonight?" But he lost 8 to 1.

Q: When you were going to go make your first arguments before the California Supreme Court, did you talk to Stanley about it? Did he ever offer you advice? Was he a sounding board or anything for you on legal cases?

A: No, I was always — he used to say that whenever I called him I'd say, "Outrageous." He said, "The only time you call is to criticize my opinions,"

(laughs) I don't think he gave me advice. I think he may have watched the argument from behind the curtain someplace.

Q: Did he ever talk to you about your interest in being a judge? Did that ever come up?

A: Yes. He encouraged it. He thought I should get Jerry Brown to put me on the Superior Court. My name was submitted to the screening committee for the Court of Appeal, but I withdrew when I was appointed to the Iran–U.S. Claims Tribunal. I expressed some interest in an appellate court judgeship after I came back from the Iran–U.S. Claims Tribunal, when Deukmejian was governor. I met with Marvin Baxter, who was his legal affairs secretary, and I said, “I’d like to be on the Court of Appeal.” He said, “Our policy is that you must start and work your way up from the trial bench.” I said, “Does that mean if the attorney general, William French Smith, came back to California and wanted to be on the Court of Appeal you’d have to say, you would have to start him on the Municipal Court?” He said, “That’s our policy.” He did suggest a Superior Court judgeship. It turns out that Marvin Baxter got appointed to the Court of Appeal without having been a trial court judge. Later he was elevated to the Supreme Court. (He has been a fine jurist.) I don’t think being a trial court judge is essential for being an appellate court justice. It might help, but they involve different skills.

Q: That’s funny. He offered you, or there was a possibility of a Superior Court judgeship, but that didn’t interest you?

A: No, I didn’t really think I was cut out for that. My father encouraged me to take it. He said he liked it and thought it would be worthwhile and I could work my way up. But somehow or other, I was a little more impatient; if I wanted to be something I wanted to be that and not work my way up at that stage. As I mentioned, I was on track to go straight to the Court of Appeal just before I was appointed to the Iran–U.S. Claims Tribunal, but that appointment ended the possibility of a Court of Appeal appointment at that time.

Q: Superior Court is a grueling kind of judgeship, right? You’re seeing . . .

A: No, not really. But the idea of just sitting there troubled me — sitting passively.

Q: You note here, “death penalty cases.” Do you want to talk a little bit about that?

A: Yes. I did some pro bono work for the NAACP Legal Defense Fund — some briefs on capital cases. One of them I thought looked like a good bet to go to the U.S. Supreme Court. It was an older man and a younger man, and the younger man was clearly under the sway of the older man. And the younger man was also not very bright. The older man had killed somebody in connection with the robbery. The younger man was with him. The older man got life and the younger man got death. So I thought this was a pretty good case as to whether or not a non-triggerman could be executed.

It was a case out of Ohio, and I remember getting up one morning and seeing in the newspaper, “The Supreme Court Takes Ohio Death Penalty Case,” and I thought, “Wow, I got it.” But it was another case involving the getaway driver or aider and abettor who was given death, and the perpetrators received life.

Q: So it was similar. The court was looking to take a case like this — a non-triggerman — but they took a different one.

A: Right.

Q: Were you interested in death penalty cases? Did you have moral feelings about the death penalty?

A: I personally was opposed to the death penalty, yes. I wasn’t out picketing, and I wasn’t actively involved, but when these cases came along I thought they were interesting and worthwhile cases to take.

Q: This is a political topic that’s surfaced over and over again in California in conjunction with Stanley. Did you and Stanley talk about the death penalty at all or how to approach the topic?

A: He always took the position that he was personally opposed to it. In fact, he even testified against it, but he would carry it out as a judge and seek to enforce it as attorney general. People seemed to accept that notion. I don’t know that they are quite so tolerant these days, although I think Jerry Brown has probably been able to do that. I asked my father, “What about Eichmann? Is there some limit?” He said, “No, I’m just opposed to the death penalty, period.”

When I applied for a federal judgeship later on, I was selected by the committee recommending appointments of federal judges and went up to be interviewed by Senator Dianne Feinstein. And she asked me my position on the death penalty, and I said, “I’m personally opposed to it, but I’d carry it out if I were a judge.” Capital cases generally at that time didn’t come before federal judges. I said, “Maybe Eichmann, and maybe if I think Eichmann should be executed, I’m a little bit pregnant in that sense.” That wasn’t good enough for her. She just wouldn’t accept anybody who had any reservations about the death penalty.

Q: It was too politically difficult for her.

A: No, I think she had been on the Parole Board as a young person and been opposed to the death penalty, but allegedly she had an epiphany when she was running for statewide office. Maybe it had to do with the murder of Harvey Milk, with whom she served on the San Francisco Board of Supervisors. I’m not sure. But that was her position.

Q: What is the Judicial Procedures Commission?

A: That was a Los Angeles County commission that Kenny Hahn, Supervisor Hahn put me on. We’d make recommendations to the Board of Supervisors with respect to the court system. Also a little earlier I was on another local commission . . .

Strangely enough, Sam Yorty, whom I mentioned earlier . . .

Q: Who you slammed the door in his face.

A: Yes, who was then mayor, and had been in the Legislature during the Olson days and was a friend of my father. He put me on this L.A. City-County Fire Board of Inquiry, which arose after some devastating fires in the area. Unfortunately, it sort of devolved into a fight between the wood shingle industry and the non-wood shingle roofing industry. It’s so obvious that you couldn’t have wood shingles in fire areas. But I ultimately wrote a “concurring opinion,” in which I made a number of recommendations: for “Super Scoopers,” and even controlled burning as a possibility, and fire-breaks and communications enhancements between various departments. So just like many blue ribbon commissions, I’m not sure the recommendations ever had much impact. Paul Ziffren, who lived in Malibu — a fire-prone

area — was also on the committee and joined in my opinion. (My Board papers are with the Huntington Library.)

Q: During this time you did a lot of traveling with Mom or with friends, or do you want to talk a little bit about how the world was changing, as you saw it at that time?

A: We took various trips. Japan, Europe, and Israel. I remember one — my parents had gone to Morocco, and they went into a rug store in Fez. My mother bought a rug, but she was a little concerned about whether it would be sent. And so she said, “You know, my husband is a judge. I just want you to know that.” And the man said, “Oh, a judge,” and he went back and he brought some bounced checks from Americans and gave them to my father and said, “Can you collect these?” And my father, not wishing to offend him, took them and then gave them to me. I wrote collection letters on Mitchell, Silberberg & Knupp stationery, and these people all paid after a big firm letter came to them. He was so excited. He sent us gifts.

Ultimately we went over there, and he treated us quite nicely. He took us up to his mansion for dinner. He had asked us to pick out any rugs that we liked at his store, so I picked out a whole bunch. Then he put them down on the grass after dinner and said, “Which one do you want?” It was like a game show. I didn’t know: “Is he going to give it to me, or is he going to sell it to me? If he’s going to sell it to me, I just want the cheapest one. If he’s going to give it to me, I want the most expensive one.” Since my nature is conservative, I picked the cheapest one, and he gave it to me. Wrong again.

Q: (laughs)

A: You ultimately hooked up with his son, and . . .

Q: Three generations. That was quite a good deed that Stanley did, with you doing the actual heavy lifting.

A: Also, in the seventies I took a leave of absence to work for the Federal Public Defender Office. John Van de Kamp was the federal public defender — a great public servant. He became district attorney and attorney general. We were sitting together, and I was saying I’d like to do something else. And he said, “Why don’t you come down to the Public Defender’s Office?” So I took a leave of absence, and I tried criminal cases down there as a

public defender. It was a great experience because I actually tried jury cases (and I handled the appeals). I won one and lost the rest.

Q: Is that the norm for the public defender?

A: Yes. I remember one of the judges took me aside and said, “Richard, just plead them all guilty.” But the one that I won, I had some help from Alan Isaacman, who became famous later on as Larry Flynt’s lawyer. The assistant U.S. attorney on the other side, Howard Matz (later a U.S. District Court judge), really didn’t like the idea that I won this case because the assistant U.S. attorneys got called up to the office of the U.S. attorney to explain how they could lose a case. So I guess he blamed me. There was some hostility there, and it carried over. I had applied for, and Alan Cranston, who had become a U.S. senator, had agreed to make me, U.S. attorney. He promised it to me. He said, “Now all you have to do is get through this committee.” Well, the committee was like a nightmare for me because the members had their own constituencies. The Latino wanted a Latino. The African American wanted an African American. There was pretty keen competition to get through. And because of this assistant U.S. attorney with whom I had had a conflict, some opposition to me from within the office was generated.

In any event, I was one of the ones recommended by the committee. When I got back to my office one day there’s a call from Cranston. I thought, “Well, he’s going to come through here for me.” And he said, “Richard, I’ve decided to appoint Andrea Ordin. She’s a Latina — but how about a judgeship?” I said, “You promised the U.S. attorney spot. I’m not interested in the judgeship.” I was pretty annoyed by that. And especially since Cranston had basically helped spread some of the rumors about my father in order to get the Senate nomination.

Q: Did you know that at the time?

A: Oh, yes. I was hoping he’d redeem himself, but he didn’t.

Q: What about Stanley’s political career?

A: In ’66 my father thought about running for governor. Pat Brown decided he would run for reelection, and so my father didn’t run for governor. And then in ’68 he thought about running for the Senate, but it just seemed too difficult to beat the incumbent Republican, Tommy Kuchel. It

turned out that Kuchel got knocked off by a right-winger named Max Rafferty. And Cranston ran and won and had been there for quite some time until some little scandal turned up years later. But in the '68 campaign for President, Lyndon Johnson had decided not to run for reelection — Gene McCarthy had opposed him and beat him I think, or come close to him in New Hampshire. Then Bobby Kennedy decided to run. My father was relatively close to Bobby Kennedy. When he was attorney general and Bob Kennedy was U.S. attorney general, they cooperated quite a bit. And of course, my father was an early supporter of JFK, something the Kennedys did not forget.

Q: So did you get involved in the 1968 campaign?

A: Kennedy, then a senator from New York, was running against Minnesota Senator Eugene McCarthy for the Democratic nomination. Vice President Humphrey, a candidate, did not run in California. I got involved as an advance man for Bobby Kennedy here in Los Angeles, and that basically meant arranging his schedule and turning out the crowds. I remember that we had scheduled an event at noontime in front of Canter's Delicatessen on Fairfax Avenue. We figured we'd get a huge crowd because that's a big lunch crowd. Mrs. Canter went nuts because it was ruining her lunch business. I think I said, "The next President of the United States is going to be here in front of your place." This did not satisfy her.

Then we had an event at Temple Isaiah, and I sat on the stage with Senator Kennedy. RFK was an exciting person, and I think would have been a great President. I went with another lawyer and friend, Sol Rosenthal (who had worked on the campaign), to the Ambassador Hotel, but we left before the assassination took place.

Q: Can you recount that night at all? Do you remember how that went?

A: Yes. I was at the Ambassador, and it was festive.

Q: You'd done advance work for this? What was your role there?

A: I had no role in this event. This was election night.

Q: Okay. So you'd worked on the campaign, the California primary, and it had come down to election night, and take it from there.

A: Kennedy was winning, and I went home early to watch the results and the victory statement and then saw the actual events that unfolded, the

shooting of Bob Kennedy by Sirhan Sirhan. It was quite shocking. At that point I was on the delegation; I was an alternate. My mother was a delegate. So we went to the 1968 Convention in Chicago, which was a tumultuous one. You could see the demonstrators out there. We were rooting for Senator George McGovern as the alternative candidate. I liked Hubert Humphrey, but we thought McGovern would be more Kennedyesque.

Q: He was a war hero.

A: The fact that he was a war hero was not widely known. It wasn't like PT-109 for Jack Kennedy or the war exploits for George H.W. Bush. McGovern didn't promote that aspect. He should have. But he was a progressive, bright, articulate fellow. I liked Humphrey, and it's a shame that he got nosed out by Nixon.

Q: Did you witness the actual lobbying and pursuit of support from delegates at the Convention? What did it look like? How did it work?

A: People were running around. There were demonstrations in the streets of Chicago. It was pandemonium. There were efforts to extract votes and promise votes and deliver delegations. I do remember Mayor Daley in the front row. I can't remember who it was that was speaking — it may have been Connecticut Senator Abraham Ribicoff — but Daley was standing shaking his fist. It was a very ugly convention.

Q: Conventions now aren't like this anymore. But when you went to that convention or the convention in Los Angeles, the nominee wasn't really settled?

A: No. It didn't go 121 ballots, "Alabama casts 24 votes for Oscar W. Underwood" in 1924 (there were 103 ballots). But nevertheless it wasn't a sure thing. And delegations weren't automatically pledged; they could move around. I think they could switch at least after the first ballot. And nowadays, because of primary elections, matters have been determined at the outset.

Q: So when your mother went . . .

A: And my father went, although as a jurist, he was not a member of a delegation.

Q: . . . And your father, everybody pretty much knew whom they supported. Or do you think there was wiggle-room where you could have been persuaded to move? Were there efforts to pressure?

A: No. Certainly my mother, who was the delegate, was going to vote for her choice. She was pledged to Bob Kennedy, and I think she decided to go for George McGovern, and that was that. I think Hubert Humphrey unfortunately became the person to be against. He was a good man, and the world would have been a much better place had he won the general election.

Q: You have reference here to Joey Bishop.

A: Yes. After the assassination of Robert Kennedy, Joey Bishop, one of the Hollywood “rat pack” (with Sinatra, Sammy Davis, and Dean Martin), had been a client or at least his agent was a client. He had a national television talk show that was very big at the time, and he had me on the show with Charles Evers, who was Medgar Evers’s brother. Medgar Evers had also been assassinated — he had been a civil rights leader in the South. We talked about gun control. The National Rifle Association representative was on the show, and there was a debate about gun control at the time. I felt that the fact that these assassins got a hold of weapons that were not hunting weapons seemed to be incompatible with law and order.

Q: To that point had gun control been a long-running, big issue or did the assassinations give rise to the issue?

A: No, I think it had been an issue; but just as anytime we’d get into mass murders now, suddenly people start wondering, “Why are all these guns floating around?”

Q: You met Benjamin Netanyahu?

A: Yes, I had lunch with him when he was U.N. ambassador. My cousin Jon Mitchell set it up. Netanyahu was bright and articulate. He was quite impressive.

Also, I became active in the local chapter of the Federal Bar Association, becoming president. It gave me a chance to invite public figures to speak to the group. Incidentally, I found a job in Los Angeles for the husband of my wife’s identical twin. He was a patent lawyer, and he helped found a patent firm here. I believe they did work for Apple Computer. He

and the twin live up the street from us and have children the same age as our children.

Q: I don't want to go out of order, but you're talking about this incredible grounding you had in politics firsthand, both watching your father and his maneuvering, and watching the Kennedys — their successful JFK campaign and Bobby Kennedy's campaign. Did you become more engaged yourself in political campaigns? Is that something you wanted to do?

A: People welcomed my participation, especially my name that was well known because of my father. It started to become less well known as time went on, but yes, I supported Tom Bradley when he ran for mayor. I remember organizing a law enforcement rally for him, and it wasn't easy to do because most of law enforcement supported the incumbent, Sam Yorty. I put together this big rally at the request of Bill Norris, who was working for Bradley. I thought it was successful. I never got a thank-you or anything from it. I learned then that you can't work for somebody not the candidate or a close aide of the candidate. I'm sure Bill Norris is a fine person — but I suspect he took credit for it. If you're going to get anywhere, you've got to do it directly with the candidate or a top aide because others will take the credit. Bradley helped Norris and Steve Reinhardt get on the Ninth Circuit Court of Appeals. Norris had been a strong supporter of my father and ran for attorney general. He is a fine lawyer. At some point I was the state chairman for Kenny Hahn when he ran for the U.S. Senate against Congressmen John Tunney and George Brown. Hahn did very well considering he never got out of the County of Los Angeles. He was very popular here. But we couldn't get him up to Redwood City, or someplace like that. I felt I owed him because he was the first major officeholder to endorse my father in his 1958 campaign for attorney general. I also helped his son Jim when he successfully ran for mayor.

I think I tried to help out Lloyd Hand who ran for lieutenant governor. He had been chief of protocol for President Johnson. I believe he lost in the primary. I helped an assortment of other candidates. When my friend Ron Schoenberg (son of the famous composer Arnold Schoenberg) ran against an incumbent judge, I sent him to Joe Cerrell, who had worked for my father when he was Democratic National Committeeman. This was Joe's first judicial candidate. When Ron won, Joe was the person most judicial

candidates hired. Also, another candidate at that election designated himself as “retired judge,” and I challenged in court that ballot designation as not being an “occupation.” The judge agreed with me.

When Jerry Brown first ran for the Junior College Board of Trustees, it was the first time there was any election for those positions. They were new positions, so there were a lot of candidates who ran. He was “Edmund G. Brown, Jr.,” so he had name identification. I got signatures for him to get on the ballot. And I also recall — I don’t know if it’s that election or another — when he asked me to drive down to the *Herald Examiner* with him, and there was a strike against the *Herald Examiner*. We got there and Jerry said, “Could you bring this press release in for me?” I didn’t think much about it; I crossed a picket line. They took my picture, or they said they took my picture. I got back in the car, and I said, “I don’t think we should have done that.” But Jerry didn’t do it. He had me do it. Pretty cunning of him. Jerry won quite handily.

The next thing I got involved with was the 1972 Democratic Convention. I was on the Hubert Humphrey delegation. At that time there was a push and even a rule mandating diversity, and Gene Wyman was picking the delegates. He wanted to have a certain representation of Latinos and Blacks and women and so forth. So he had it all worked out, and he finally picked somebody named Mrs. Gozar. I just remember that name. And I said, “What did you pick her for?” He says, “Well, it’s a woman and Latina and fills both requirements.” She wasn’t a Latina, but he said “close enough.” I was a member of the delegation.

The Humphrey delegation lost to Senator George McGovern in the California primary election. It was winner take all at that time. We took the position that that was wrong, and it should be proportional representation. So we went to the Convention demanding that we be proportionally represented, and there was a big fight — this was in Miami. I remember Willie Brown, who was on the McGovern delegation, getting up before the Convention and saying, “Give me back my delegation.” John Burton also was a leader of the McGovern delegation. Ultimately, I think we were “de-seated,” so to speak.

Q: So you went to the Convention, but there was no seat for you?

A: No seat. But I met some interesting people, including Ed Sanders, a well-known lawyer, who was on the rival McGovern delegation; years later we became partners. He was in the White House under Jimmy Carter.

Q: When did Jerry Brown run for governor, or are we too far ahead of ourselves to talk about that?

A: No. Jerry, first ran for secretary of state. And Frank Jordan and his father had been secretary of state since the early 1900s. Jerry was going to challenge him, but Frank Jordan died and left a vacancy. Governor Reagan was going to leave the spot open for the winner of the Republican primary so that he could run as an incumbent. I came up with an idea. I found some authority that you couldn't leave the secretary of state's office open; otherwise, charters and things that were filed might not be effective. At least that was the theory. Jerry jumped on that, and Reagan felt compelled to appoint an interim secretary of state. So Jerry didn't have to run against an incumbent. I thought that was a very important aspect to his winning. I was also chairman of one of his dinners; I raised a lot of money for him. And he got elected secretary of state.

I also handled some litigation for him as time went on. Then Jerry ran for governor when Reagan's term was up, which I guess would be in 1974. I was one of the insiders. I got all of my friends to contribute to his campaign, and raised a lot of money for him. I got some heavy hitters in his campaign.

I remember Gloria Allred, the famous feminist attorney, was a driver for him, as was somebody named Rose Bird, whom I'll talk about in a while. Jerry got elected, and that was sort of the last I heard from him. Recently I asked him about that, and he said, "You never asked for anything." I said, "I didn't think I really had to." But . . .

Q: Do you want to talk about how your life was evolving during this period, the early to middle seventies?

A: I made partner at Mitchell Silberberg in five years, which was probably the minimum amount of time. In a firm like Mitchell Silberberg, business-getting was important. Mitchell Silberberg was one of the largest firms in L.A., but it was more entrepreneurial. It didn't have these large corporations with the retainers, so it did require business-getting. So I did make efforts to go out and get business, and I did pretty well at that. As I mentioned, I was a litigator, but not really a trial lawyer. I tried cases, but not

like personal injury or criminal lawyers. I did some appellate work, but just on my own cases.

I also did some work for the State of California. At least people in the Brown Administration knew me. I was hired to deal with representing the state involving cases upholding our due-on-sale clause restrictions. The Federal Home Loan Bank Board claimed the restrictions were preempted as to federally chartered savings and loan associations. We ultimately did not prevail on that issue, so that the federal savings and loans were able to avoid our California rules on due-on-sale clauses. I did some work for the California Energy Commission — again, dealing with preemption questions, concerning our regulation of nuclear facilities here. So I got some business out of the State of California. I also was appointed to the Museum of Science and Industry — now the California Science Museum. A few members of that board were to serve on the Coliseum Commission. That was my incentive. But I did not get on the Coliseum Commission. I found the museum position interesting. The Board was composed of some high-powered Los Angeles leaders — for example, Caroline Ahmanson and Bill Robertson (Los Angeles labor leader). Janice Berman, Congressman Howard Berman's wife, was on the Board, and we usually agreed on issues. Then, the "Industry" aspect was significant because many of the contributors were from the business world. Janice and I wanted less focus on industry. The present name of the museum suggests that is what has occurred. The museum is a very important resource for Los Angeles. Supervisor Ed Edelman appointed Loren Rothschild and me to the Los Angeles County Law Library board. It has been an outstanding law library. I focused on its international law collection.

After Jerry became governor, the chief justice retired and my father, one would think, would be the most logical person to name as chief justice. My mother had actually fed Jerry when he was running for office, and so it seemed logical. The other possibility would have been Mathew Tobriner, although he was a bit older. But Jerry had clerked for him. Jerry decided to appoint Rose Bird, who had been on the California Agricultural Labor Relations Board. She was a controversial character. Indeed, then Bishop (later Cardinal) Mahoney wrote a letter vehemently opposing her, saying she wasn't temperamentally suited for the job. They served on the Agricultural Relations Board together. So it came up before the Judicial Qualifications

Commission, and they voted 2 to 1 to approve her. Tobriner voted for her; he was the acting chief. And one of the Court of Appeal justices voted against her. It came down to Evelle Younger who was the attorney general, and he voted for her, inexplicably; although rumor has it that he extracted a promise that one of his deputies, Wiley Manuel, would be appointed to the Supreme Court, and he was.

Rose Bird was a reasonably smart lady and wrote some decent opinions from time to time, but personality-wise was one of the few people with whom my father couldn't get along. He said she'd lock her door. She made all the justices make appointments to see her, rather than just walk in like you ought to be able to do in a collegial court. She had her assistant sit in on all conversations with other justices. She was secretive and difficult.

My father was a little bitter about that appointment, I think. I don't know if "bitter" is the right word, but he was quite angry at Jerry for this. He also felt that Jerry had used the concept of affirmative action for the bench, which might be good policy in theory, to appoint judges who were not qualified and that he had damaged the bench in the name of affirmative action or diversity.

My father wrote the *Bakke* opinion in which he said there shouldn't be any racial quotas. So he was controversial in that regard. Jerry was reported to have indicated this was a reason for not appointing my father as chief justice. I don't know what his motivation was. I think my father's views on affirmative action may have had something to do with the fact that there were once quotas against Jews. That Dartmouth and Stanford had such quotas may have had an effect on him. Certainly no one could suggest he was weak on civil rights. Not only did he strike down racial restrictive covenants, he forced the PGA to accept the black golfer Charles Sifford, and he established a civil rights division in the state Department of Justice. He wrote opinions that supported civil rights. He supported the Anti-Defamation League.

In about 1978, the Supreme Court decided *People v. Tanner*. It concerned some issue prohibiting the grant of probation to one who used a firearm during an offense. There was a concern that Tobriner or the Court had held up this opinion until after the retention election at which Rose Bird was on the ballot. Because of these allegations, Rose Bird unwisely called for an investigation. My father thought it was nuts to do this, and

they did set up an investigation panel — the Judicial Performance Commission, which disciplines judges.

Seth Hufstedler became special counsel. He was the husband of Shirley Hufstedler. They were good friends of my father and of me. Shirley Hufstedler had been secretary of education, had been on the Ninth Circuit, and had worked for my father when he represented California in the *Arizona v. California* water case. Seth Hufstedler, a fine lawyer, began this investigation and started subpoenaing the justices to appear on televised hearings and be grilled about their deliberations.

My father took the position that the Constitution said the investigation must be held in private. That's what it said. So he resisted as a matter of principle. He asked me to represent him and to resist the subpoena. We went before the Superior Court, and the judge ordered that the subpoena had to be complied with.

I took an immediate writ up and four Court of Appeal justices signed a peremptory writ that set aside the trial court's order. Hufstedler took the matter up to the Supreme Court. All but one of the justices disqualified themselves. I took the position that they should sit under the rule of necessity, or if there was nobody to hear the matter, then the Court of Appeal opinion should govern. But the chief justice appointed by lot an *ad hoc* Supreme Court composed of seven Court of Appeal justices.

We prevailed 7–0 before the *ad hoc* court, which brought an end to the public hearings. No discipline resulted, but the spectacle caused damage to the Court. The whole matter generated a little bit of conflict between Tobriner and my father.

When there were depositions being taken, I brought my partner, Ed Medvene into the case to help prepare my father for them, because I was a little too close to the matter. I could handle the legal issues, but I didn't want to get into the factual issues. I felt it would be better to have an independent counsel representing him. I recall an associate in Hufstedler's firm, Pierce O'Donnell, who kept castigating my father to the press. I asked Hufstedler to restrain him. O'Donnell ran for Congress shortly thereafter. I guess he felt his name in the paper would help. He later has had some high profile cases and some personal legal difficulties.

Q: Because you were fighting the subpoena it made it look like you were protecting him?

A: Some people suspected that. He didn't really have anything particularly to hide. He had his own position. I think he basically tried to protect everybody he could. That incident had a deleterious effect on Rose Bird when she came up years later for this retention election.

Q: There are a couple things here we may have skipped over I want to make sure we touch on. There was a fairly high profile case you handled involving Edwin Moses, the Olympic hurdle sprinter. How did that come about?

A: Edwin Moses was one of the most spectacular athletes of our time. He repeatedly won the 400-meter hurdles. If you just nick a hurdle, you're finished. And Edwin Moses had won, I don't know, 120 or so consecutive straight races, held the world's record, won the Olympics several times, and he was running in the 1984 Olympics here in Los Angeles. He was arrested for soliciting prostitution in Hollywood from what turned out to be an undercover policewoman. He allegedly was trying to pick up a prostitute, and they handcuffed him. He said he felt like Kunta Kinte (from *Roots*) when he was hauled off to jail in chains. It was very embarrassing. Of course, it could adversely affect his commercial value.

Q: Can you explain, how did you get this case?

A: It came through somebody in the firm, and it went to Ed Medvene who was a partner of mine, and so Medvene and I both were involved. Ed was much more experienced in criminal law than I was, and so he was the lead counsel. I remember calling the city attorney in charge and saying, "Drop this thing, you're ruining his life, and you're not going to win anyway." And they insisted he should be treated like anybody else and decided to try him.

We got a jury consultant; and Ed and I, mostly Ed, tried the case. Edwin Moses was acquitted, as we predicted.

Q: How did you get him off?

A: I think we raised some doubts as to whether or not he actually did solicit this person.

Q: Or whether he was entrapped?

A: No, it wasn't a question of entrapment. I think it had to do with whether he actually said or did whatever they claimed. I don't remember the specifics.

Q: But this was sort of a show trial at the time, right? This was on TV and . . .

A: This was a big trial.

Q: So that's a big success to get him off, a very high-profile case. Did that lead to more interest on your part in criminal cases, or you left that to Ed Medvene and went on to the next thing?

A: No. We didn't get many criminal cases at that point. I had taken some criminal cases after I was a deputy federal public defender. I took some cases while on the Federal Indigent Defense Panel. But for the most part, you couldn't do criminal law part-time. There wasn't a lot of white-collar crime being prosecuted at the time, other than drug cases I suppose, and we didn't get involved in that.

Q: I turned the page, and it's the first time I've seen something I completely did not recognize or expect. What is this "offer to be a coach at Pepperdine" about?

A: Somewhere along the line my good friend Allen Fox was the tennis coach at Pepperdine. He had left business. I guess he'd made all the money he needed, and he loved coaching. And so at one point he said, "Do you want to be my co-coach?" I thought, "Yes, that would be great to be a coach." I love athletics, and I would like to be a coach. I just didn't do it, but I thought about it. I thought that would be a great opportunity to do something a lot of fun.

Q: Why didn't you do it?

A: Well, I was probably more career-oriented at the time.

Q: You hadn't figured out yet where this career you'd been building all this time was going?

A: No. If they offered it to me today, I might take it. I enjoyed the opportunity to deal with athletes in practice or otherwise. I had the opportunity to get to know the Hall of Fame baseball player, Hank Greenberg. He was a member of my tennis club. The story was that when he was on the verge of breaking Babe Ruth's home run record, the pitchers would not pitch to him because they did not want a Jew to have this record. Greenberg did

not support that story. He said he just failed to hit the necessary three home runs.

Q: You're at a point where you had all these different, almost apprentice-like experiences in the Public Defender's Office; as a private attorney and in politics working on campaigns. Did you have a sense of where you wanted to go, what this was all building toward?

A: No. Public service is a matter of luck. It's something you might put yourself in a position to get, but unless you run for something, there are no assurances. To get appointed to positions is a matter of luck. I had my disappointments — the U.S. attorney job, the district attorney position twice, and federal judgeships. There was a second time the opening for district attorney came up and again I was one of the finalists but didn't get it. When I was in the Federal Public Defender's Office, John Van de Kamp and I both were vying for the district attorney position, and Van de Kamp was the one who got it. Other candidates were Judges Manuel Real and Matt Byrne. I believe Byrne may have been mentioned, or may have been mentioned the earlier time. I realistically never had a chance.

My good friend Ed Edelman was on the Board of Supervisors. I first met Ed back in Washington when he was a government lawyer and I was with the Warren Commission, and we had lunch. He said he was going to go back to Los Angeles and run for office. He started to read me his campaign speech — “First, we need civic pride” — and I thought, “You must be crazy.” He went back to Los Angeles and won a City Council seat. He later successfully ran for the Board of Supervisors. So he and Kenny Hahn were on the Board. I thought I might have a chance, but I didn't.

In any event, talking about luck, in 1981 I was playing tennis at lunch and I got a call from William Clark who had been a colleague of my father's on the California Supreme Court. He was Reagan's deputy secretary of state. He said there was an opening on the Iran–United States Claims Tribunal, which I'd never heard of, and would I be interested in living in Holland and being on this tribunal. I think he first offered it to my father. He needed me to get back to him quickly because the time deadline for naming members of the Tribunal was running out. At the time, as I mentioned, I was being considered for appointment to the California Court of Appeal. I think Jerry would have done it, but who knows?

I decided to take the appointment to the Tribunal. It was a very interesting process. It was part of the hostage agreement that was negotiated. The Iranians had taken over the American Embassy in Tehran and held Americans hostage. To get them released, Deputy Secretary of State Warren Christopher negotiated what's called the Algiers Declarations or Algiers Accords. We had frozen Iran's assets. We agreed to return assets; they had agreed to return the hostages. All disputes between Americans and Iranians and the two governments against each other would be determined by a tribunal in The Hague composed of judges: three Americans, three Iranians, and three from other countries. The agreement called for up to 27 arbitrators, and originally the Iranians named 9. The American government said that's too unwieldy, so it agreed on 9-3 from each side.

I went to Washington to meet the others involved. The first nominee by the U.S. was Judge Malcolm Wilkey from the D.C. Circuit. The Reagan Administration designated the Americans. Bill Clark was a Republican, and he said, they wanted me because I'd had litigation experience and they wanted a litigator on there. They had another person, Howard Holtzmann, who was very knowledgeable about rules in connection with international arbitrations. And they had Wilkey. But then Wilkey found that ethically he couldn't do it; the canons of ethics said one couldn't be a judge and an arbitrator, even if he or she took a leave of absence.

So another State Department person, George Aldrich, who had been ambassador to the Law of the Sea Conference and an aide to Henry Kissinger, was appointed. We went over to The Hague. The American agent was Arthur Rovine, an experienced State Department lawyer.

There were some disruptions in Iran at the time, an explosion I think. This was not long after the Iranian Revolution. So it was unclear if the Iranians would show up, but they did. They appeared, and the first thing we had to do was pick the third-country arbitrators or judges. Of course, we started nominating Brits, Canadians and Australians, and they nominated Pakistanis and Bangladeshis and other Third World people. Ultimately we agreed upon two Swedes: The marshal of the realm of Sweden, Gunnar Lagergren; Swedish Appellate Judge Nils Mangard; and the chief justice of the Court of Cassation, or the French Supreme Court, Pierre Bellet. Then we had to adopt rules. As required, we adapted the UNCITRAL (United Nations Commission on International Trade Law) rules.

We were starting from scratch with thousands of claims. Others had been judges, but I had had a hands-on experience with clerks and filings and things like that, because I had to deal with them as a young lawyer. So I brought over a clerk from the California Supreme Court to help set things up, and we started with what we called a registry or a clerk's office, and file stamps and docket sheets.

We started meeting at the Peace Palace at The Hague, and I had a great office there with books by Grotius and Persian rugs. It was a beautiful facility. And then we got our own building, which we rented, over on Parkweg. The Peace Palace, which has housed the International Court of Justice, looks like it is right out of a drawing by Charles Addams. Its construction was funded by Carnegie. Now, the Deliberation Room and offices of the ICJ are housed in a building behind the Peace Palace.

Q: You had a budget to work with, I assume? Who paid for all of this?

A: The American government and the Iranian government. They would provide funds, and we hired a secretary general and an accountant.

Q: You had a number of possible positions and jobs put in front of you up to that point in your career and had for one reason or another passed on them. What was it about this that you think made you take this?

A: I hadn't passed on anything that was really good. I'd been rejected for a few things; I got a few things. I'd always thought about living abroad. I remember telling Lagergren, the president of the Tribunal, that I thought a half-year or year would be our time frame to dispose of all the cases. I said, "Do you think we can get through these things in a year?" And he said, "No, no, no; maybe a couple of years." I'd thought, we could use class-action techniques to get common issues and common facts, but the one thing I didn't count on was that the Iranians were in no hurry to have these claims resolved. Most of the individual claimants were Americans claiming against Iran. So they resisted any kind of processes to expedite this process, at least initially. Part of it was that they didn't have the lawyer capability. Many people had left because of the Revolution, and the ministries were not up and running and efficient and could not get the necessary information. The Tribunal is still operating — for over thirty years and probably for another decade. All of the private claims have been resolved. The remaining cases involve numerous claims by Iran against the United



RICHARD MOSK (RIGHT SIDE, WITH HANDS ON CHAIR), AS ONE OF THE THREE U.S.-DESIGNATED JUDGES APPOINTED BY PRESIDENT RONALD REAGAN, AT THE FIRST MEETING OF THE UNITED STATES AND IRANIAN GOVERNMENT REPRESENTATIVES — TOGETHER WITH THE THREE IRANIAN-DESIGNATED JUDGES AND REPRESENTATIVES OF THE PERMANENT COURT OF ARBITRATION — TO ESTABLISH THE IRAN-U.S. CLAIMS TRIBUNAL AND SELECT THREE THIRD-COUNTRY JUDGES, AT THE PEACE PALACE IN THE HAGUE, MAY 18, 1981.

States and involve substantial sums. So in fairness to the Iranians, they had some logistical problems in trying to get these cases heard fast.

Once, the American agent said there were reports of possible terrorist attacks against the Americans at the Tribunal. I asked what I should do. He replied, “Be careful.” I showed up for work the next day, but none of the others did.

Q: You were sitting across the table from these Iranian judges. Iran had a revolution, had killed Americans, made hostages of Americans. We weren’t at war with Iran, but we were certainly unfriendly with Iran. What was the experience like of working in close consultation with the Iranians at this moment?

A: I made it my business to try to get along with them and to be friendly with them. I didn't know that I'd get anything for it, but I just felt that it was probably the best way to operate. There was no sense having hostilities in a legal mechanism. I remember the Ayatollah Kashani, a very famous ayatollah in the Mosaddegh era back in the fifties. His son was one of the arbitrators, and we used to play ping-pong. I remember that one time I hit the ball and it caromed off the side. He said, "That's unacceptable." I remember we had an introductory dinner, and the Europeans and Americans had wine and, of course, for the Iranians there was apple juice.

Q: What were your impressions of them?

A: They are very bright and very clever. They certainly had more incentive to toe the line with their government. We American arbitrators didn't want to see an American claimant get money to which that claimant wasn't entitled. There was a certain pot, and we'd rather have the money go to somebody who was entitled to it. The Iranians did have to replenish an account to secure payments once that account dropped below a certain level.

The Tribunal was considered the largest international arbitration mechanism in history. There have been others with more cases. After World War I, the Versailles mechanism had thousands of claims, and there had been others with large volumes, but nothing approaching the dollar amounts that were involved here. We dealt with very significant issues of international law on which there was a paucity of authorities. We were faced with issues of dual nationality, force majeure, forum selection clauses, exchange controls, exchange rates, interest, state responsibility, treaty interpretation, expropriation, standard of compensation, applicable law, application of the UNCITRAL rules, and a whole host of issues on which there had not been significant authorities.

Because many of the Americans' claims had merit, if they were decided properly, the Iranians would lose many of these cases. It was difficult for the third-country judges to rule against the Iranians repeatedly. So they often tried to compromise the decisions. I would always tell them to decide the cases in accordance with the law and the facts, but they expressed the view that compromise was preferable. Perhaps they wanted to keep the Iranians in the process. I felt one of the judges seemed to buckle to Iranian pressures and protestations. I once showed him a clipping saying the tennis

player John McEnroe, who ranted at the linesmen, saw fear in their eyes. The judge, a one-time competitive tennis player, wondered what I was getting at. I said, "The Iranians see fear in your eyes." I suggested that if he was going to tilt toward the Iranians because of their pressure, I could exert the same pressure. Of course, I tried to get along with these judges. For the most part, I liked them. I must say, I found international law a bit uncertain and international dispute resolution subject to unexpected results.

The hearings were based on civil law and common law traditions. The cases, including witness testimony, were submitted in written form. The hearings consisted of any witness amplification, limited cross-examination, and argument. The best oral advocates I heard were British. They would meet adverse facts head on. Americans seemed to avoid them in the apparent, but incorrect, belief that if they were not raised by the other side, the judges would not notice them. American lawyers also used idioms ("slam dunk," "whole enchilada," etc.), not recognizing that English was not the first language of the Europeans or Iranians, including the interpreters. At the time, international arbitration was done by a few law firms. Because there were so many American companies that had claims, many lawyers participated. This opened up the field of international arbitration to many lawyers. With international trade expanding, the field of international arbitration is increasing.

Q: So you picked up your family and you moved to Holland. You had been to Holland, to Europe, as a child. How was it different? How jarring was that? You weren't in Los Angeles anymore.

A: I did not go to Holland as a child. We went through Belgium. I had been to Holland before. I went over there several times in early '81, and I don't think the whole family went over until the beginning of 1982. We rented an apartment overlooking the North Sea, and we put the kids in an American school. We made a number of friends who were on or associated with the Tribunal. I became somewhat interested in the International Court of Justice, having been in the Peace Palace. We befriended the American judge, Steve Schwebel, and the U.S. ambassador. We had a nice little community. I also made friends with some of the Iranians and some of the interpreters, although we didn't socialize much with them. I also joined a tennis club. It competed against other clubs. I was put on the third

level team — the first being Davis Cup. My level was pretty high. I played against mostly 20-year-olds. We played singles, doubles, and mixed, and it was serious business. We trained for it during the winter. I actually won most of my singles matches. By the time we got around to mixed, I was tired. We played on clay. I once asked what happens if we lose. The person said we would be “degraded.” He meant the team would be downgraded or demoted to a lower classification. I met and became friendly with many Dutch people through tennis. Some of the young juniors I played with came over to play at U.S. colleges, and I would see them from time to time. I did win the club championship.

I should have taken more advantage of the ease of travel around Europe while I was there because it’s an easy jaunt to other places. But I was living there, and I did what I do when I live in a place — I would get up in the morning, I’d go out and jog and play tennis, and then I’d go to a movie or do something else. So I just lived there, and I didn’t take advantage of all the travel that I probably could have done. The kids traveled around Europe on their school teams. I tried to learn French, but not with much success. Everyone there spoke multiple languages.

Q: Were there things about living there that were different that you hadn’t anticipated?

A: No, I don’t think so. Everybody spoke English in large part. The bureaucracies there are a little more rigid than they are here. Whenever I’d go someplace I’d expect to hear, “It is not possible,” and I used to say, “Before you say anything to me, please don’t say, “It is not possible.” (laughs)

Q: Still, it was jarring culturally I’d think. I remember Mr. Rademaker, the man who used to pick you up at the airport. Didn’t he have like animal skins in his car? There were things that you were seeing that you wouldn’t have seen in L.A.

A: He was an avid hunter, and he used to have these dead ducks or rabbits or whatever they were in the trunk. I noticed a smell, and I finally figured out what it was.

Q: Do you remember your family’s reaction, our reaction? Kids’ reaction, Mom’s reaction to the news that you were considering doing this? When

you were making the decision, how did Mom react? This is a big decision to pick up and move from your routine and your life.

A: I think she thought it was exciting, and I don't know what you kids thought about it; we had taken you on a trip before to Ireland and . . .

Q: England and France.

A: England and France. So you'd done some traveling. The fact that you were in an American school certainly made the transition a bit easier.

Q: Had you given any consideration to putting us in a Dutch school?

A: I thought it would have been a nice idea, but you were not that proficient in languages as I recall.

Q: I wonder where that came from. So this was an enormous undertaking. You were essentially setting up an entirely new court.

A: Exactly.

Q: Were there snags, things in retrospect you would have done differently? Were there lessons learned? What was the experience like?

A: There are always snags. Nothing operates smoothly. We were dealing with hostile governments. There were language barriers, although we had interpreters, and access to evidence was difficult. Different legal systems were involved. We had to choose third-country arbitrators, who were pressured from each side. It was a formidable task, and the fact that it started up and ran and issued awards and stayed together — it's still operating as a matter of fact — is amazing. All these years people assume that the United States and Iran have had no dealings with each other at all, and it's not true. We dealt with the American government and the Iranian government continuously, and they dealt with each other in connection with these claims at the Tribunal. Also, the Tribunal probably produced more authorities on international law than had ever been produced before. Just the separate opinions, a number of which the government-appointed judges wrote, are a great resource.

Q: And everybody on both sides has honored the work of the Tribunal, that when the Tribunal said, "You must pay," they paid?

A: There was a security account into which Iran had to put money, and sometimes Iran was derelict in putting its money in. But all the claimants who received awards have been paid.

Q: Did this experience change your views on what you wanted to do with your career? How did it shape what followed?

A: I had hoped to get involved with international arbitration. I probably knew more about it than most people, certainly in California, and I remember going back to the law firm. I had been one of the better business-getters there, and when I got back all my clients had been gobbled up by others. So I thought about generating an arbitration practice. The firm really wasn't that interested, and I was a little disappointed in that. I had to start over.

However, if somebody thought about an international arbitrator in Los Angeles or California I would certainly be on their list, and I did get involved in some international arbitrations. I was picked as one involving a Saudi company and a California company, and we went to Saudi Arabia. I remember they had asked about the visa for an on-site visit to Saudi Arabia, and they said if you put "Jewish" down there you won't get in. I wanted to go, so I wondered if I should stand on principle even if no one cared what I put down. I thought about putting down something like "Reform" or "protestant" (with a lower-case "p" to indicate "one who is protesting") — I did put down "Protestant." Then I went to Saudi Arabia and checked into the hotel, and there they ask your religion. You're there, so what are you going to do?

Q: What was that experience like?

A: It was very interesting. I met a person who works now for the Saudi government named Armand Habiby. He was one of my co-arbitrators. He was a Palestinian, and it was a very congenial group. We had a Canadian chairman, Neil McKelvey, who became president of the International Bar Association. I was the party-appointed arbitrator designated by the California company. It had to do with mobile homes sold by the California company to a Saudi company. I had some other international arbitrations. I had some international arbitrations in Paris, Zurich, Munich, and London, and then sometime later after the Iraq invasion of Kuwait had been repulsed, there was set up a United Nations Compensation Fund



RICHARD MOSK AS A MEMBER OF THE IRAN-U.S. CLAIMS TRIBUNAL AT AN EARLY HEARING BEFORE THE TRIBUNAL, AT THE PEACE PALACE IN THE HAGUE (FAR RIGHT END OF TRIBUNAL TABLE), CA. 1982.

containing a percentage of Iraq oil revenues and out of which claimants would be compensated. I was retained by the law firm representing the government of Kuwait to assist it. I was retained partially to help the law firm land the job because many of the people with the commission were alumni of the Iran-U.S. Tribunal. So I made a pitch and talked about our experience and my experience.

I went to Kuwait several times. The first time, I actually flew around the world in three or four days — returning via Asia. This time, when they had the visa question about religion, I said to the law firm, “You fill it out, I’m not going to do it.” So I guess whatever they put in it, got me in. We ended up getting the job. I went over there a couple of times and consulted on various claims by the government of Kuwait. That was an interesting process. It was not a complete adversary system. Iraq did not fully participate, and hearings were truncated. I assisted to help ensure that the evidence clearly supported the claim — especially as to the amount of damages. But

there wasn't enough international arbitration to make a full-time practice, and so I had to do the same things that I did before in practice. I did have to return repeatedly to the Tribunal to deal with cases I had heard under what became known as "the Mosk Rule" — i.e. an arbitrator who resigns should continue on the cases he or she heard. I also heard a case as a substitute arbitrator when one of the Americans was ill.

One interesting thing that happened related to the Tribunal concerned a case I heard involving Reynolds Tobacco in my first stint at the Tribunal. As a matter of fact, somewhere along the line after an award to Reynolds, the Iranians got so incensed they actually started to beat up the Swedish arbitrator, and then they had to resign. It was kind of a messy situation; an odd way for a judicial panel to work. But later on I had a private arbitration involving Reynolds Tobacco concerning the smuggling of cigarettes into Lebanon. Reynolds prevailed, and the Lebanese company filed a lawsuit in France saying I should have disqualified myself because I had sat in a Reynolds case in the Tribunal and had not disclosed it.

I didn't feel I had to disclose that because it was part of a judicial system. It wasn't as though I was picked by Reynolds Tobacco in that case. I was picked by the United States government. In any event, I'm told it went all the way to a high appellate court in France, and it agreed with me. It did not vacate the award; so apparently my decision not to disclose was upheld. Another case in which I was an arbitrator involving Iran and Cubic Defense Systems ended up in the United States Supreme Court on enforceability issues.

Q: Before we stray too much further from Holland, while you were in Holland your grandmother and your mother both passed away. Is there anything you wanted, your recollections of hearing that news, your last contact with your mother? Do you remember what it was?

A: No. I knew she was not in good shape; I didn't realize that she was going to die. And when I was informed that she had died and had made arrangements to fly back, the Iranians asked some of the Americans, "Does he know?" And the Americans found that curious. I guess in Iran, they don't quite flat out tell you, "Your mother died." They beat around it a little bit. They say, "I think it's probably in your best interest to get back now." So they have a different way of presenting the bad news.

Q: What is the last time you remember being with your mother or talking to her? Do you recall?

A: No. I actually don't. I'm sure I talked to her before we went to Holland. She had had this cancer for a long time, breast cancer, which metastasized. But a lot of the women in my mother's family have had breast cancer.

Q: Minna?

A: Minna? Minna died at 92 or something like that.

Q: Can you remember . . .

A: And my grandfather had passed away.

Q: . . . talking to Stanley about it? He was pretty choked up about Minna dying, wasn't he?

A: Yes. It was his mother, and he and his brother Ed had basically supported her all the years, and she was a very nice woman, very supportive.

Q: Didn't he make some comment about being an orphan?

A: I don't recall.

Q: When she died, Stanley said, made some remark about now — I think it was Ed Lewison who told me about that — “now I'm an orphan.”

A: I say that, too.

Q: So you come back from Holland, and you're essentially finding yourself in the position of having to go back and drum up private work and do the same stuff you had been doing before this incredible experience of starting a whole court system essentially on your own. What did you do?

A: As I mentioned, I kept my fingers in the Tribunal by virtue of the “Mosk Rule” and being a substitute arbitrator. I kept going back, so at least it wasn't the usual mundane work. I should mention that Ted Olson, a top aide to the attorney general, came over when I was in The Hague, and I spent time with him showing him the Tribunal. Then when I came back going through Washington, Ted was kind enough to invite me up to have lunch at the private dining room with Attorney General William French Smith and him. I like Ted Olson. He is a very renowned Supreme Court lawyer these days. I also dropped in on Bill Clark, who was then secretary of the interior.

When you have had such an experience, you think most people would be interested in it. But actually most people aren't interested in it. They don't want to hear about it particularly. People in the Foreign Service advised me about that. The Foreign Service officers bounce around from place to place, and people aren't interested in whatever they've done, no matter how interesting it might be. I remember going back to the law firm and walking in for the first time and people would just look up and say, "Oh, how you doing?" And not like, "What did you do, and what were your experiences." There were interrogatory answers waiting for me on my desk, and it was just back to the same old thing.

I helped Stanley in connection with Supreme Court retention elections. In 1966 they had the first retention election involving Stanley. The voters are asked to vote yes or no to retain appellate justices, who first must fill out the term of the justice they succeed, and then they are voted on for retention every twelve years. That was the first time that they mounted a campaign against incumbent justices. It was because of their decision on the California Fair Housing Law, the Rumford Act. The author, Justice Paul Peek, got something like a 42 percent no vote, and I think Stanley got a 40 percent no vote. There was a campaign against them. Prior to that, they had around a 20 percent or 15 percent no vote, so it showed that with any kind of a campaign this was a dangerous area.

I think in '78, he was back on the ballot again, and there was a little bit of a campaign by a fellow named Wakefield, an assemblyman — a law and order thing, but it wasn't too serious. But in 1986, because Rose Bird was on the ballot and very controversial, the conservatives really were engaged. They started off with a campaign to get rid of the "Gang of Four" which consisted of Supreme Court justices Rose Bird, Cruz Reynoso, Joe Grodin and my father. I thought, "This is pretty dangerous," because how hard is it to get from 42 percent to 50 percent?

So I went and talked to some of the Republicans behind this thing. I talked to Stu Spencer, a well-known Republican and said, "I'm not in favor of this at all, but I'd like you to leave my father out of it, if you could, because he knows what he's doing. He'll take care of himself, and you'll have your hands full with him. He's run for office." They liked him personally. He'd always gotten along with Republicans, and he had shown some independence; i.e. not always voting with the "liberals" — his position on

Bakke, and he'd voted to affirm some death penalty cases. And ultimately they left him out of it, and Republican Governor Deukmejian actually recommended a yes vote on him. So he was out of the fray. The electorate ultimately knocked Rose Bird and the other two off, and my father received a 75-percent yes vote.

Q: When you say they left him out of it, so when they sent literature around, when they did advertising, they focused on the three and not him.

A: Right.

Q: Do you think if you hadn't gone to them that might not have happened?

A: I don't know. There were other things that were done. He waited until the last moment to declare if he would seek retention, thereby delaying any possible campaign against him. As the senior justice, by custom, he would normally be just below Rose Bird, the chief justice, on the ballot, an element that could cause him to be dragged down by her. I undertook research of systems around the country to come up with examples of rotating the candidates, so that the secretary of state would have some basis for doing that here. He sent this research to the secretary of state, March Fong Eu, a friend, and suggested rotation of the candidates on the ballot. There being no statutory requirement and armed with the authorities he sent to her, she did so. He publicly announced that his only campaign expenditure would be the postage to send in his filing papers. These were pretty clever maneuvers. Incidentally, the replacements on the Supreme Court now resulted in my father being in the minority on many more cases. He said, however, that the court was much more congenial than it had been under Rose Bird. Stanley's last retention election was when he was 86 years old. This was dangerous because a 12-year term for an 86-year-old could be viewed dimly by the electorate. He wavered on whether to run. I said he should because he would no longer be a justice if he retired or if he lost — it didn't make a difference. He did not want to lose an election. Nevertheless, he gambled and ran. He went around to newspapers to show he was still in good shape. I got him on slate mailers and got him various endorsements. Somehow, miraculously, his age never came up, and he was retained.

Q: We've gone a little bit out of your order here, but I don't know if you wanted to add anything about USC. You started to do some teaching at USC?

A: I taught a class on litigation at USC, and I actually didn't enjoy it all that much, frankly. I worked hard at it, and I don't think I was that good at it, but it was the first time.

Q: Was this a sort of trial balloon for you to see if you might want to go be a law professor?

A: No. I think it was just something to do.

Q: What didn't you like about it?

A: I thought the students were so grade-hungry then. I'd say, well, now we're going to get into an area, and they'd say, "Is this going to be on the final?" I'd say, "I don't know." They'd say, "We don't want to hear about it if it's not on the final." They'd say, "What's going to be on the final?" And I'd say, "What kind of test is that?" It just seemed to be an obsession with grades at that time, and I don't think they just had the burning desire to listen to my great wisdom.

By the way, I did book reviews for the *Riverside Press Enterprise* for a number of years — always non-fiction. I also wrote a number of articles for scholarly legal publications and op-ed pieces for newspapers.

Q: Explain what the *LA Weekly* is, and how you dealt with it.

A: It's a weekly newspaper here that's sort of a throwaway. But it has entertainment and local gossip. For example, my father had had a fund set up for his political career, and he kept it going after he went on the bench. He used to make donations from the fund to political campaigns. He said, "I have to stand for office; this is for my political career, a separate fund that has trustees." But when it came to why it was considered to be inappropriate, I remember Reagan commenting about how judges shouldn't be contributing to candidates, and candidates shouldn't be taking from judges.

They didn't have computers in those days. I went down to the County Hall of Administration to look at the records, and I pored through all of Reagan's contributions, and I found some of them from sitting judges. So I made that public, and Governor Reagan seemed to cease his criticisms.

At one time in 1970 my father thought about running for the Senate, and I took a poll. I paid for a poll out of this fund, and it showed him winning the

Senate seat against the incumbent George Murphy. So he started to make some rounds on radio programs.

He always wanted to be a senator. “But all in all,” he used to say, “Even if I’d won the Senate in ’64 I’d probably have been beaten for reelection by Robert Finch” — who was lieutenant governor. He’d always figure, “Maybe I wouldn’t have won, and then where would I be? I’d have to go practice law,” which is something he didn’t want to do.

Q: At this stage you’re acting really as his lawyer.

A: Yes. But it was a mutual thing. Many of my opportunities were generated as a result of him, and I did what I could to protect him.

Q: Did you ever talk about that with him? Or he wasn’t that type of person, it didn’t seem like, who would — he wanted your help, he’d call you routinely with things that were going on, advice? He wrote you. I remember seeing letters arrive all the time from him. Can you talk about how that relationship matured at all?

A: We used to talk every day or every other day about things, not about ourselves necessarily. If I needed help, he would do it, whatever it was. Usually he didn’t ask for any help. I would just do it. He wouldn’t always do what was in his best interest, so I tried to do it for him. When disclosure laws for public officials were new, I would remind him from time to time to put down small things like this or that dinner.

Q: After the L.A. riots, you had a unique opportunity. Is that what led to the Christopher Commission?

A: After Rodney King. It wasn’t the riots. Rodney King was chased by some police officers, and when he resisted they beat him with their clubs, and this was caught on a videotape. So there was a call for an investigation of the Los Angeles Police Department. Chief of Police Gates had his own commission that he named, including a retired Supreme Court justice, John Arguelles, a wonderful person. Arguelles asked me to be on it, probably because of my father.

Mayor Bradley had his own commission. He named Warren Christopher as its chairman. Finally it was decided to merge the two commissions. Christopher was agreeable. He and I had been running together at 5:00 a.m. at a track and thus had gotten to know each other better. It was

really an outstanding group of people. It included Mickey Kantor, who became secretary of commerce and trade representative; Christopher, who of course became secretary of state; Andrea Ordin, who had been the U.S. attorney and later became the Los Angeles county counsel; and others from academia and the professions. It also had a superb staff of the best and brightest lawyers from this area, led by John Spiegel of Munger, Tolles & Olson. (He is a former Stanford tennis player.)

Q: What was the mission?

A: The mission was to investigate and report on the Los Angeles Police Department and particularly discipline and conduct issues and to make recommendations. It was first to see if there were problems in the police department and, second, to make recommendations on how to deal with them.

Q: The purpose of the Christopher Commission?

A: Was to ascertain if there were problems with the LAPD in terms of the way it treated people, and in turn make recommendations on how to deal with any such problems. My only real contact with local law enforcement prior to this, other than as being a criminal defense lawyer, was former Los Angeles Chief of Police Tom Reddin. His wife had worked with my mother as a real estate broker, and I represented him in his private career. After he left as chief of police he started a security company. So I used to ask him about police issues. I guess those of us who were appointed by Chief Gates were a little more tolerant of Chief Gates than the others were. But ultimately we all went along, and it was a unanimous report. I'd say Christopher did quite an outstanding job. This Commission has had a profound effect on law enforcement in Los Angeles, and has led to a number of reforms.

Q: Talk a little bit about when you started into this. What were your impressions of the police based on Rodney King and everything that had happened? And how did they evolve over the course of this commission?

A: My impressions of the Los Angeles Police Department were that we were and are under-policed in this community. We have fewer police per person than, say, New York, and we have a much larger area to police. I guess it was believed that the police could only control crime under these conditions by being "militaristic." They dressed in black uniforms and

were in good physical shape, were well-trained, and were forceful. The problem was, in being forceful, especially in the minority communities, they antagonized those communities. So it's a difficult balance to draw. The Commission believed there were too many officers who had been disciplined who continued to be out there active in the force and were dangerous in that respect.

I guess the statistics bore that out to a certain degree; we did a lot of studies.

Q: What do you do about that? When you say there were reforms that changed the department, what kind of things were implemented?

A: I think there was an inspector general, methods of tracking discipline, more emphasis on hiring in the minority community and so-called community policing, and other reforms. I don't remember them off the top of my head, but I do know that even to this day when there are discussions of the LAPD in the *L.A. Times* or otherwise, there's always reference to the Christopher Commission and implementing its recommendations. Warren Christopher did a masterful job in bringing about unanimity and in promoting the recommendations. He had a follow-up meeting after the report was issued to see whether or not the reforms had been implemented and helped get a necessary ordinance enacted. We ended up recommending that no police chief serve more than a certain specified number of years or two terms, and it led to the retirement of Chief Gates, who was always a bit bitter about it. I remember that those of us who had been appointed by Gates went to see him about it, and he was angry about the Christopher Commission recommendations. We told him it could have been a lot worse for him and that we did the best we could to keep it as balanced as possible. The *Los Angeles Times* has said of the Christopher Commission that it helped "transform" the Los Angeles Police Department by identifying structural flaws in the department and that it restored the department's reputation after the Rodney King beating. So the Commission has been viewed as successful. (My Christopher Commission papers are at USC.)

Q: You had a case around this time that went to the U.S. Supreme Court. Was that the only case you argued in the U.S. Supreme Court?

A: Yes. A friend of mine from college was having his nails done, and the lady doing his nails said that her boyfriend or erstwhile husband, whatever,

had a case up in United States Supreme Court. So my friend said, “Why don’t you go see Richard Mosk?” She said, “Mosk, Mosk! There’s a judge named Mosk who wrote an opinion that led to my husband’s release from prison,” which was the genesis of this case.

My father had written an opinion that said there was a lack of substantial evidence that Juan Venegas had murdered somebody in Long Beach. Venegas got out, and then sued the City of Long Beach for, among other things, violation of his civil rights by virtue of its police arresting and having him prosecuted. He hired Johnnie Cochran of O.J. fame (trial of O.J. Simpson). And Cochran struck a deal that it was a 40-percent contingency and didn’t cover the appeal, or any appeals. It was sort of like shooting goldfish in a bowl. It was a couple of days of trial, and Cochran didn’t even try it; one of his associates tried it. I think they won \$2 million plus attorney’s fees. The court awarded \$135,000 in attorney’s fees, something like that. And Cochran said, “Thank you for my \$800,000 and something; and if you want me to handle the appeal that will be more.”

Venegas used the lawyer who had represented him in the original criminal appeal that reversed his conviction. The case involved Cochran’s right to the contingency. This lawyer now lived in Sag Harbor, New York, and was a one-man operation. Ultimately, the lawyer filed a petition for certiorari to the U.S. Supreme Court on the issue of whether a contingency could be superseded by an award of reasonable attorney fees in a civil rights action. It was granted because there was a conflict in the circuits as to whether or not the award of attorney’s fees was the exclusive amount of attorneys’ fees or whether or not a lawyer could still get his contingency notwithstanding a Civil Rights Act attorney fee award.

When Venegas called and said I’d been recommended for a case in the Supreme Court, I was thinking, “He just has a petition for cert.” When he said cert was granted, I said, “Come on over!” So he did come over, and of course the lawyer in New York was upset because this was his chance to argue in the Supreme Court. So we reached an accommodation whereby he would be first on the brief, but I would do the oral argument. We had to fend off solicitations from so-called Supreme Court lawyers who were trying to get another case on their résumés.

I went back and argued, and we lost 9–0. The idea that at that level lawyers win or lose is misleading. Even the most brilliant appellate advocates

lose, and the weakest lawyers win. At the Supreme Court level, the Court has all the resources to review the records and do legal research. That isn't to say effective advocacy plays no role. But to say a lawyer has won or lost doesn't mean much. At least that is the way I looked at it.

Q: But you went in to the Supreme Court and it was your time for oral arguments, and how much of your argument did you get out of your mouth before they started firing questions at you?

A: Almost immediately. They asked a lot of questions. We didn't have the money to afford or pay for a mock hearing, but I did one or two at a law school and other places. But . . .

Q: Who was the toughest justice?

A: Obviously, they weren't going with me, so they were all pretty tough. Justice Scalia asked some questions, and he was good. He was smart, right on top of it. The thing I was disappointed in is that even if under the statute the award of attorneys' fees was not the exclusive amount that an attorney could get, and even if the lawyer could get his contingency, I felt they ought to have addressed the question about whether or not the court below had the inherent authority in regulating fees to determine if these fees were excessive. The court had determined that \$135,000 was a reasonable amount of attorneys' fees; that would suggest that \$800,000 plus more for an appeal was unreasonable. But their position was, a deal was a deal, and that's the deal he made.

Q: Can you describe at all the experience of going to the Supreme Court, and there's a lot of pomp and circumstance that accompanies that?

A: I'd spent a lot of time in the Supreme Court building when I was at the Warren Commission. As I mentioned, the next time was when I was in the U.S. Naval Reserve JAG unit, and they flew us back to be sworn in.

That was the last time I'd been in there. I think I spent some time the day before looking at arguments just to see what they were like. Because I had so many questions thrown at me, I ran out of time, so I didn't have any time for rebuttal. I should have tried to save some time. They don't give you any leeway at all on time, at least in those days. I understand that Chief Justice Roberts is a little more lax about that. In those days when the red light went on, the argument ended. I remember Chief Justice Rehnquist

was having back problems, and he'd go behind the curtain and lie down during part of this argument, which was disconcerting.

By the way, there is one thing I forgot to mention about arguing that case in the Supreme Court. I've recently inquired as to whether or not there is any family that has had three members of its family argue before the United States Supreme Court. I've been unable to find that answer.

But I argued a case. And my father, although he was not listed as the oral advocate, he did in fact argue, at least introduced counsel and took questions, in *Arizona v. California* — a water case before the U.S. Supreme Court. And my Uncle Ed argued two cases, the *Konigsberg* cases, which involved the right of the State Bar to require an attorney to answer whether or not he had been a member of the Communist Party or whether he could refuse to answer any questions about his affiliations.

So we did have three members of the Mosk family argue before the U.S. Supreme Court, and I just recently wrote the Supreme Court Historical Society to ask if we were unique. They said they had no indication that any other family had but didn't know; they said they would note my observation. That's just a little sidelight.

Q: After this period you were presented with an opportunity to work in a totally different area, in the Motion Picture Association. How did that come about?

A: In 1994, my college and law school classmate and law school roommate Bill Kartozián got me that position. I'd helped him get a job early in his career with the Attorney General's Office and then United Artists Theatre Circuit as a general counsel. I had been offered the job, but turned it down and recommended Bill. As I mentioned, had I taken it, I would have become quite wealthy. Bill also had me appointed to the Stanford Athletic Board, which I enjoyed. Bill ended up owning his own theaters and making a tremendous amount of money. He was also a head of the National Association of Theatre Owners, NATO. They used me as an attorney from time to time. NATO and the Motion Picture Association were ostensibly the co-operators of the rating system for motion pictures, the "PG" and "R" and so forth, although it was really administered in large part by the Motion Picture Association.

Jack Valenti was looking around for a new chairman of the organization, and Kartozián recommended me. Ultimately Valenti retained me.

Valenti had been an aide to President Johnson. He became head of the MPAA (Motion Picture Association of America) and made himself a celebrity. The MPAA is a lobbying organization, so Jack, as a celebrity, was very effective. He was a flamboyant fellow and quite bright.

The rating system is composed of parents who watch movies and give them ratings based on what they think is appropriate for children. It was a brilliant process conceived by Valenti, because in the earlier days there were government censors. The problem was, they had censors all over the country, and different censors and different ratings, and it was a mess. Actually, the Motion Picture Association itself was a heavy censor in the past — the old Hays doctrine, which in effect dictated that there could be no bad language and no suggestion of sex. (Hays was the former head of the MPAA.) Ultimately the system started breaking down, with movies like *Who's Afraid of Virginia Woolf* and others that came out. Valenti saw this happening, and he wanted to get rid of the local government rating censors. In order to get rid of those censors, Valenti came up with this voluntary rating system. He said, "Leave it to the parents to decide, and we'll give them the information, rather than government."

Ultimately government censoring bureaus disappeared. My job was to hire the parents and to oversee the ratings and to see that the operation ran well.

So I did it. I used to go from my office to the MPAA. It had its own theater. We had parents — they had to be parents — but some of them had been there for a number of years. The idea was to have some turnover, but there often wasn't the turnover. We needed senior people who had a history with ratings and could deal with producers and studios. I would go watch a movie or two movies, and I would deal with people who would complain or come to see us before the ratings to see what needed to be done in order to get a certain rating.

Q: Who would come to see you? Like the director or the producer?

A: Yes, either or both. Spielberg came and Katzenberg and . . .

Q: Can you describe what an interaction like that was? Do you remember what the movie was that Spielberg came in on?

A: I think he came over on *Saving Private Ryan* because . . .

Q: It's a very violent movie.

A: Yes, there was some war violence in there, and he wanted to make sure that it wouldn't be a problem or what could be done.

Q: So how did he do it? Do you remember what he said?

A: Well, he talked about it, the historical aspect of it, and I don't remember quite the details but ultimately . . .

Q: But he came and said, I'm making a movie that's going to depict in a realistic way the D-Day landing and the war?

A: He'd already made it. He was coming over either as we saw it or after we saw it. They can always edit certain things in a way to get rid of anything that might be objectionable.

Q: Do you remember your reaction to that movie when you watched it?

A: Yes. I thought it was — it was violent, but I thought it was a very well done picture.

Q: So he came over to make sure that it was going to get a certain rating?

A: Yes. He wanted to make sure it did not get an "NC-17." If it gets an "NC-17," which is "No Children Under 17," that results in a death knell financially in this country because many theaters will not run pictures that are "NC-17" (even though *Midnight Cowboy* won an Academy Award with an "X" rating — the predecessor of "NC-17"). In other countries, major theaters run pictures restricted to adults.

Q: So he wanted to make sure that you weren't going to push it over the top because of the violence?

A: Right. He was very pleasant and likeable.

Q: And do you remember what Katzenberg came over . . .

A: No, I don't remember what . . .

Q: These guys would come in and they'd essentially try and justify to you if there was violence or explicit content in the movie why it needed to be there and how they could edit it in such a way that the ratings . . .

A: Right. If we gave someone a stricter rating, they'd want to see what they could do to satisfy us. And sometimes there was an appeal process, and

that I always found somewhat disagreeable because we made our decision, and why should there be an appeal to industry people? The whole idea was what parents think. On the other hand, Valenti wanted to make sure when he put this in the system that there wouldn't be some great injustice. So this was supposed to be a failsafe — at least from the viewpoint of producers.

I thought if you want to have parents do it, then parents should do it and not some other board.

Q: Any particularly memorable movies that came up that you objected to or aspects that you did or . . .

A: There were issues that I would discuss with Valenti. For example, should smoking prevent a picture from being a "G" or a "PG"? We discussed whether gay sexual activity ought to be viewed differently than heterosexual activity, and he felt not, although realistically speaking, the average parents would probably object more to gay sex. On the other hand, I suppose if you go back in time you could say the same thing about race. It wouldn't be right to be harder on the picture because there was black-and-white sex as opposed to white-and-white sex or black-and-black sex. So maybe the same principle should apply to gays and heterosexuals.

So those were issues I remember discussing with him, and there were specific pictures where there were difficulties — Clint Eastwood's *Bridges of Madison County* for example, because of language. There was one fellow named James Toback, a director, who was particularly critical of me and the Board when he didn't get his way, and he was quite outspoken. He has done a few well-received pictures.

Q: These were big, cultural, 30,000-foot-view kinds of questions. Did you leave the Board with any feelings about how violent movies are and violence in the culture versus the sexual content of movies? Did you leave with any feelings about where we are as a culture on those topics?

A: There used to be 70 percent of the pictures "R"-rated, and now it's flipped so that 70 percent are "PG-13." Certainly sexual mores have changed substantially. In the old days if a woman just let her hair drop, then you knew what was going to happen, and nowadays they go into pretty explicit activity. As far as violence is concerned, pictures have gotten more violent, no question about it. People feel that maybe we were harder on sex than we

were on violence. I don't think so, but I do think that the average American parent would probably be more concerned about sex than violence.

They also have a language rule about no more than one use of the F-word if it were to be a "PG-13," with certain exceptions. There were arguments over that. I remember directors saying, "Well, they had their focus groups, and when they used the F-word the people liked it better," and so they tried to justify the use of the F-word. People found that odd. Why should language be a disqualifier when specific sex or violence wasn't? Valenti's view was that middle America reacted strongly against profanity in movies.

Those were all the issues, and there have been some scathing reviews of the rating system and the raters. But people seem to be satisfied with it. As Jack Valenti said, "It's worked for a long time."

I made the ratings panel more diverse. While I was there, there was little controversy and the system ran efficiently and economically. We tried to keep the religious community involved so that it would support the system. I also promoted the system, including slides and trailers in the theaters and with websites. When I left I recommended some further improvements in the system, but I do not believe they have been implemented. There are things that can be done to deal with criticisms and to make the system better. It is true, as Valenti has said, the system has endured. That is why he was slow to change it. But, as we are learning, one cannot take anything for granted. Institutions and beliefs change. Everything has to adapt to be relevant. That includes the rating system, if necessary.

Q: This was in many ways a desirable job. Were there things about going to the movies every day that got burdensome or tiring or what was your reason for leaving ultimately?

A: Well, people used to say, "Aren't you bored watching all those movies?" A lot of them were just straight-to-video movies. I'd say, "Sitting in depositions isn't so interesting either." My grandchildren might be impressed that in my first year with the MPAA, *Entertainment Weekly* rated me number 84 of "Hollywood's Hottest Players," ahead of the actress Meg Ryan. But after six years there, ultimately the decision was made that perhaps there was no imperative to renew my contract. (My MPAA papers are with the Academy of Motion Picture Arts and Sciences. The MPAA wants to keep some of that material confidential, and I have allowed it to do that.)

I was doing a lot of things. My firm had merged into an Oakland firm called Crosby Heafey, and I didn't go with it. I continued to act as an arbitrator or lawyer in domestic and international cases.

I had been reappointed to the Iran–U.S. Claims Tribunal in 1997 by the Clinton Administration. Rather than living in Holland, I decided to try to commute, which I did once a month. So I had that, and I was doing some arbitrations and I was doing the motion picture work. I think Valenti decided that it was time for a change (he had already elevated Joan Graves to be my co-chairman). That was fine with me. I was probably doing too much at that time.

Q: You were essentially doing three full-time jobs at the same time.

A: Correct.

Q: What made you start your own law firm?

A: This happened in 1987. It was part of my “change for change’s sake every now and then.” Ed Sanders who had been in the Carter White House and my old friend Irwin Barnet asked me if I wanted to join the firm they had established. They originally had been partners in Irell & Manella. It was a small firm, and I decided to do it. The practice changed. We didn't have a mass of associates, so I had to do a lot of work that I normally would divert to young associates. But on the other hand, we all shared equally, and it was a congenial group. It was not as large a practice, but I found it to be interesting.

Q: Was there a guiding mission for the firm, what kind of work you guys wanted to do, your goals? Did you want to build it into a big L.A. firm?

A: No. On the contrary. The idea was not to expand. We added somewhat, but there was not an idea of growing into a large firm.

Q: And was it successful? Did the firm do well?

A: Yes. It depends; it's all relative. I mean big firms make much more money, but it was certainly a decent living.

Q: And you had a case with the Lakers when you were at the firm?

A: Yes. We represented the Los Angeles Lakers basketball team on behalf of Vlade Divac who played for the Lakers. They were both on the same side in this dispute. He was a Serbian star, who played on the Lakers, and a

team in Serbia claimed that he signed an agreement with it. And so it sued. It turned out that it had fraudulently placed his signature on a contract.

We figured it out that they had actually superimposed his signature on an agreement. He was a very nice person, and I remember that some witnesses came over from Bosnia-Herzegovina, and they were giants. I said, "You're awfully tall people." One said, "We are among the tallest people in the world." I guess the Dutch are the tallest behind maybe tribes in Africa, such as the Watusis. But in any event, they are very tall people and they produce a lot of basketball players.

Q: You went back to the Tribunal?

A: I was appointed to go back on the Iran–U.S. Claims Tribunal. Warren Christopher was secretary of state. (It is amazing how people seem to enter and re-enter one's life at various periods.) I guess those in the State Department's Legal Adviser's Office thought I performed well enough in my first stint. Bill Clark and Alexander Haig had praised my work.

Q: Had things changed there?

A: When I went back to the Iran–U.S. Claims Tribunal, many of the same people were still there. It was suggested, perhaps by Secretary of State Christopher, that I had tried to speed up the process during my first tenure, but now that the U.S. was generally a defendant, I should slow down. I'm afraid that was not my nature. There were changes, and the president was now a Polish fellow by the name of Krzysztof Skubiszewski, who had been anti-Nazi during World War II, and had been anti-Communist during the Soviet expansion, the Iron Curtain. He was a very courageous guy. He was a tough nut and very bright, and an expert in international law. He had been the Polish foreign affairs minister under Lech Walesa. He had a rough time with the Iranians. The American judges included Charles Duncan (whose father was the original Porgy in *Porgy and Bess*), a civil rights pioneer, government lawyer, and law school dean. Charles Brower, a leading international arbitrator also served on the Tribunal. George Aldrich was still there. I had helped Brower succeed me in 1984 and to succeed Duncan. The cases now pending were less of the claimant cases and mostly the disputes between the two governments. There were billions of dollars at stake, and at some point, maybe after I'd left, I said, "The Iranians have not lived up to all their obligations all the time, and this may be a

no-win situation for the United States.” The Tribunal is credited with many accomplishments. I hope its longevity and handling of the intergovernmental cases do not diminish those accomplishments.

But the U.S. opted to remain involved and engaged in this even though I think they had grounds to pull out (failure to make payments and to replenish the Security Account, and meritless, repetitive challenges to third-country judges) and avoid possible liability. I discussed this with the legal adviser after leaving the Tribunal. It is hard to imagine the U.S. appropriating money to pay Iran. After leaving office, that legal adviser issued the same warning in an op-ed piece. Perhaps he could have done something about that when he was in office. When he was legal adviser he expressed concern about the image of the United States if it is not seen as complying with its international obligations — certainly a tenable position (although not paying awards against it would have the same result).

There were some interesting cases that came up after my return involving disputes between the central banks, questions about the right of an Iranian retiree for his American dual-national wife to claim some of his pensions, and others. I’ve been very fortunate in the legal assistants I had. My first legal assistant was a fellow by the name of Mark Clodfelter who is a very prominent attorney. He had been a Michigan legislator and White House Fellow; David Caron, who is a professor at Boalt Hall; and Tom Ginsburg, a professor now at University of Chicago. I also had one who is a law professor at Wisconsin and another who was with the Justice Department. I’m fortunate to have had the legal assistants that I had there. Many of the American legal assistants have become part of the next generation of legal scholars, especially in international law and international arbitration.

Q: Did you have contacts with other international institutions in The Hague?

A: Yes, I knew some of the International Court of Justice judges and some of the judges at the Yugoslav war crimes tribunal (including former D.C. Circuit Judge Pat Wald). There were a number of international legal institutions in The Hague. One American ambassador who had us over was Jerry Bremer, whom President Bush first sent over to run matters in Iraq.

Q: Over the course of this period after your mother died, Stanley twice remarried.

A: Yes.

Q: Did you want to talk about that?

A: No. It's always tough for a son to see his father or his mother remarry. It's a difficult situation, and these were not the easiest of relationships, but nothing of great significance.

Q: Also during this period I guess is when Stanley passed away.

A: Yes. He started to feel as though he could not perform well. He stayed until he was 88, almost 89, and then he determined that he was going to retire. We talked about what he was going to do. He'd written some chapters, and he'd submitted them for a book, but he didn't get any bites.

Q: A memoir?

A: A memoir. The chapters have been published in *California Legal History*, as has his correspondence with his brother Ed during World War II.

Q: He was showing some signs of his aging, right? He had a little fender bender in the parking lot and he seemed a little depressed about growing older?

A: Yes. I remember he wanted to drive, and he finally cracked into a state car in a parking lot, and I told the chief justice, Ron George, "You should take the state car away from him," which he did. The Highway Patrol would pick him up and take him to work. I thought that was great. I'd prefer not to drive myself, but he liked the idea of driving. It was just like my mother; I was in Holland when he died. I had to fly back immediately for that. He died the very day he submitted his resignation from the Court.

I must say I took a role in getting some buildings named for my father. With the help of Supervisor Zev Yaroslavsky, the main civil county courthouse was named the Stanley Mosk Courthouse, and State Senate President John Burton helped get the main library and courts building up in Sacramento named the Stanley Mosk Library and Courts Building. And recently with the help of Steve Zimmer on the Los Angeles Board of Education, a Los Angeles public elementary school was named after Stanley Mosk. I have helped the school financially and otherwise. I've tried to help a couple of authors do a book on Stanley, which is due to be published in a year or so — a biography of Stanley Mosk. The authors are Jerry Uelmen, the former dean of the Santa Clara Law School, and Jacqueline Braitman, who has taught history.

Q: Why did you feel it was important that he be remembered this way, with his names on these buildings and on the school? What was the significance to you for that to happen?

A: I thought he was a major figure in California history. I'm not sure he received all the credit that he deserves — certainly not in some of the books on California history. I just felt that he had devoted sixty years to California, and he was involved in every aspect of California government and politics for that whole period of time. He was and is considered one of the leading state court jurists, and many of his cases have been reprinted in law school casebooks. He was a trailblazing attorney general. So I thought he deserved it. And he and my mother were good parents to me.

Q: Gray Davis, then the governor, came to his funeral, and did that event plant the seeds for your appointment to the court?

A: I was on the Tribunal, and I was doing these arbitrations, and I thought, "What's my next act?" And so I sent in an application for a Court of Appeal judgeship, recognizing that Gray Davis had the same policy, that everybody had to be a trial court judge first. But I thought I'd put it in, and I mentioned that I had been a judge on the Iran-U.S. Claims Tribunal, which tried cases, and I'd been an arbitrator. My cousin Jon Mitchell had influence with Gray Davis, and I think my father had talked to him before he died.

I was interviewed by Burt Pines who was his judicial appointments secretary. I had helped with Burt's successful campaign for city attorney years earlier. I said, "Burt, we've known each other for forty years." And he said, "I have to interview you anyway," and he asked me about my positions on matters. Also, the death penalty was something that Gray Davis had made a litmus test. So I thought, "Here we go again, like Dianne Feinstein." But I must say, when Burt got to that question he just skipped over it. I think they were a little worried that I'd be too liberal or radical or like Rose Bird. They were very risk-averse on judges. Jerry Brown's appointment of Rose Bird remained an obstacle to his political career — although not insurmountable. Jerry now says — at least to me — he should have appointed my father. Because of the Davis Administration concerns, I think they ultimately put me in a division in which they said I couldn't do any harm — I guess meaning a conservative one. I think considering older,

more experienced lawyers for judicial positions has merit. They are not as likely to leave to become private judges or arbitrators.

Q: I don't know what the coinciding timing was with Stanley passing away and you . . .

A: Shortly thereafter.

Q: Did Stanley know this was in the works?

A: I don't think so. I mean, I think he knew that I had an application, and he'd certainly put in his good word for it, but I don't know that he knew anything was imminent.

Q: When you were sworn in to be a judge, there was something that happened with Stanley's judicial robes, right? Did you wear them for your first appearance?

A: Yes, and I still wear them. I'm too cheap to buy my own. They fit. Ron George, whom I've known for many years and who was the chief justice, was kind enough to swear me in, and I had to go through the JNE [Judicial Nominees Evaluation] Commission, which is a commission of the State Bar that rates prospective judges as well-qualified, exceptionally well-qualified, qualified; or unqualified; and fortunately I was rated "exceptionally well-qualified," so that helped.

Q: Obviously you spent a lot of time around the courts, you clerked, you'd been on the Tribunal. Were there any aspects of becoming a judge that surprised you or that caught you off-guard or unexpected? What was it like, going to the court for the first time?

A: When I was on the Iran-U.S. Claims Tribunal, we orally deliberated cases, maybe endlessly — we talked and talked them out. I don't know how many minds were changed, but nevertheless that seemed to be the process. Certainly in the arbitrations — tripartite tribunals — I've been involved with, we spent a lot of time with all three arbitrators deliberating. It did surprise me, at least in my division, that there wasn't much formal oral deliberation. It was mostly done in written form.

I was appointed a couple of times to sit *pro tem* on the state Supreme Court, one case being the *Intel-Hamidi* case, which had to do with whether or not somebody could be stopped from sending e-mails to employees. There was an ex-employee who bombarded all the employees, and Intel

wanted to stop that. I felt they could, and wrote a dissenting opinion, in which the chief justice joined.

But my point is, even at the Supreme Court, the deliberations seemed to be perfunctory. The justices had staked out their views in writing, and there really wasn't much discussion in the formal deliberations. In a way, maybe it's not efficient to have a lot of oral deliberations, but on the other hand I think it's desirable. Some divisions in our district do have significant deliberations, and some don't, and ours does not. We talk among each other one-on-one occasionally, but for the most part things are done in written form.

Q: When you went to sit in on the state Supreme Court, what was that experience like, having a Mosk back on the Supreme Court?

A: It was interesting. The cases that they have selected to be heard are ones that are of some significance. When you're in an intermediate appellate court, you take them all. The emphasis in the intermediate appellate court has gone more heavily criminal and dependency in recent years. I think arbitration has sucked out a good number of the important civil litigation cases from the system. This may hinder the development of the law. A lot of the civil litigation is employment-type cases. So the issues are not quite as fascinating all the time as they are on the state Supreme Court. The reduction in significant civil cases could adversely affect the development of the law.

When I was appointed to the court, one thing I had to give up, in addition to resigning from the Tribunal, was any type of arbitral role. I'd been put on the panel of the Court of Arbitration for Sports. It deals with international sport or athletic disputes. So I was designated, at least as an alternate, to be on the panel at the Salt Lake City Winter Olympics. And when disputes arise over doping or whatever, and they need immediate arbitrations to find out who gets the gold medal or who is disqualified, I could have sat on a panel. I was pretty excited about that, but I had to give that up by going on the Court of Appeal.

Q: Did you get a chance to do it?

A: I never got a chance. I also was involved with the U.S. Anti-Doping Agency, which dealt with athlete doping issues — I had to resign from that also.

Q: How long have you been on the Court of Appeal now?

A: I've been on over ten years, since 2001. I've had to stand for a retention twice, and that's always a nerve-wracking thing because you never know what might happen. There has been some opposition to the Democrats, for example. It's always sort of annoyed me that some of these commentators on the radio come out and say, "Vote no on all the Democrats who are justices." Why? I mean, why would you vote no on Democrats? Have they not been good judges? We don't get into partisan issues, and it's not like we're a Supreme Court. We're not often deciding questions on social values. But nevertheless they do it. And I must say, my no vote has been a little higher than some of the other justices, maybe because my name is well known as being a Democratic name, so Republicans vote against it.

Also, it's now an unusual name. One of my colleagues is named Orville "Jack" Armstrong, and he always gets the highest total votes — great name. Ethnic-sounding names have lower totals. Women get more votes than men. People with funny names end up with lower totals. People don't know anything about the justices, so it's sort of an irrational system.

Q: How many justices are there in your division of the appellate court?

A: In my division there are four justices.

Q: How many divisions are there?

A: There are eight divisions in this district, which covers several counties.

Q: Do you always work with the same justices?

A: Same division, the same four. Three of those four sit on any one case.

Q: What's that experience been like?

A: The ones that I sit with have different backgrounds than mine. We get along fine. Socially we don't get together. We have different philosophies. They've been appointed by Republican governors. One has worked in a law firm, the other two have been long-time judges. It's a group of different types of people. I generally socialize with justices from other divisions. Some from the different divisions and I lunch together almost every day. It is important that appellate justices, like trial judges, have a good temperament. They have to get along with each other even if they have different points of view and philosophies. The book *Scorpions* by Noah Feldman

about the personal conflict of the Roosevelt appointees on the U.S. Supreme Court highlights this. I make a point in my dissents of generally not arguing with or even mentioning the majority opinion. I just set forth my point of view. Biting and personal opinions do not enhance the judicial image.

Q: Are there any cases that have come before you that are particularly memorable? Have there ever been any surprises in the courtroom, anything that's happened in the courtroom that you remember that stuck with you?

A: I sat on a case in another division because somebody was disqualified, which had some notoriety. It dealt with whether or not somebody could sue a law firm for malicious prosecution. In that case I said no, but I was a dissenter. It generated a lot of interest by lawyers who felt this made it too risky for lawyers. I tended to agree, but the Supreme Court did not grant a review of that case. Some cases that I've had have gone up to the Supreme Court, so they have obviously been of some consequence. I have published opinions on virtually every area of the law — civil, criminal, family law, dependency, and others. Most of our cases are unpublished, but can be obtained on Westlaw or Lexis. The criminal and dependency cases often contain depressing fact scenarios — gang evidence, child molestation, etc. Every now and then we have a case for which there is little or no authority on point. For example, in one case a woman's identity was stolen and used to purchase a house. The lender foreclosed, but the value of the house had increased. The issue was who was entitled to the proceeds above the loan amount from the sale of the house. The lender did not claim it. The trial court gave it to the county. We awarded it to the woman. It is rare to have such a novel case.

I am fortunate to have a fine staff. My assistant, Lori Jankovic, started with me in 1980. Our research attorneys generally stay for years. As I mentioned, unlike when I clerked, the California appellate courts generally no longer use recent law graduates for a one-year clerkship. I guess it is felt it is more time-consuming to train a new clerk every year. Some use law student externs for a semester. I have done so but generally do not because I teach at USC.

Q: Do you ever find yourself moved emotionally in a criminal case?

A: No. I find the sentences are so draconian — so tough. These Three Strikes rules operate sometimes in a fashion that seems unfair. But there it

is; I carry it out whatever it is. But sometimes I cringe at some of the criminal sentences. And we're paying the price now because the jails and prisons are overcrowded, and the prisons and jails have turned into basically taking care of the mentally ill.

Q: What's the most frivolous crime that's been someone's third strike that they've wound up going to prison over?

A: Well, we've seen some that have been like shoplifting or stealing a couple of videos, and because it's their third strike it's a life sentence. The U.S. Supreme Court has upheld these sentences.

Q: All this time you maintained a healthy tennis career during all of this, and your friendships have endured.

A: Yes, all of us who grew up together and played against each other and still socialize with each other. My closest friends emerge from the tennis world. We still play. Most of us are still alive and able to play, and I've known these people for fifty, sixty years. It's quite remarkable. We still get together and have social events together and play tennis together, and it's a great experience. The tennis accomplishments of my group include a variety of junior, collegiate and senior national championships, high rankings in the U.S. and even a Wimbledon quarterfinalist. Two won NCAA singles, doubles and team championships. Another won the team championship. One won both the 15's and 18's national championships. There are at least 5 All-Americans and 4 that were ranked in the top 13 in the U.S. Quite a group. And I still am in touch with Leslie Epstein. His son, Theo, was the wunderkind general manager of the Boston Red Sox and brought them to the World Series to overcome the "Curse of the Bambino." He is now with the Chicago Cubs. I see them from time to time.

Q: Tennis is the glue?

A: Tennis is the glue. I did play basketball, but had too many injuries.

Q: You have mentioned an Iranian lawyer?

A: When I was at the Tribunal, a lady appeared representing the Central Bank of Iran, the Bank Markazi, and she was very good — spoke perfect English, and she was there arguing cases. We thought very highly of her, and then she was gone. And the rumors were that maybe she was a Bahai or some reason why she was yanked back. In any event, I bumped into her

here in Los Angeles, and she had immigrated and married a doctor here. I've stayed in touch with her. She interprets for the Nobel Peace Prize winner, Shirin Ebadi, whom I have been with on a couple of occasions.

I also stay in touch occasionally with former Massachusetts Governor Mike Dukakis when he comes to town to teach at UCLA. We get together sporadically.

Q: How did that start? How did you know him?

A: I met him through Ed Sanders, who was active in his presidential campaign. He was the Democratic nominee for President in 1988 and would have been a fine President. He is smart and principled. Then I heard he was teaching part-time at UCLA, so I called him up, and we routinely have lunch when he comes out here. I also saw Warren Christopher until he died. We went to Stanford-UCLA basketball games, and I had lunch with him once in a while. I admired Christopher. He always exhibited the perfect temperament and had great judgment.

Q: Despite your earlier experience teaching law at USC with the grade-grubbing students who always wanted to know what was going to be on the final, you resumed some teaching. What brought you back to that?

A: I gave a course in international arbitration in Brisbane at the University of Queensland, T.C. Beirne Law School. I gave a course at The Hague Academy of International Law, which is considered a prestigious undertaking. My course was published in its publication. I gave a course at Duke University Law School in Geneva. I'd lectured around in different places on international arbitration and was able to get some interesting travel in the process.

I was asked to teach a class on international arbitration at USC, and I decided I really wasn't interested in teaching law there. But I said maybe an undergraduate class. So I have taught a freshman seminar, and they said I could do it on any subject I wanted. I said, "Fine, I'll do it on sports," because I'm kind of a sports junkie. They said, "You are a judge." So for the first few years I did teach somewhat law-related matters, Law and Morality. And then taught sports for a couple of years. And this last year I have gone back to the Law and Morality. So I keep varying it from time to time.

Q: Is that a for-credit course?

A: Two units, and it's a pass/fail. I don't have to mess around with exams or papers.

Q: What do you teach them about sports?

A: Oh, I teach them ethical and moral issues that arise in the sports world, and legal cases that emanate from sports. I've had plenty of cases myself when I was in private practice.

Q: Can you share one of those issues you teach? What's your favorite?

A: Well, there were some that actually came up before our court, when for example a college baseball player was told by his manager to retaliate and aim for the head of an opposing batter, which is called "head-hunting." I joined an opinion which said the college could be sued for that action — that it was actionable to seek to injure an opposing player — just like in hockey, if you take a stick and bash somebody. It went up to the California Supreme Court, and it held that the batter assumed the risk. Head-hunting is part of the game. I disagree.

Then there was a case in a different division in which a batter used a metal bat, and the pitcher got hit by the ball off the bat. His claim was that he assumed the risk of a normal metal bat, but this metal bat was of some composite so the ball came off the bat much faster, just like hockey sticks these days, and so he did not assume that risk. The court held that the pitcher stated a cause of action.

So those are interesting cases. Then there are morality cases or ethical cases. A USC player is credited with a game-winning touchdown for catching a ball in the end zone, but actually the ball first hit the ground. He rolled over it and held it up as if he caught it. He said a couple years later he hadn't caught it, but he was trained by his coaches to roll over and hold it up as if he had caught it. That raises the question about whether this kind of activity is character building. Is it something that we ought to do?

Most people think that's part of sports, just like flopping in a basketball game or . . .

Q: Taking a dive in a soccer game?

A: Yes, the fake injuries, and all that sort of stuff. In sports, we no longer really adhere to the fiction that it builds character. I think sports is a wonderful thing. My old partner Ed Medvene used to say, if he's going to hire

somebody, he wants somebody who's competed, whether it be in sports or violin competition or something; if you've gone through competition you're going to be a better lawyer and maybe a better — more effective in your occupation.

Q: If your grandchildren or great-grandchildren see this someday, are there lessons from your life that you want to share with them, or advice or guidance that you have for them?

A: You only go through once, and seems to me the idea is to try to change course every now and then, experience as much as you can, whether that be different jobs or something else. I haven't changed wives. We took one of these private jets around the world, and went to the wonders of the world, three and a half weeks, and it was a great experience. We went with my old friend Justice Arthur Gilbert and his wife as part of a group of about eighty people. I just think as many things as you can experience, you ought to try them. Most of our vacations are not so elaborate. Every year for decades, we have gone to Lake Sunapee in New Hampshire — a place we really enjoy. There, by the way, we became friendly with a Boston lawyer who became ambassador to Norway. We recently visited him and stayed at the residence in Oslo.

I pointed out, many of the great industrialists, the Armand Hammers and Norton Simons, are risk-takers. I never have been much of a risk-taker, and I've always felt that avoiding calamity and disaster and pain and poverty is key. I'd rather not risk having those situations even if I forego gaining great wealth and great success. I was a little more cautious because I think so few people who do gamble actually win the bet or the gamble.

Someone can say, "I want to be a Supreme Court justice." But how many people get to be a Supreme Court justice? Or, "I want to be head of a Fortune 500 company." How many people get there?

I guess a lot of people have gone into banking and Wall Street, and many became wealthy — or if you go to Silicon Valley, certain areas and occupations. But it's difficult out there. Finally, I can remember each instance when I didn't do the right thing. I hope there are not many. But the point is to do what is right and proper.

Q: Your generation — I think about how you and Uncle Stan (husband of Mom's identical twin) both went into law, and yet all of his children and all

of your children went into careers that aren't big money-making careers, that are more for the love-of-the-job kind of careers. Is there a right way, do you think? A better approach?

A: Law to a certain extent was sort of a default choice. I did not think I was adept at science or business, and I ruled out academia. So what does that leave for me? To follow one's passion is again risky. If you want to be a violin player, the chances of becoming first violin in any major orchestra are very slim. If you want to be a ballet dancer, the chances of getting into a top ballet company are very slim. The competition now for anything is so difficult. At least with a profession, whether it be law or medicine or business, the chances are that one is going to make out all right. Law leaves the opportunity for government service and judgeships and other possibilities. The legal practice has become lucrative for some, but has become a much more hazardous occupation in the sense that success is not based necessarily on talent but on business-getting ability.

You might notice how the same people keep popping up in my life. Keeping in contact with friends is psychologically satisfying and can be rewarding, personally and career-wise. By the way, health is a critical matter. There is longevity in the family, but also heart disease, cancer and digestive problems. So healthy living, diet, exercise, and control of stress are important ingredients for a successful life.

Q: You said you liked to make changes every ten years. Do you have a . . .

A: Five-to-ten years.

Q: . . . any idea what the next change will be?

A: It has been over ten years since I've been on this court. But the problem is that at an elevated age the opportunities become significantly less. The California Constitution, as interpreted wrongly I believe, prohibits a judge from holding any public position during the term for which he or she is elected (this issue is still being litigated). That would preclude me from any state or local service until 2018 and thus restricts my opportunities further. But who knows what might come. I have tried to keep constant my friendships. I still socialize with people with whom I went to grammar, junior high, and high school, and camps, as well as college and law school, and people against whom I competed in tennis since age 14.

Q: Anything else you want to add? We can always come back but if there's anything you wanted to include . . .

A: No, I think that pretty well does it. I'm fortunate to have a son who is a prominent journalist, a daughter who's very successful as a psychologist; and a wife who's successful as an educational therapist. She was the president of the National Association of Educational Therapists and is well known in that field. They all did well academically. They all attended Ivy League schools either as undergraduates, or graduates, or both. I'm looking forward to my grandchildren (Noah, Jenna, Samantha and Bennett) being equally successful or at least happy.

Q: Well, wish them all the best, hope that's what happens. If not, they will come and watch this and learn the keys to that success.

A: Right.

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EDITOR'S NOTE

On the following pages are Richard M. Mosk's résumé and a list of most of his publications. Of special note is the newly-written appreciation of his father, the late California Supreme Court Justice Stanley Mosk, which appears in print, for the first time, at the conclusion of this section. It is the most recent item in his Bibliography, being posted in December 2012 on the website of the Duke Law Center for Judicial Studies.

His Warren Commission papers are with the National Archives; his California Supreme Court Justice Tobriner clerkship papers and some of his correspondence with public figures are with the California Judicial Center Library; his sports program collection is with Stanford University; his correspondence with Shinzo Yoshida is with UCLA; his Iran–U.S. Claims Tribunal papers are, in part, with Boalt Hall and, with material he still has, subject to transfer to another institution; his Christopher Commission papers are with USC; his L.A. City–County Fire Board of Inquiry papers are with the Huntington Library; his MPAA papers are with the Academy of Motion Picture Arts and Sciences; and some of his correspondence is with the California Judicial Center Library. The Justice Stanley Mosk papers are with the California Judicial Center Library.

— SELMA MOIDEL SMITH

JUSTICE RICHARD M. MOSK

CURRICULUM VITAE

EDUCATION

A.B., Stanford (“with great distinction,” Phi Beta Kappa, Honorary Woodrow Wilson Fellow, three varsity athletic letters), 1960.

J.D., Harvard Law School (*cum laude*, Roscoe Pound Prize), 1963.

MILITARY

Active duty, California Air National Guard; legal officer, U.S. Naval Reserve (honorably discharged).

JUDICIAL EXPERIENCE AND ACTIVITIES

Justice, California Court of Appeal, Second Appellate District, Division Five (2001–); pro tem on the California Supreme Court.

Judge, Iran–United States Claims Tribunal, The Hague, designated by the U.S. (1981–1984, 1997–2001; substitute judge 1984–1997)

PRIOR PROFESSIONAL EXPERIENCE

Admitted to State Bar of California (1964). Admitted to practice before U.S. Supreme Court, U.S. Court of Military Appeals, U.S. Court of Appeals, U.S. District Courts. Served as a State Bar examiner (prosecuted attorney disciplinary case) and as a member of a State Bar Disciplinary Committee.

Partner, Los Angeles law firm of Mitchell, Silberberg & Knupp (1965–1987) and principal in the firm of Sanders, Barnet, Goldman, Simons & Mosk, P.C. (1987–2000). Tried civil and criminal jury and non-jury trials in California and federal courts. Argued cases before U.S. Supreme Court, California Supreme Court, Ninth Circuit Court of Appeals and California Court of Appeal. Experience in arbitration, mediation, litigation — domestic and international (commercial, appellate, entertainment, sports, trade regulation, labor, real estate, employment, intellectual property,

construction, public international law). Worked on United Nations Compensation Commission cases.

Chair and co-chair, Classification and Rating Administration of Motion Picture Association of America (1994–2000).

Special Deputy Federal Public Defender (1975–1976) — on leave of absence from firm — handled federal criminal cases, including jury trials; Federal Indigent Defense Panel.

Law clerk, California Supreme Court, Justice Mathew Tobriner (1964–1965).

Staff member, President's Commission on the Assassination of President Kennedy (Warren Commission) (1964).

SPECIAL COMMISSIONS AND BOARDS

Member, Independent Commission on the Los Angeles Police Department (Christopher Commission) (1991), Los Angeles City-County Board of Inquiry on Brush Fires, Los Angeles County Commission on Judicial Procedures (chair), Mass Claims Steering Committee of the Permanent Court of Arbitration.

CIVIC ORGANIZATIONS

Board of Trustees of the Los Angeles County Law Library, Board of Directors of the California Museum of Science and Industry, Board of Directors of Town Hall of California, Southern California Steering Committee for NAACP Legal Defense and Educational Fund (co-chair), Stanford Athletic Board, and various charitable organizations.

PROFESSIONAL ORGANIZATIONS AND BAR ASSOCIATIONS

Member, American Law Institute, American Society of International Law, American Judicature Society, California Judges Association.

Member, American, Los Angeles County, and Beverly Hills Bar Associations. Formerly: Federal and International Bar Associations and Association of Business Trial Lawyers. Served on Council of ABA Section of International Law and Practice; Executive Committee of State Bar Criminal Law Section;

and various committees of bar associations, including Los Angeles County Bar Association Judicial Candidate Evaluation Committee. Past president, Los Angeles Chapter of Federal Bar Association.

ACADEMIC

Taught undergraduate seminars at University of Southern California; lecturer, USC Law School (1979–); taught course at The Hague Academy of International Law (2003). Lectured at law schools in the United States (Stanford, UCLA, Loyola-Los Angeles, Berkeley [Boalt], Southwestern), Europe (University of Leiden; Central European University, Budapest), and Australia (University of Queensland, Brisbane); lectured at George Washington University. Participated in symposia at New York University and University of Virginia Law Schools, and at Conference of International Council for Commercial Arbitration, Beijing (2004).

PAST ARBITRATION AND MEDIATION EXPERIENCE

Member, arbitration panels of American Arbitration Association (Commercial Panel; Large, Complex Case Dispute Resolution Panel; Entertainment Panel; International Panel; and Mediation Panel); American Film Marketing Association (Independent Film & Television Alliance); World Intellectual Property Organization; British Columbia International Commercial Arbitration Centre; The Hong Kong International Arbitration Centre; Center For Public Resources (including Commercial, Entertainment and Sports panels); Court of Arbitration for Sport, Geneva; California Tribal Labor Panel; Kaiser Hospital Panel; NASD Panel; Los Angeles Superior Court Alternative Dispute Resolution Program; and Kaiser Permanente Members Arbitration Service. Served as International Chamber of Commerce arbitrator in various cases. Listed in *Parker School Guide to International Arbitration and Arbitrators*.

PUBLICATIONS

Contributor to various legal periodicals in the U.S. and Europe and to the *Los Angeles Times*, *Riverside Press Enterprise*, and other newspapers. Prepared chapter for Continuing Education of the Bar work on Civil Procedure. Course at The Hague Academy published in *Recueil des Cours*,

2003. Opinions of Iran–U.S. Claims Tribunal published in *Iran–U.S. Claims Tribunal Reports* and *Mealey’s International Arbitration Report* and on Westlaw. Opinions of California Court of Appeal published in *Official California Appellate Reports*. (See following Bibliography.)

PERSONAL

Wife — educational therapist (former president, National Association of Educational Therapists). Son — journalist. Daughter — psychologist. Four grandchildren.

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JUSTICE RICHARD M. MOSK

BIBLIOGRAPHY

ARTICLES AND CHAPTERS

- “The State of the Criminal Law: Another View,” 41 LOS ANGELES BAR BULLETIN 90 (1965–1966) (with Harry C. Sigman).
- “The Use of Personal Names as Unfair Competition,” 41 LOS ANGELES BAR BULLETIN 266 (1965–1966) (with Michael M. Plotkin).
- “The Warren Commission and Legal Process,” 42 LOS ANGELES BAR BULLETIN 164 (1966–1967); reprinted, 72 CASE AND COMMENT 13 (May–Jun. 1967).
- “The Role of Courts in Prison Administration,” 45 LOS ANGELES BAR BULLETIN 319 (1969–1970), reprinted in 4 ARKANSAS LAWYER (1970).
- “Copyright in Government Publications,” 5 JOURNAL OF THE BEVERLY HILLS BAR ASSOCIATION 24 (1971).
- “Justice Tobriner and Real Property,” 29 HASTINGS LAW JOURNAL 127 (1977–1978) (with Jonathan R. Adler).
- “Declaratory Relief” in CIVIL PROCEDURES BEFORE TRIAL (C.E.B., 2nd ed. 1978).
- “Privacy in Judicial Discipline,” L.A. DAILY JOURNAL, Jun. 5, 1980.
- “Early Visions of Justice,” 12 HASTINGS CONSTITUTIONAL LAW QUARTERLY 383 (1984–1985).
- “International Commercial Arbitration,” 8 LOS ANGELES LAWYER 58 (Dec. 1985) (with Robert E. Lutz).
- “Lessons From The Hague—An Update on the Iran–United States Claims Tribunal,” 14 PEPPERDINE LAW REVIEW 819 (1986–1987).
- “The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran–United States Claims Tribunal,” 1 TRANSNATIONAL LAWYER 253 (1988).
- “International Arbitration,” 10 WHITTIER LAW REVIEW 195 (1988).
- “Enforcement of International Arbitral Awards,” 2 THE CALIFORNIA INTERNATIONAL PRACTITIONER 9 (1991).

- “The Kennedy Assassination,” 78 ABA JOURNAL 36 (Apr. 1992).
- “Conspiracy Theories and the JFK Assassination,” 15 LOS ANGELES LAWYER 34 (Nov. 1992).
- “Arbitration Disclosure,” L.A. DAILY JOURNAL, Mar. 22, 1993.
- “Expropriation: What To Do About It?” 5 THE CALIFORNIA INTERNATIONAL PRACTITIONER 11 (1993–1994).
- “The Debate Over Dissenting and Concurring Opinions in International Arbitrations,” 26 UNIVERSITY OF WEST LOS ANGELES LAW REVIEW 51 (1995).
- “The Role of Party-Appointed Arbitrators,” 1 ADR CURRENTS 19 (Summer 1996).
- “Motion Picture Ratings in the United States,” 15 CARDOZO ARTS AND ENTERTAINMENT LAW JOURNAL 135 (1997); reprinted in THE V-CHIP DEBATE 195 (edited by Monroe E. Price, 1998).
- “Celebration Session Honoring the Record Service of Justice Stanley Mosk (1964–Present),” 21 Cal. 4th 1314 (1999).
- “Clemency Hearings,” L.A. DAILY JOURNAL, May 25, 1999.
- “Dissenting Opinions in International Arbitration,” in *LIBER AMICORUM* BENGT BROMS: CELEBRATING HIS 70TH BIRTHDAY 16 OCTOBER 1999 259 (Finnish Branch of the International Law Association, edited by Matti Tupamäki) (1999); reprinted in 15 MEALEY’S INTERNATIONAL ARBITRATION REPORTS 6 (2000) (with Tom Ginsburg).
- “Pace of the Proceeding” in THE IRAN–UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION (edited by David D. Caron and John R. Crook, 2000).
- “Worldly Wrangles” [Verdicts & Settlements], L.A. DAILY JOURNAL, Oct. 6, 2000.
- “International Tribunals Help Redress Injustices Abroad,” L.A. DAILY JOURNAL, Nov. 30, 2000.
- “Dangerous Waters” [Verdicts & Settlements], L.A. DAILY JOURNAL, 2001.
- “Going Global” [Verdicts & Settlements], L.A. DAILY JOURNAL, Apr. 4, 2001.
- “In Memoriam, Honorable Stanley Mosk (1912–2001),” 26 Cal. 4th 1240 (2001).
- “Rededication of the Library and Courts Building as the Stanley Mosk Library and Courts Building (November 6, 2002), Sacramento, California,” 28 Cal. 4th 1296 (2002).

- “Evidentiary Privileges in International Arbitration,” 50 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 345 (2001) (with Tom Ginsburg).
- “The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdiction,” 18 *JOURNAL OF INTERNATIONAL ARBITRATION* 463 (2001) (with Ryan D. Nelson).
- “Becoming an international arbitrator: qualifications, disclosures, conduct, and removal,” in *PRACTITIONER’S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION* (1st ed., 2002, edited by Rufus V. Rhoades et al.; 3rd ed., 2012, edited by Daniel M. Kolkey et al.) (with Tom Ginsburg).
- “The Role of Facts in International Dispute Resolution,” 304 *RECUEIL DES COURS* 9 (2003) (Collected Courses of The Hague Academy of International Law).
- “Comments on Enforceability of Awards,” in *ICCA PROCEEDINGS—17TH ICCA BEIJING CONFERENCE* 327 (International Council for Commercial Arbitration) (2004).
- “Law Graduates Who Pursue Public Service Need Debt Relief,” *L.A. DAILY JOURNAL*, Jul. 28, 2004.
- “Judge Clark: One of Our Great Public Servants,” *SAN LUIS OBISPO TRIBUNE*, Jul. 5, 2006.
- “Communication with Iran—Even Today,” *LONG BEACH PRESS TELEGRAM*, Aug. 20, 2006.
- “Victims of Terrorism Should Be Compensated on Equitable Basis,” *L.A. DAILY JOURNAL*, Sep. 18, 2006.
- “Judges Share Responsibility for Saddam’s Crimes,” *L.A. DAILY JOURNAL*, Jan. 16, 2007.
- “The Iranian Hostage Crisis and the Iran–U.S. Claims Tribunal: Implications for International Dispute Resolution and Diplomacy,” 7 *PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL* 165 (2007) (with Warren Christopher).
- “Injunctions,” in 2 *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS* 185 (edited by Arthur W. Rovine, 2007).
- Contributor to *INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES* (edited by Howard M. Holtzmann and Edda Kristjánsdóttir, May 2007).

- “Trepidations About November 22,” L.A. DAILY JOURNAL, Nov. 25, 2009.
- “Stanley Mosk’s Letters to His Brother During World War II,” 4 CALIFORNIA LEGAL HISTORY 3 (2009).
- “Attorney Ethics in International Arbitration,” 5 PUBLICIST 32 (2010).
- “Education According to the Court,” L.A. DAILY JOURNAL, Dec. 20, 2010.
- “Trends in International Arbitration,” 18 SOUTHWESTERN INTERNATIONAL LAW JOURNAL 103 (2011).
- “Arbitrators Should Apply The Law,” L.A. DAILY JOURNAL, Apr. 19, 2011.
- “Difficulties in Communication,” L.A. DAILY JOURNAL, Jun. 14, 2011.
- “The Collapse of Civility Among Lawyers,” L.A. DAILY JOURNAL, Jul. 26, 2011.
- “The Intersection of Two Lives,” L.A. DAILY JOURNAL, Oct. 14, 2011.
- “Trends in International Arbitration,” 18 SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW 103 (2011).
- “‘Protecting Constitutional Rights’: Supreme Court of California Associate Justice Stanley Mosk,” in “The Storied Third Branch: Stories about judges, by judges,” Duke Law Center for Judicial Studies (Dec. 2012), available at <http://law.duke.edu/judicialstudies/thirdbranch/>.

BOOK REVIEWS

- PREPARATION AND TRIAL, by John Alan Appleman, 16 UCLA LAW REVIEW 216 (1968).
- POVERTY, INEQUALITY AND THE LAW, by Barbara Brudno, 24 UCLA LAW REVIEW 928 (1977).
- THE LAW OF SPORTS, by John C. Weistart and Cym H. Lowell, 14 JOURNAL OF THE BEVERLY HILLS BAR ASSOCIATION 161, 162 (1980).
- INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN–UNITED STATES CLAIMS TRIBUNAL, by John A. Westberg, 24 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 587 (1991); condensed version in 21 INTERNATIONAL BUSINESS LAWYER 200 (1993).
- CASE CLOSED: LEE HARVEY OSWALD AND THE ASSASSINATION OF JFK, by Gerald L. Posner, L.A. DAILY JOURNAL, Sep. 30, 1993.

THE JURISPRUDENCE OF THE IRAN–U.S. CLAIMS TRIBUNAL; AN ANALYSIS OF THE DECISIONS OF THE TRIBUNAL, by George H. Aldrich, 8 THE CALIFORNIA INTERNATIONAL PRACTITIONER 34 (1997).

DEMOCRACY DETAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY, by David S. Broder, L.A. DAILY JOURNAL, Nov. 3, 2000.

INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, by W. Lawrence Craig et al. (3rd ed.), “Dicta,” L.A. DAILY JOURNAL, Dec. 1, 2000.

ARBITRATION INTERACTIVE: A CASE STUDY FOR STUDENTS AND PRACTITIONERS, by Klaus Peter Berger, 17 MEALEY’S INTERNATIONAL ARBITRATION REPORTS 23 (2002).

CALIFORNIA RISING: THE LIFE AND TIMES OF PAT BROWN, by Ethan Rarick, L.A. DAILY JOURNAL, Jan. 25, 2005.

LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, by Alan Redfern et al. (4th ed.), L.A. DAILY JOURNAL, Apr. 22, 2005.

JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE, by Jim Newton, L.A. DAILY JOURNAL, Oct. 11, 2006.

THE JUDGE: WILLIAM P. CLARK, RONALD REAGAN’S TOP HAND, by Paul Kengor, L.A. DAILY JOURNAL, Oct. 2, 2007.

BIG DADDY: JESSE UNRUH AND THE ART OF POWER POLITICS, by Bill Boyarsky, L.A. DAILY JOURNAL, Nov. 9, 2007.

CLAIMS OF DUAL NATIONALS AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW, by Mohsen Aghahosseini, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 215 (2008).

INTERNATIONAL COMMERCIAL ARBITRATION, by Gary BORN, L.A. DAILY JOURNAL, Dec. 7, 2009.

REDFERN & HUNTER ON INTERNATIONAL ARBITRATION, by Nigel Blackaby et al. (5th ed.), L.A. DAILY JOURNAL, Jul. 27, 2010.

DEMOCRACY’S LAWYER: FELIX GRUNDY OF THE OLD SOUTHWEST, by J. Roderick Heller III, L.A. DAILY JOURNAL, Jan. 7, 2011.

LIFE AMONG THE CANNIBALS, by Arlen Specter, L.A. DAILY JOURNAL, Apr. 19, 2012.

Book reviews for RIVERSIDE PRESS-ENTERPRISE (1960s–1990s).

OP-ED AND LETTERS TO EDITOR

Letter on the Reapportionment Decision, L.A. TIMES, Dec. 13, 1965, at B4.

Letter on the Warren Commission, HARVARD LAW RECORD, Mar. 10, 1966.

Letter on the Warren Commission, L.A. TIMES, Oct. 26, 1966, at B4.

Letter on Fire Protection, L.A. TIMES, May 4, 1971, at A7.

“Convention Quotas Should be Eliminated,” L.A. TIMES, Jul. 7, 1972, at C7.

“On Trial: The Ground Rules for Grand Juries,” L.A. TIMES, Feb. 4, 1973, at K1.

“Kennedy Conspiracy Discounted,” L.A. TIMES, May 11, 1975, at F1; reprinted in SKEPTIC, Sep. 1975 (with W. David Slawson).

“Hell Behind Bars: In County Jail, the Innocent Suffer Along With the Guilty,” L.A. TIMES, Apr. 5, 1976, at C7.

“Justice System Cries Out for Uniformity” [sentencing], L.A. TIMES, Jan. 16, 1977, at E5.

Letter on Fire Protection, L.A. TIMES, Nov. 16, 1978, at E6 (with Paul Ziffren).

Letter on the Warren Commission, L.A. TIMES, Nov. 18, 1988, at D6.

“The Plot to Assassinate the Warren Commission,” L.A. TIMES, Dec. 30, 1991, at F3.

“Distortions Will Continue No Matter What” [Warren Commission], L.A. TIMES, Apr. 6, 1992, at B5.

Letter on the Warren Commission, PRESS-ENTERPRISE, May 7, 1992, at D9.

Letter on Fire Protection, L.A. TIMES, Nov. 16, 1993, at 6.

“Warren Commission Report is Proving True,” L.A. TIMES, Nov. 29, 1993, at F3.

“Hold Handgun Makers and Sellers Liable,” L.A. TIMES, May 19, 1994, at B7 (with Erwin Chemerinsky).

Letter on the LAPD and Chief Reddin, L.A. TIMES, Apr. 4, 2000, at 8.

“Technical Foul” [athletics], CALIFORNIA LAW BUSINESS, Sep. 25, 2000.

“Lex Mercurial” [international arbitration], HOUSE COUNSEL, May/June 2001.

“Picking our Own Pocket” [legislation regarding foreign blocked assets for victim compensation], NATIONAL LAW JOURNAL, Sep. 17, 2001, at A20.

Letter on The Golden State, L.A. TIMES, Aug. 5, 2002, at B10.

“A Crazy Quilt of Victim Compensation,” L.A. TIMES, Aug. 18, 2002, at M5.

“Conspiracy Theories Have Run Their Course,” L.A. TIMES, Nov. 11, 2003, at B13.

“Debt Precludes Pursuit of Public Service,” CALIFORNIA BAR JOURNAL, Sep. 2004.

Letter on the appointment of Earl Warren, L.A. TIMES, Nov. 20, 2004, at B20.

“Bring Back Pen Pals,” L.A. TIMES, Jul. 10, 2006, at B11.

Numerous opinions are published in the *Iran–U.S. Claims Tribunal Reports*, in the *Iranian Assets Litigation Reporter*, in *Mealey’s Litigation Reports—Iranian Claims*, at the Tribunal website, and at *Westlaw*. California Court of Appeal and Superior Court opinions are published in the official reports and on *Westlaw* and *Lexis*. One article for the *L.A. Times* is reprinted in part in the book, *The Assassinations: Dallas and Beyond: A Guide to Cover-Ups and Investigations*, edited by Peter Dale Scott et al. (1976). Another is reprinted in *JFK: The Book of the Film* (2000).

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PROTECTING CONSTITUTIONAL RIGHTS:

Justice Stanley Mosk

BY RICHARD M. MOSK

From: “The Storied Third Branch: Stories about judges, by judges,” Duke Law Center for Judicial Studies (December 2012).¹

My father, Justice Stanley Mosk, is well known for being the longest serving member of the California Supreme Court and for rendering landmark decisions, many of which are in law school textbooks. But prior to his appointment to the Supreme Court, he rendered decisions as a trial judge and as California attorney general that did much to advance civil rights.

Stanley Mosk, a top aide to the governor of California at age 26, was, at the age of 31, one of the youngest, if not the youngest, superior court judge in California history. A few years later, after having won a bruising campaign for reelection, he was faced with a significant case.

In 1947, Frank Drye, a decorated black veteran of two world wars, brought his family from Alabama to Los Angeles, where he purchased a house in an upscale community. Within several months of the Drye family moving into their house, the white neighbors began agitating about a Black family living in the neighborhood.

¹ Posted as “Protecting Constitutional Rights’: Supreme Court of California Associate Justice Stanley Mosk” (Dec. 2012) at <http://law.duke.edu/judicialstudies/thirdbranch/>.

The pastor of the local Presbyterian Church, who lived across the street from the Dryes, led eight other white neighbors in filing an action to enforce a Caucasian-only deed restriction. Drye filed a demurrer to the complaint, and the matter came before the young Judge Stanley Mosk. This was before the United States Supreme Court held the enforcement of racially restrictive covenants unconstitutional and when California Supreme Court authority seemed to approve them.

Nevertheless, Judge Mosk sustained the demurrer without leave to amend. In his minute order, he wrote:

There is no allegation, and no suggestion, that any of these defendants would not be law-abiding neighbors and citizens of the community. The only objection to them is their color and race. . . . We read in columns in the press each day about un-American activities. This court feels there is no more reprehensible un-American activity than to attempt to deprive persons of their own homes on a master race theory. . . . Our nation just fought against the Nazi race superiority doctrines. One of these defendants was in that war and is a Purple Heart veteran. This court would indeed be callous to his constitutional rights if it were now to permit him to be ousted from his own home by using 'race' as the measure of his worth as a citizen and a neighbor. . . . The alleged cause of action here is . . . inconsistent with the guarantees of the Fourteenth Amendment to the Constitution.²

A few years ago, one of the Drye children, a respected Los Angeles teacher, successfully supported the naming of a new Los Angeles elementary school after Stanley Mosk.

After Stanley Mosk won election as State attorney general by the largest margin of any contested election in the United States that year, he was introduced to a black golfer named Charlie Sifford. Mosk asked Sifford how he expected to do at a major Professional Golfers' Association (PGA) tournament in Los Angeles. When Sifford said that Blacks were not allowed to compete, General Mosk threatened to use existing laws to preclude PGA tournaments in California unless it dropped its racial exclusion bylaws. When the PGA indicated it would simply operate in other states,

² *Los Angeles Sentinel*, Oct. 30, 1947: 1; *California Eagle*, Oct. 30, 1947: 6.

General Mosk contacted attorneys general of those states, who then similarly threatened the PGA. Accordingly, the PGA dropped its exclusionary policy. A few years later, when Charlie Sifford won the Los Angeles Open, he recognized the support he had received from a courageous Attorney General Stanley Mosk.

Also as Attorney General, Stanley Mosk opined that a local realty board could not exclude a qualified applicant on the basis of race; worked with state and federal agencies and private organizations to end discrimination on housing, lending and public accommodations; took steps to prevent voter suppression in Latino areas; precluded a public school district from segregating Blacks and Whites on a swim team even though the teams could have no place to train other than at a private club that barred Blacks; and actively recruited minorities and women for the California Department of Justice.

Stanley Mosk showed that appellate decisions are not the exclusive way to advance constitutional rights. He demonstrated that a trial judge and a law enforcement officer can be at the frontline of protecting the rights of the people.

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JEFFERSON
MEMORIAL LECTURE

SPRING 2012, UC BERKELEY



KATHRYN MICKLE WERDEGAR
ASSOCIATE JUSTICE, CALIFORNIA SUPREME COURT

LIVING WITH DIRECT DEMOCRACY:

The California Supreme Court and the Initiative Power — 100 Years of Accommodation

SPRING 2012 JEFFERSON MEMORIAL LECTURE, UC BERKELEY

KATHRYN MICKLE WERDEGAR*

Justice Werdegar has been an eloquent and highly respected voice in the vital dialogue of recent years regarding constitutional principle and democratic governance. Her contributions both to scholarship and to the jurisprudence of California's high court are of enduring importance, and her lecture will deal with an issue — the initiative power in relation to the judicial role — which has been a key feature of conflicts over modern-day legal process in our state.

— Harry N. Scheiber

Thank you, Professor Scheiber and Chancellor Birgeneau, for your generous introductions. And good afternoon to all of you. I'm delighted to be with you today, back at my alma mater. And I'm deeply honored to have been invited to deliver the Spring 2012 Jefferson Memorial Lecture, as I'm aware of the many distinguished speakers who have preceded me.

* Associate Justice, California Supreme Court. This article is a slightly revised version of the Jefferson Memorial Lecture delivered by Justice Werdegar on March 20, 2012, at the invitation of the Graduate Council of UC Berkeley. Introductions were delivered by Jefferson Lectures Committee chair Harry N. Scheiber, the Riesenfeld Professor of Law and History; and Robert Birgeneau, chancellor of UC Berkeley. [The article is styled in accordance with the California Style Manual published by the Supreme Court.]

Thomas Jefferson, although not a true proponent of direct democracy, is the founding father most frequently quoted by those who are. Thomas Cronin, in his book “Direct Democracy: The Politics of Initiative, Referendum, and Recall,” tells us that Jefferson, more than most of the founding fathers, was willing to place his trust in the wisdom and goodness of the majority. As long as citizens were informed, he believed, as long as they had good schools and good newspapers, they could be entrusted with their own governance.¹ According to editor Horace Greeley, writing in 1838, the cardinal principle of Jeffersonian Democracy, the political theory that takes his name, was that “the People are the sole and safe depository of all power, principles and opinions which are to direct the Government.”² This principle is echoed in our state Constitution, which declares, “All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.”³

As we know, the framers of the U.S. Constitution, wary of the potential excesses of direct democracy, in the end established a republic, that is, an indirect democracy, a representative democracy. James Madison, writing in the Federalist Papers in support of the Constitution, pushed strongly for a barrier between what he described as the passions of the popular will and sober governance of the nation through a legislative branch. Pure democracies, he wrote, “have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.”⁴ There was nothing in direct democracy, he was concerned, “to check the inducements to sacrifice the weaker party or an obnoxious individual.”⁵ As Cronin puts it, “Even Jefferson’s faith in the mass of the people was tempered,” first by his recognition of a “natural

¹ Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (1989) page 40 (hereafter Cronin).

² Greeley, *Editorial*, *The Jeffersonian* (Feb. 17, 1838) page 287, quoted and cited in Wikipedia <http://en.wikipedia.org/wiki/Jeffersonian_democracy> (as of Mar. 20, 2012).

³ California Constitution, article II, section 1.

⁴ *The Federalist* No. 10, page 81 (James Madison) (Clinton Rossiter, ed. 1961).

⁵ *Ibid.*

aristocracy” who would be best equipped to govern, and second by his concern that the “urban masses” would be easily corrupted.⁶

Yet an impulse toward direct democracy has been a part of our political history throughout. Some view direct democracy as complementary to our republican form of government, others see it as in direct conflict. But this question is not for the courts; more than a century ago the United States Supreme Court held that questions about the guaranty clause of the Constitution — the clause guaranteeing the states a republican form of government — are the province of politics, not law.⁷

The challenge for the courts, as I will discuss, is to effectuate the will of the people as expressed through direct democracy, while holding true to the fundamental principles of our Constitutions, federal and state. Hence the title of my speech: *Living with Direct Democracy: The California Supreme Court and the Initiative Power — 100 Years of Accommodation*.

In the next few minutes I would like to touch on the history of the initiative, the limits on the power, and how the California Supreme Court has responded to legal challenges to initiative measures. My comments, I should note, reflect my personal assessment only and should not be taken as speaking for the court, nor do they indicate in any way how the court — or I — would rule in any particular future case involving an initiative.

HISTORY

One hundred years ago, in a dramatic move toward direct democracy, the citizens of California approved a state constitutional amendment giving themselves the power of the initiative — the power of voters, on their own, to initiate laws and amend the Constitution independent of the Legislature. As is now familiar, the initiative and its attendant provisions were

⁶ Cronin, page 19.

⁷ *Pacific Telephone Co. v. Oregon* (1912) 223 U.S. 118; see generally Miller, *Direct Democracy and the Courts* (2009) page 34 (hereafter Miller); Graves, *The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution* (1998) 31 Loyola L.A. L.Rev. 1305, 1305–1306.

enacted as reforms in reaction to the stranglehold on California politics of the Southern Pacific Railway.⁸

California was not the first state to allow for voter initiatives. In the 1880's and '90's a strong populist movement emerged in the country, particularly in the West and Midwest, and with it a push for direct democracy or direct legislation by the people.⁹ As Thomas Cronin tells us in his book, because direct democracy was initially promoted by groups regarded as cranks — groups such as socialists and single-issue groups — incumbent legislators tended to dismiss the measures as too radical, but by the late 1890's the numbers of converts were increasing throughout the West.¹⁰ Proponents claimed direct democracy devices would diminish the impact of corrupt influence on the Legislature and would induce legislators to be more attentive to public opinion.¹¹ The initiative was viewed as a means to “increase government responsiveness to the will of the people and encourage greater citizen participation.”¹²

Heeding the call, in 1898 the State of South Dakota became the first state in the country to incorporate the initiative process into its Constitution.¹³

But there was opposition. As a push for the initiative developed in California, the Los Angeles Times asserted that the “‘ignorance and caprice and irresponsibility of the multitude’ would be substituted for the ‘learning and judgment of the Legislature’; radical legislation would result, and business and property rights would be subject to constant turmoil at the hands of agitators.”¹⁴ In Colorado, the Denver Republican lamented, “‘The initiative and referendum both conflict directly with the representative principle, and to the extent to which they may be applied representative government will be overthrown. . . . Must [the people of Colorado] adopt every new fangled

⁸ See Comment, *Putting the “Single” Back in the Single Subject Rule: A Proposal for Initiative Reform in California* (1991) 24 U.C. Davis L.Rev. 879, 882 and footnote 16 (hereafter *Putting the “Single” Back*); see generally Broder, *Democracy Derailed* (2000) pages 38–41.

⁹ Miller, page 24.

¹⁰ Cronin, page 50.

¹¹ *Id.*, page 53.

¹² *Putting the “Single” Back, supra*, 24 U.C. Davis L.Rev. at pages 881–882.

¹³ Cronin, table 3.1, page 51; see generally Miller, page 25.

¹⁴ Cronin, page 52.

notion which may be experimented with in some other state? Let Oregon be foolish if it wants to, but let Colorado always be sober and sane.’”¹⁵

It was not to be. The experiment proliferated. And today 24 states — including foolish Oregon and sober and sane Colorado — as well as the District of Columbia have the initiative procedure.¹⁶ Today, no longer an experiment, direct democracy is an established part of the fabric of our California state government.

In this centennial year, many have asked whether the power of the initiative has hurt or helped California. Much can be said on that topic — much has been said — and you perhaps have your own ideas. My focus, however, will be not on the merits of the process, but the challenges it poses for the courts.

Now, to illustrate the scope of the issue, I’d like to start with a quiz.

What do the following laws have in common: the death penalty, the limit on property tax, the right to privacy, the two-thirds requirement for increasing taxes, guaranteed financing for education, the establishment of a state lottery, term limits, tribal gaming rights, reapportionment by citizen committee, the ban on affirmative action, the ban on same-sex marriage, the top-two candidate open primary? Of course: They were all enacted by constitutional initiative.

But many of these provisions have something else in common as well. It’s that after passage, they were challenged in court, and it was given to the courts to either uphold or invalidate them. This is a daunting task. Any court that invalidates an initiative opens itself to the charge that it is “thwarting the will of the people.” I’ve been there, and I’ll have more to say about it later.

This, then, is the story of the initiative process, a process often dubbed our “Fourth Branch of Government.”¹⁷

¹⁵ *Ibid.*

¹⁶ Miller, pages 35–36 and table 1, page 36.

¹⁷ See generally Shrag, *The Fourth Branch of Government? You Bet.* (2001) 41 Santa Clara L.Rev. 937; Uelmen, *Handling Hot Potatoes: Judicial Review of California Initiatives After Senate v. Jones* (2001) 41 Santa Clara L.Rev. 999 (hereafter *Handling Hot Potatoes*).

LEGISLATURE INITIATED VERSUS SIGNATURE INITIATED

Let me start by explaining that there are two types of initiatives — those originating with the Legislature and those proposed by the voters. All of the legislative initiatives deal with constitutional amendments.¹⁸ Our concern today is *voter* initiatives. Voter initiatives can deal with both constitutional amendments and statutes.¹⁹ And once enacted, they can be changed only by another voter initiative, unless they authorize legislative amendment, which they seldom do.²⁰

That a simple majority of voters can amend the state Constitution²¹ is one of the salient aspects of the California initiative process. A recent, high profile example of this power occurred four years ago, on November 4, 2008, when a majority of voters passed Proposition 8, restricting marriage to a man and a woman. In so doing, they overruled the California Supreme Court's decision in the so-called *Marriage Cases* that same-sex marriage was a protected right under the state Constitution.²²

Nor was Proposition 8 the first time the voters exercised their right to reverse a state Supreme Court constitutional decision. After the court in 1972 declared the death penalty unconstitutional under the state Constitution,²³ the voters passed an initiative reinstating capital punishment.²⁴ And after the court held that the state Constitution required busing to alleviate school segregation,²⁵ the voters repudiated the decision, enacting a constitutional amendment that barred court-ordered busing except when necessary to remedy a federal constitutional violation.²⁶

¹⁸ California Constitution, article XVIII, section 1.

¹⁹ California Constitution, article II, section 8, subdivision (a).

²⁰ *Id.*, section 10, subdivision (c).

²¹ *Id.*, section 10, subdivision (a).

²² *In re Marriage Cases* (2008) 43 Cal.4th 757.

²³ *People v. Anderson* (1972) 6 Cal.3d 628.

²⁴ California Constitution, article I, section 27; see *People v. Frierson* (1979) 25 Cal.3d 142, 188–189 (conc. opn. of Mosk, J.).

²⁵ *Crawford v. Board of Education* (1976) 17 Cal.3d 280.

²⁶ California Constitution, article I, section 7, subdivision (a).

CONSTITUTIONAL LIMITATIONS ON THE POWER OF THE INITIATIVE:

The Prohibition Against a Revision of the Constitution and the Single Subject Rule

Revision

Broad as it is, however, the initiative power is not without limits. First, a voter initiative can only *amend* the Constitution, it cannot *revise* it. The difference is that an amendment is intended only for narrowly targeted changes to the Constitution, whereas a revision effects broad structural changes in our governmental framework.²⁷ Only a constitutional convention or a *legislative* initiative can effect changes substantial enough to be called “revisions.”²⁸ This restriction on initiatives is rooted in the idea of the Constitution as an instrument of a permanent and abiding nature that should not be lightly altered.²⁹ Comprehensive changes to the Constitution “require more formality, discussion, and deliberation than is available through the initiative process.”³⁰ A constitutional convention or a Legislature-proposed revision serves as a bulwark against improvident or hasty change.³¹

The second limit is that an initiative must address one subject only.³² Enforcing these limits is the responsibility of the courts.

Speaking first to revisions, when an initiative is challenged as effecting too fundamental or sweeping a change, how do we decide whether it is a permissible amendment or a prohibited revision of the Constitution? The test is this: A measure revises the Constitution when it substantially alters the basic governmental framework set forth in our Constitution;

²⁷ *Strauss v. Horton* (2009) 46 Cal.4th 364, 413, 441.

²⁸ California Constitution, article XVIII, sections 1, 2; see generally *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332–333; Mosk, *Raven and Revision* (1991) 25 U.C. Davis L.Rev. 1, 1–8 (hereafter Mosk); Grodin, *Popular Sovereignty & Its Limits* (2011) 44 Loyola L.A. L.Rev. 623, 623–632.

²⁹ *McFadden v. Jordan*, *supra*, 32 Cal.2d at page 333.

³⁰ *Legislature v. Eu* (1991) 54 Cal.3d 492, 506 (citing with approval a suggestion in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349–350).

³¹ *McFadden v. Jordan*, *supra*, 32 Cal.2d at page 347.

³² California Constitution, article II, section 8, subdivision (d).

when it undertakes a wholesale alteration of our constitutional structure.³³ The analysis has a dual aspect: the court looks to the *quantitative* effects of the measure on the Constitution — how much of the written document does it actually alter or replace, and its *qualitative* effects — how significant or how broad are its changes to the substantive provisions of the Constitution.³⁴

In the Proposition 8 case, the opponents of the initiative asserted that restricting marriage to a man and a woman revised the Constitution; they argued that Proposition 8 fundamentally altered a foundational constitutional principle of law, that is, the basic right of same-sex couples to equal protection.³⁵ The court disagreed. *Quantitatively*, the initiative added only a single sentence to the Constitution: “Only marriage between a man and a woman is valid or recognized in California.” *Qualitatively*, the court reasoned, Proposition 8 removed from a same-sex couple’s state constitutional rights only one right: the right to have their union designated “marriage.” This restriction, the court concluded, did not have even a minimal effect on the governmental plan or framework of California that existed before the amendment. So, on neither basis — quantitative or qualitative — was the initiative a revision.³⁶ Hence, Proposition 8 was within the power of the people to enact. The court’s analysis, as well as its conclusion, I should note, were not without dissent.³⁷

On only two occasions has the court struck an initiative as effecting a revision of the Constitution.³⁸

The first case, in 1948, involved an ambitious initiative entitled the California Bill of Rights. Comprising 21,000 words, the initiative contained

³³ *Strauss v. Horton*, *supra*, 46 Cal.4th at page 441.

³⁴ *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 223 (hereafter *Amador Valley*).

³⁵ See *Strauss v. Horton*, *supra*, 46 Cal.4th at page 442.

³⁶ *Id.* at pages 440–447.

³⁷ See *id.* at page 477 (conc. opn. of Werdegar, J., criticizing the court’s analysis); *id.* at page 483 (conc. & dis. opn. of Moreno, J., dissenting from the court’s analysis and conclusion). For a review of the court’s decisions on revisions and amendments, see *id.* at pages 427–440.

³⁸ *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at pages 1014–1016 (citing *McFadden v. Jordan*, *supra*, 32 Cal.2d 330, and *Raven v. Deukmejian*, *supra*, 52 Cal.3d 336).

208 subsections, which were to be added to 15 of the 25 constitutional articles. The measure dealt with such disparate subjects as gambling, civic centers, mining, fishing, city budgets, liquor control, senate reapportionment, and taxes on oleomargarine. Some called it the Ham and Eggs initiative because of the varied subjects it encompassed.³⁹ The court held the measure was so multifaceted as to compel the conclusion it was a revision, rather than a permissible amendment to the Constitution.⁴⁰

The other case involved the Crime Victims Justice Reform Act, Proposition 115 on the June 1990 primary ballot. The Crime Victims Justice Reform Act dealt with numerous matters of criminal procedure, including increasing the number of felonies that would support a charge of first degree felony murder, increasing the number of special circumstances that would elevate a first degree murder to a capital crime, expanding the use of hearsay testimony, declaring the right of the people of the state to a speedy trial, granting the people the right of discovery, and the like.⁴¹ The court upheld most of the Reform Act.⁴² But one key provision, the court held, was invalid as a revision. This was the provision that would have amended the Constitution to require state courts — our court — to follow federal court interpretations of criminal constitutional rights; it would have “vested all judicial interpretive power [on the subject] in the United States Supreme Court.”⁴³ Although the provision was quantitatively modest, affecting only one article of the Constitution,⁴⁴ from a qualitative standpoint, the court stated, the effect would be “devastating.”⁴⁵ It would unduly restrict judicial power and “would substantially alter the substance and integrity of the state Constitution as a document of independent force and effect.”⁴⁶

³⁹ See Grodin, In Pursuit of Justice: Reflections of a State Supreme Court Justice (1989) page 107 (hereafter Grodin); *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at pages 1014–1015, 1022.

⁴⁰ *McFadden v. Jordan*, *supra*, 32 Cal.2d at pages 349–350; see *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 252–253.

⁴¹ *Raven v. Deukmejian*, *supra*, 52 Cal.3d 336.

⁴² *Id.* at page 349.

⁴³ *Id.* at page 352, italics omitted.

⁴⁴ *Id.* at page 351.

⁴⁵ *Id.* at page 352.

⁴⁶ *Ibid.* For one justice’s view of the single subject and revision analysis in *Raven v. Deukmejian*, see Mosk, *supra*, 25 U.C. Davis L.Rev. 1.

The question of revision is sure to recur. Several months ago, 34 years after its enactment, attorneys filed a new lawsuit challenging Proposition 13, not in its entirety, but the provision that requires a two-thirds vote of the Legislature to raise taxes. The argument is that by requiring a two-thirds vote, Proposition 13 “restructured California’s basic governmental plan” in that it grants a minority of legislators a veto over the majority’s exercise of the core legislative power to raise revenue by taxation.⁴⁷

Single Subject Rule

The second limitation on voter initiatives is the single subject rule. Likely prompted by the infamous California Bill of Rights, the so-called Ham and Eggs initiative, the voters in 1948 amended the state Constitution to add the single subject requirement for initiatives.⁴⁸ The Constitution now provides that “[a]n initiative measure embracing more than one subject may not be submitted to the voters or have any effect.”⁴⁹ The test as to whether an initiative violates the single subject rule is whether all of its parts are “reasonably germane” to a common theme, purpose, or subject; do the component parts have a reasonable and common sense relationship in furtherance of a common purpose.⁵⁰ You can see that the 1948 California Bill of Rights initiative would have flunked this test.

But with just one exception, all initiatives challenged in the Supreme Court for violation of the single subject requirement have passed the test.⁵¹

For example, the 1982 Victims’ Bill of Rights passed. A wide-ranging criminal justice initiative, this measure guaranteed victims of crime the right to restitution, declared a right to safe schools, declared what evidence

⁴⁷ The trial court rejected the challenge and the Court of Appeal affirmed. (*Young v. Schmidt* (Cal. Ct.App., July 24, 2012, B230629 [nonpub. opn.] 2012 WL 3013900, petn. for review denied Nov. 20, 2012.)

⁴⁸ *Amador Valley*, *supra*, 22 Cal.3d at page 229.

⁴⁹ California Constitution, article II, section 8, subdivision (d).

⁵⁰ *Amador Valley*, *supra*, 22 Cal.3d at pages 229–230; *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1157 (hereafter *Senate v. Jones*); *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 764, footnote 29.

⁵¹ The Courts of Appeal, in contrast, on two occasions have held an initiative in violation of the single subject rule. (*California Trial Lawyers Assn. v. Eu* (1988) 200 Cal. App.3d 351; *Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian* (1991) 227 Cal.App.3d 663.)

was admissible in trials, abolished the defense of diminished capacity, limited the right to bail, and restricted plea bargaining. The various provisions, the court held, had a reasonable and common sense relationship in furtherance of a common purpose, the purpose of promoting public safety and the rights of crime victims.⁵² And the 1990 Crime Victims Justice Reform Act also passed. Although the court struck the judicial power article as a revision — that was the article requiring state courts to follow federal court precedent in matters of fundamental criminal rights — the court declared the act’s many other provisions did not violate the single subject rule.⁵³ Why? Because they were unified by the purpose of abrogating certain judicial decisions of the Supreme Court — our decisions — that were deemed unduly expansive of criminal defendants’ rights.⁵⁴

Other examples abound. The court rejected single subject challenges to Proposition 9, the 1974 Political Reform Act;⁵⁵ Proposition 140, the Political Reform Act of 1990;⁵⁶ and Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998.⁵⁷ In all these cases the court followed the principle, first stated in 1949, that the single subject rule should “be construed liberally to uphold proper legislation, all parts of which are reasonably germane.”⁵⁸

But there has been one exception. This occurred in 1999, 56 years after the Constitution was amended to impose the single subject rule.⁵⁹ The initiative was Proposition 24, the proposed Let the Voters Decide Act, slated to be placed on the March 2000 ballot. The measure would have amended the Constitution to reduce legislative salaries, mandate voter approval of any increases in salary, and transfer reapportionment from the Legislature to the California Supreme Court. Reapportionment was the sleeper. As the challengers of the measure observed, Proposition 24 presented a classic example of “logrolling” — that is, the joining of one measure that’s of primary interest to the proponent with an unrelated measure the proponent views

⁵² *Brosnahan v. Brown*, *supra*, 32 Cal.3d at page 247.

⁵³ *Raven v. Deukmejian*, *supra*, 52 Cal.3d at page 349.

⁵⁴ *Id.* at page 348.

⁵⁵ *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 41, 43.

⁵⁶ *Legislature v. Eu*, *supra*, 54 Cal.3d at pages 512–514.

⁵⁷ *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 581.

⁵⁸ *Perry v. Jordan* (1949) 34 Cal.2d 87, 92.

⁵⁹ *Senate v. Jones*, *supra*, 21 Cal.4th 1142.

as politically popular, simply for the purpose of increasing the likelihood the initiative will be adopted.⁶⁰ In the Proposition 24 case, the measure of interest to the proponent was the transfer of reapportionment power from the Legislature to the Supreme Court; the measure thought to be politically popular was the cutting of legislators' salaries.⁶¹ The court agreed the measure was invalid. The court stated that the underlying purposes of the single subject rule are to prevent joinder of disparate measures for improper tactical purposes — logrolling — and to minimize voter confusion and deception. It was not enough, the court held, that each of the sections had a provision for voter approval, as declared in its title “Let the Voters Decide.”⁶² Legislative salaries and reapportionment were two distinct issues; combining the two would cause voter confusion and obscure the electorate's intent with regard to each of the separate subjects.⁶³

This case, *Senate v. Jones*, was the first, and to date the only, Supreme Court case to invalidate an initiative for violation of the single subject rule.

THE COURT'S APPROACH TO INTERPRETING INITIATIVES

People v. Romero

As you can see, most of the initiative measures challenged in court are politically charged. They involve redistricting, term limits, legislative pay, the death penalty, same-sex marriage, Three Strikes, affirmative action. These are issues that deeply divide the citizens of our state. Once a majority of the electorate has passed a measure, those opposed to it often file a lawsuit challenging its legality, hoping to win in court what they didn't win at the ballot box. So unwillingly, reluctantly, the court is thrust into the middle of a political thicket. Our task is to resolve the challenge according to the law, without regard to any personal political or policy preference, and without

⁶⁰ *Id.* at page 1151; see generally *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at pages 1004–1005.

⁶¹ *Senate v. Jones*, *supra*, 21 Cal.4th at page 1151.

⁶² *Id.* at pages 1162–1163.

⁶³ *Id.* at pages 1167–1168.

regard to the political impact of our decision — be it on ourselves or on the state.

How daunting is our task? The late Supreme Court Justice Otto Kaus, reflecting on the pressure that accompanies the court's duty to resolve a legal challenge to an initiative when the justices must face the voters in a retention election, observed that it's like "finding a crocodile in your bathtub when you go in to shave in the morning. You know it is there, and even though you try not to think about it, it is hard to think about much else while you're shaving."⁶⁴ And former Justice Joe Grodin has described these cases as "political hot potatoes for the judicial branch," explaining that "the initiative measure, once adopted, has behind it the political force of the electorate at large. It is one thing for a court to tell a *legislature* that a statute it has adopted is unconstitutional; to tell that to the people of a state who have indicated their direct support for the measure through the ballot is another."⁶⁵ In the view of the late Justice Stanley Mosk, "Over the years to an almost universal extent, initiatives have been judicially un-touchable."⁶⁶

Why this difficulty with ruling on initiatives? Because in the event the court invalidates an initiative measure, it subjects itself to the criticism, deeply felt, that the court — an unelected body, and one little understood, I might add — is thwarting the will of the people. As one commentator has observed, "In the Populist mind, judicial review [of ballot initiatives] raises the specter of arrogant, elitist, insular judges usurping power from . . . the people themselves."⁶⁷

I experienced this reaction early in my tenure on the California Supreme Court. Soon after I was appointed to the court, in the wake of the notorious and tragic Polly Klaas kidnapping and murder, the voters by statutory initiative passed what is familiarly known as the Three Strikes law, popularized by the phrase "Three Strikes and You're Out." The voter pamphlet explained that under the Three Strikes law, if a criminal has been

⁶⁴ *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at page 1003.

⁶⁵ Grodin, page 105, italics added.

⁶⁶ Mosk, *supra*, 25 U.C. Davis L.Rev. 1; see generally *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at pages 1000–1004.

⁶⁷ Miller, *Courts As Watchdogs of the Washington State Initiative Process* (2001) 24 Seattle U. L.Rev. 1053, 1084–1085.

convicted of two serious or violent felonies, on his third conviction of a felony — any felony — he would be out, out of commission and behind bars for a fixed, mandatory term. The trial judge could neither grant probation nor modify the sentence. Opponents challenged the law as a violation of the separation of powers, depriving judges of their traditional sentencing discretion.⁶⁸

For reasons unknown to me, then Chief Justice Malcolm Lucas assigned the case to me, the newest member of the court. Ultimately, after briefing and oral argument, the court, in a unanimous opinion, held that contrary to the assertion of its proponents, the Three Strikes law did not eliminate a judge's discretion to select an appropriate sentence for third strikers.

The morning after our opinion was released, as I was driving to work, I happened to tune in to a popular radio talk show. The entire program was devoted to the court's opinion and how outrageous it was. And every newspaper in the state that day, in reporting on the court's decision, referenced the widespread view that the court had thwarted the will of the voters.⁶⁹

Notwithstanding the initial public outcry, the court's approach in the Three Strikes case is a good illustration of the court's respect for the initiative process. In the Three Strikes case, we merely *interpreted* the initiative, we didn't invalidate it. Although we interpreted it in a way that differed from voter expectations, we did so in a manner that assured its constitutionality. We held that the law did not eliminate a judge's discretion to select an appropriate sentence for three-timers. Had we held otherwise, had we held that the initiative *did* deprive the court of discretion, as the voters thought it had, we would have had to decide whether it was constitutional, a question seriously in doubt. Rather than invalidating the law, we thus preserved it with our interpretation.⁷⁰

⁶⁸ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 508–509 (hereafter *Romero*).

⁶⁹ See, e.g., Gunnison, *Angry Supporters of '3 Strikes' Say "The Court has ignored will of voters,"* S.F. Chronicle (June 21, 1996), page A17; Ainsworth, *Senate GOP Leader Urges Justices' Ouster*, S.F. Recorder (June 21, 1996), page 1. See generally Vitiello and Glendon, *Article III Judges and the Initiative Process: Are Article III Judges Hopelessly Elitist?* (1998) 31 Loyola L.A. L.Rev. 1275, 1285–1286 and footnote 84 (discussing the political response to the *Romero* decision).

⁷⁰ *Romero, supra*, 13 Cal.4th at pages 509, 513, 530.

Our approach in the Three Strikes case reflects the court's general approach in interpreting initiatives: we are mindful that an initiative measure is an expression of the will of the people, and that as the unelected third branch of government, it behooves us to uphold the people's will whenever we possibly can without doing violence to our state or federal Constitutions. As we stated in the 1978 case upholding the validity of Proposition 13, "It should be borne in mind that notwithstanding our continuing representative and republican form of government, the initiative process itself adds an important element of direct, active, democratic contribution by the people."⁷¹

Consistent with this approach, the California Supreme Court over the years has, with few exceptions, upheld the validity of every initiative constitutional amendment brought before us. In so doing, we have expressed great deference to the people's expression of their will through the process of the initiative.

The power of the initiative, the court has stated, "must be *liberally construed* . . . to promote the democratic process. . . . [I]t is our solemn duty jealously to guard the sovereign people's initiative power, it being one of the most precious rights of our democratic process."⁷²

Nevertheless, we will, when we must, invalidate an initiative that is inconsistent with the state or federal Constitution. I've touched on the cases where the court found that an initiative was procedurally invalid as constituting a revision of the Constitution⁷³ or violating the single subject rule.⁷⁴ But we look to the substance of the initiative measure as well. Our deference to the initiative process does not extend to overlooking substantive constitutional violations. As has often been observed, the courts are the only institutional check there is on the otherwise unfiltered majoritarian initiative process.⁷⁵

A case in point is the 1964 ballot Proposition 14. Proposition 14 amended the state Constitution in essence to authorize discrimination in

⁷¹ *Amador Valley, supra*, 22 Cal.3d at page 228.

⁷² *Brosnahan v. Brown, supra*, 32 Cal.3d at page 241, internal quotation marks omitted.

⁷³ *McFadden v. Jordan, supra*, 32 Cal.2d 330.

⁷⁴ *Senate v. Jones, supra*, 21 Cal.4th 1142.

⁷⁵ See Miller, page 2; see generally *id.*, pages 79–100.

housing. In a decision later validated by the United States Supreme Court, we held the proposition violated the Equal Protection Clause of the United States Constitution.⁷⁶

As we explained in the *Marriage Cases*, the Constitution itself constitutes the *ultimate* expression of the people's will, and it reflects restraints that the people themselves have imposed upon their own ability, through a transient majority of the moment, to enact laws in violation of that fundamental document.⁷⁷ Professor Jesse Choper, quoted in the *Marriage Cases*, has observed that “‘the Court should review individual rights questions, unabated by its judgment about whether a particular result will be subject to criticism, hostility, or disobedience.’”⁷⁸ And this we endeavor to do.

Pre-Election Challenges

Let me touch briefly on pre-election challenges. Pre-election challenges generally are disfavored, the view being that we should avoid invalidating an initiative before the electorate has had the opportunity to speak to it. “A court that intervenes to keep a measure off the ballot is perceived as obstructing the expression of the popular will.”⁷⁹ If the measure doesn't pass, we need never consider it. If it does, that's time enough to resolve a challenge.

The Proposition 14 housing discrimination case I just mentioned initially came to the court as a petition for mandamus to keep the proposition off the ballot, and we declined to intervene. Although we noted the provision raised grave constitutional questions, we stated it would be more appropriate to pass on those questions after the election “‘than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls.’”⁸⁰ After it passed, we ruled it unconstitutional.⁸¹ Similarly, we rejected a pre-election petition to prevent placement on the ballot of the 1982 Victims' Bill of Rights, on

⁷⁶ *Mulkey v. Reitman* (1966) 64 Cal.2d 529, affirmed *sub nom. Reitman v. Mulkey* (1967) 387 U.S. 369.

⁷⁷ *In re Marriage Cases*, *supra*, 43 Cal.4th at page 852.

⁷⁸ *Id.* at page 850.

⁷⁹ Grodin, page 106.

⁸⁰ *Mulkey v. Reitman*, *supra*, 64 Cal.2d at page 535.

⁸¹ *Id.* at page 545.

the ground it violated the single subject rule.⁸² The measure passed and we subsequently upheld it.⁸³

Although the court will not intervene before an election to decide a constitutional challenge to the substance of an initiative measure, we will accept a pre-election challenge to an initiative on procedural grounds if there is a “clear showing of [its] invalidity,”⁸⁴ or a “strong likelihood” that it violates the single subject rule⁸⁵ such that it should not even be presented to the voters. This was the case with the initiative that sought to transfer reapportionment from the Legislature to the Supreme Court. The petitioners argued it violated the single subject rule and we agreed. The Constitution, you will remember, states that “an initiative embracing more than one subject *may not be submitted to the electors* or have any effect,”⁸⁶ thus implicitly authorizing pre-election review in appropriate cases.⁸⁷ We engaged in pre-election review as well with the 1948 California Bill of Rights, the so-called Ham and Eggs initiative, where we stated that it was “clear beyond question” that the proposed initiative amounted to an impermissible proposed revision, rather than amendment of our Constitution.⁸⁸ And we will intervene to consider an objection that the subject matter of the initiative is not appropriate to the initiative process.⁸⁹

Of course, pre-election review poses several problems for the court. A pre-election challenge is often filed in our court within a matter of weeks — perhaps days — before critical dates in the election process. This requires that we accelerate every aspect of our decision process, including the briefing, the preparation by the assigned justice of a memorandum on the case, the written responses of the other six justices, the scheduling of

⁸² *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4.

⁸³ *Brosnahan v. Brown*, *supra*, 32 Cal.3d 236.

⁸⁴ *Brosnahan v. Eu*, *supra*, 31 Cal.3d at page 4.

⁸⁵ *Senate v. Jones*, *supra*, 21 Cal.4th at page 1154.

⁸⁶ California Constitution, article II, section 8, subdivision (d), italics added.

⁸⁷ *Senate v. Jones*, *supra*, 21 Cal.4th at page 1153.

⁸⁸ *McFadden v. Jordan*, *supra*, 32 Cal.2d at pages 331–332.

⁸⁹ See *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687 (initiative compelling state Legislature to ask Congress to convene a constitutional convention did not propose a statute); *Legislature v. Deukmejian* (1983) 34 Cal.3d 658 (redistricting initiative violated constitutional limit on frequency of redistricting). See generally Grodin, pages 105–107; *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at pages 1020–1024.

oral argument, and the post-argument deliberation and preparation of the opinion, or opinions if the decision is not unanimous. We manage, but it strains the court's resources, and certainly is not a favored mode of deliberation of what can be complex issues.

Do We Treat Initiatives Differently Than We Treat Statutes?

The question often arises whether the court treats initiatives differently than legislative enactments. Some argue we should; that as the only check on initiatives, the courts should give them special review, a heightened scrutiny. Others maintain that as the expression of direct democracy we should accord initiatives special deference.⁹⁰ We have rejected both approaches. We long ago declared that initiative statutes are to be given the same liberal construction as legislative statutes,⁹¹ but that they are entitled to no greater deference. In his opinion for the court in the *Marriage Cases*, the Chief Justice declared that just because Proposition 22, the statutory restriction on same-sex marriage, had been enacted directly by the voters, it “neither exempts the statutory provision from constitutional scrutiny nor justifies a more deferential standard of review.”⁹² Although some question our consistency in adhering to this principle of no special deference, our intent is to do so.

TENSION BETWEEN THE INITIATIVE POWER AND THE COURTS

As you can see, there is an inevitable tension between the initiative process and the courts. Whereas the role of the initiative is to translate the popular will into law, the role of the courts is to hold firm against the wishes of the majority when necessary to preserve fundamental constitutional principles.

These disparate roles can create, as one commentator has described it, a “polarized conflict between citizens and the courts,”⁹³ as illustrated by the dissension in California over the past decade concerning the definition of marriage.

⁹⁰ See Miller, pages 89–92.

⁹¹ *Gage v. Jordan* (1944) 23 Cal.2d 794, 799; see *McFadden v. Jordan*, *supra*, 32 Cal.2d at page 332.

⁹² *In re Marriage Cases*, *supra*, 43 Cal.4th at page 851.

⁹³ Miller, page 221.

In the year 2000 the voters approved Proposition 22, which enacted a statute declaring, “Only marriage between a man and a woman is valid or recognized in California.” Because it was an initiative statute, the Legislature had no power to change it, so opponents sued in court. The California Supreme Court declared the statute invalid under the state Constitution.⁹⁴ Six months later, proponents qualified for the ballot as a state constitutional amendment Proposition 8, restricting marriage to a man and a woman. The proposition passed, whereupon opponents challenged it in court. In 2009 the California Supreme Court upheld the amendment as within the power of the people to enact.⁹⁵ So at this moment in California, by state constitutional edict, marriage is permitted only between a man and a woman. Now the case is in federal court, plaintiffs arguing that Proposition 8 offends the *federal* Constitution. The federal district court agreed, and in February of this year the court of appeals affirmed,⁹⁶ but the ban remains in effect until the federal appellate decision is final.

Proposition 8 was not the first initiative to succeed in overturning a decision of the state Supreme Court. The ballot argument in favor of an earlier Proposition 8, the 1982 Victims’ Bill of Rights, explained the initiative would “‘overcome some of the adverse decisions by our higher courts,’ [decisions] which had created ‘additional rights for the criminally accused and placed more restrictions on law enforcement officers.’”⁹⁷ In upholding the measure, the court acknowledged it appeared “to reflect public dissatisfaction with several prior judicial decisions in the area of criminal law.”⁹⁸

And again, the preamble to the 1990 Proposition 115, the Crime Victims Justice Reform Act, stated that “‘we the people . . . find that it is necessary to reform the law as developed in numerous California Supreme Court decisions’”⁹⁹ Upholding the initiative against a single subject challenge, we found that its unifying theme was the abrogation of particular holdings of the court “that the initiative’s framers deemed unduly expansive of

⁹⁴ *In re Marriage Cases*, *supra*, 43 Cal.4th 757.

⁹⁵ *Strauss v. Horton*, *supra*, 46 Cal.4th 364; see generally Miller, pages 3–13.

⁹⁶ *Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, rehearing en banc denied 681 F.3d 1065 (June 5, 2012), petition for certiorari filed July 30, 2012.

⁹⁷ *Brosnahan v. Brown*, *supra*, 32 Cal.3d at page 248.

⁹⁸ *Ibid.*

⁹⁹ *Raven v. Deukmejian*, *supra*, 52 Cal.3d at page 342.

criminal defendants' rights."¹⁰⁰ And I earlier mentioned the initiatives that abrogated our opinions that the death penalty violated the state Constitution and that busing was necessary to alleviate school segregation.

In upholding these initiatives, the court recognized that while it might disagree with the wisdom of the measures, "it is not [the court's] function to pass judgment" on their soundness. "In our democratic society," the court has stated, "in the absence of some compelling, overriding constitutional imperative, we should not prohibit the sovereign people from either expressing or implementing their own will"¹⁰¹

PROBLEMS WITH THE INITIATIVE POWER

With all of its benefits, direct democracy has problems, as has been widely discussed elsewhere. With respect to the courts, the foremost problem is that it places the judiciary in the delicate but necessary position of serving as a check on the passions of the majority as expressed through initiatives unfiltered by legislative or executive review.

Post-election litigation over the validity of initiatives, in the words of one commentator, has "become an institutionalized feature of the state's initiative system[,] . . . a regular strategy for initiative opponents"¹⁰² "Normally, a court exercising judicial review overturns the decisions of another branch of the government, but, when it strikes down an initiative, it overrides the people themselves."¹⁰³ As the conflict between direct democracy and the courts as guardians of fundamental rights plays out in court, the counter-majoritarian role of the courts is highlighted to the frustration of the majority and the detriment of the judiciary, insofar as "the people come to see judges as political actors rather than as neutral interpreters of the law."¹⁰⁴ The conflict and attendant perception, in turn, "poses real threats to the independence of state judges."¹⁰⁵

¹⁰⁰ *Id.* at page 347.

¹⁰¹ *Brosnahan v. Brown*, *supra*, 32 Cal.3d at page 248; *Raven v. Deukmejian*, *supra*, 52 Cal.3d at page 347.

¹⁰² Miller, page 109.

¹⁰³ *Id.*, page 2.

¹⁰⁴ *Id.*, pages 221–222; see generally Miller, chapter 3, *The Counter-Majoritarian Power*, pages 75–100.

¹⁰⁵ Miller, page 222.

CONCLUSION

In closing, I return to the concept of the initiative process as the fourth branch of government. Under this construct, we have our traditional three branches — the executive, the legislative and the judicial, and then we have a fourth branch — the electoral in the form of the initiative. Our forefathers designed the three branches of government to provide checks and balances on one another, to enable each to curtail excesses engaged in by their sister branches. Recognition of a fourth branch can, if you will, be viewed as consistent with the principle of checks and balances. Certainly the initiative places a check on the Legislature and the Executive; that was its original intent. And the judicial branch, however seldom and however reluctantly, may be seen as placing in turn a check on the initiative.

But the initiative process can also be viewed, as many do, as inimical to our republican form of government, weakening the legislative branch, empowering a majority to impose its will on a minority, and placing the courts in the untenable position of holding firm against the voice of the people when our Constitutions so require.

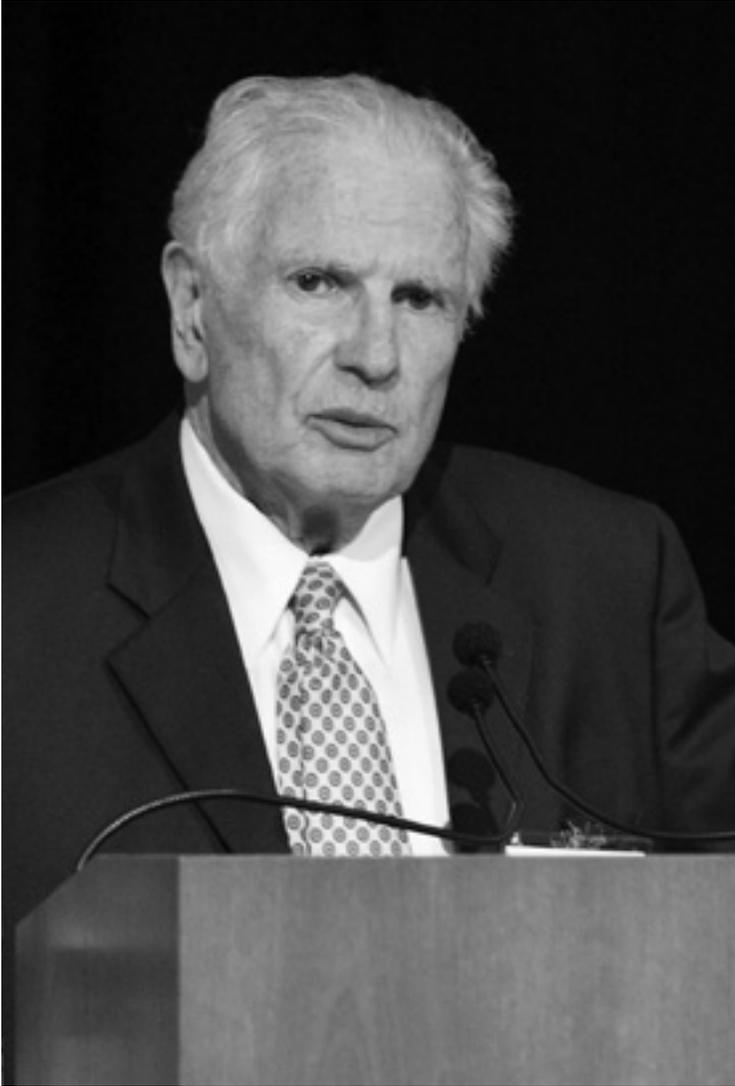
Either way, direct democracy through the initiative is here to stay, and as long as it is, the responsibility of the courts is to temper the will of the people — the fourth branch — when necessary to honor our fundamental constitutional principles, but only so much and no more. As we declared over forty years ago, “The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.”¹⁰⁶

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¹⁰⁶ *McFadden v. Jordan*, *supra*, 32 Cal.2d at page 332.

SPECIAL BOOK SECTION

PREVIEW OF FORTHCOMING
BOOK CHAPTER



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Photo by Greg Verville

LIBERTY AND EQUALITY UNDER THE CALIFORNIA CONSTITUTION

JOSEPH R. GRODIN*

INTRODUCTION

This is the second in a series of essays written with a larger project in view: a book on rights and liberties under the California Constitution. The essays, as well as the projected book, have as their principal focus the ways in which the state Constitution, through differences in text or differences in interpretation by the courts, may provide California citizens with greater protection than is available under the federal Constitution.¹ Within

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¹ I write on the assumption that the reader is generally familiar with the proposition that state constitutions may provide broader protection than the federal Constitution, and with the argument (which I endorse) that state courts should look to their own constitutions before reaching federal constitutional claims. See Joseph R. Grodin, *The*

that focus, I attempt to provide historical context, both because it helps in understanding the dynamics of state constitutional development, and because it is interesting in itself. The first essay in the series, on freedom of expression, was previously published in these pages.² This second essay covers protection for other kinds of liberty interests and for the principle of equality. The subject of the state Constitution's religion clauses, which implicate both liberty and equality interests, is reserved for later treatment.

The concepts of "liberty" and "equality" are analytically distinct, the former arising from a claim that one has a constitutionally protected right to engage in certain activity, the latter from a claim that one has a constitutionally protected right to be treated the same as others similarly situated. Jurisprudentially, however, there is often an overlap — a claim that one has a right to engage in particular activity without interference may be buttressed by a claim that others are permitted to do so — and in some of the cases it is not entirely clear which claim forms the basis for a court's decision. To that extent, there is some unavoidable overlap in discussing the decisions.

I. LIBERTY

As regards liberty, my goal in this essay is a modest one. The California Constitution, like the federal, contains numerous provisions protective of particular liberties — freedom of speech and press,³ the right to assemble and petition,⁴ freedom of religion,⁵ and the rights of criminal defendants,⁶ not to speak of the right to fish.⁷ With some exceptions, I do not discuss these specific provisions here.⁸ Rather, my focus is upon how California

California Supreme Court and State Constitutional Rights: The Early Years, 31 HASTINGS CONST. L.Q. 141 (2004).

² Joseph R. Grodin, *Freedom of Expression Under the California Constitution*, 6 CAL. LEGAL HIST. (Journal of the California Supreme Court Historical Society) 187 (2011).

³ CAL. CONST. art. I, § 2.

⁴ CAL. CONST. art. I, § 3.

⁵ CAL. CONST. art. I, § 4.

⁶ *E.g.*, CAL. CONST. art. I, § 12 (right to bail); § 13 (protection against unreasonable searches and seizures); § 15 (rights of defendants in criminal prosecutions).

⁷ CAL. CONST. art. I, § 25.

⁸ An exception is the protection against unreasonable searches and seizures, which I discuss as part of the protection for privacy under the state Constitution.

courts have dealt with what in the federal arena would be called “unenumerated rights” — the sorts of rights which the federal courts have found to be supported by the general protection for “liberty” contained in the due process clauses of the fifth and fourteenth amendments.⁹

The California Constitution also contains a Due Process Clause with language virtually identical to the federal clauses,¹⁰ but until 1974 it was buried in a provision dealing with criminal procedure, and with minor exceptions has never provided the doctrinal basis for judicial protection of a general liberty interest. Rather, that function has been served by article I, section 1 which, in its original form from 1849, read:

All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.¹¹

This language, similar to that contained in a number of state constitutions, reflects a natural law social contract philosophy prevalent at the time of the Declaration of Independence. It embodies the notion that people have certain rights which exist independent of the state, and that the ceding of authority to government implies limits on what the state can do.¹² This notion of implied limits forms the basis for early decisions by the California Supreme Court supporting judicial review of legislative action, usually regulation of property or business. To that extent, article I, section 1 has served much the same function, though with different contours, as federal substantive due process.

As will be seen, its use in striking down legislation during the *Lochner* era was on occasion supplemented by reliance on a prohibition against

⁹ U.S. CONST. amend. V; amend. XIV, § 1.

¹⁰ CAL. CONST. art. I, § 7(a) (providing in part: “A person may not be deprived of life, liberty or property without due process of law . . .”).

¹¹ CAL. CONST. of 1849, art I, § 1.

¹² For more in-depth discussion of the historical context of article I, section 1 and its implications, see Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1, 5–19 (1997). That article discusses also the potential for relying upon the language of the section as a basis for affirmative rights, *i.e.*, for finding obligation on the part of government to take affirmative action to meet certain needs of its citizens, so that they are able to survive and enjoy the liberties associated with a decent society. *Id.* at 29–33.

“special laws,” reflecting an overlap between the liberty principle and notions of equality. Those cases are the focus of the first part of this essay.

Over a century after its first adoption, article I, section 1 was amended to substitute the word “people” for “men,” and to add the word “privacy,” so that the section in its present form reads:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

It is the word “privacy” that has given rise to a body of doctrine, virtually unique to California, which protects not only privacy in the sense of private information, but also an area of autonomy of action against government, and to some extent private, interference. To that extent, article I, section 1 serves much the same function as the word “liberty” under more modern notions of substantive due process. Those cases are the focus of the second part of this section of the essay.

A. REVIEW OF ECONOMIC REGULATION

1. *The Early California Cases*

Early cases reflect controversy over whether the language of article I, section 1 is merely hortatory, intended as guidance for the legislative branch, or whether it provides a basis for judicial review of legislative action,¹³ and if the latter, what the scope of that review is intended to be. At issue in *Billings v. Hall* was the constitutionality of the Settler Law of 1856.¹⁴ That law arose out of controversies between landowners who claimed title through old Mexican land grants and pioneers who, either oblivious of or in disregard of legal ownership, settled on the land and built homes and other improvements. The law, which represented a legislative victory for the settlers, would have required the legal owner of the property, in an ejectment action, to reimburse the defendant for the value of improvements that the

¹³ This controversy appears to have been resolved by an 1870 amendment, now article I, section 26, which provides: “The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.”

¹⁴ *Billings v. Hall*, 7 Cal. 1 (1857).

defendant had made.¹⁵ Chief Justice Murray and Justice Burnett found the law to violate the California Constitution, mainly on the basis of the language in article I, Section 1.¹⁶ Chief Justice Murray's opinion declared:

This principle is as old as the Magna Charta [sic]. It lies at the foundation of every constitutional government, and is necessary to the existence of civil liberty and free institutions. It was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.¹⁷

Justice Burnett expressed an even more enthusiastic view:

[F]or the Constitution to declare a right inalienable, and at the same time leave the Legislature unlimited power over it, would be a contradiction in terms, an idle provision, proving that a Constitution was a mere parchment barrier, insufficient to protect the citizen, delusive and visionary, and the practical result of which would be to destroy, not conserve, the rights it vainly presumed to protect.¹⁸

There was a dissenting view by the colorful and controversial Justice David Terry,¹⁹ who dismissed article I, section 1 as a "mere reiteration of a truism which is as old as constitutional government."²⁰ "We cannot declare a legislative act void because it conflicts with our opinion of policy, expediency, or justice," Terry insisted. "We are not guardians of the rights

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 6–10.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 17 (Burnett, J., concurring).

¹⁹ David S. Terry was in many respects a rogue justice who, among other things, stabbed a vigilante in San Francisco, shot and killed U.S. Senator Broderick in a duel, and ended up being shot and killed by a bodyguard for United States Supreme Court Justice Stephen Field, who acted in order to protect the justice against what he believed to be a threat on his life. For an interesting and entertaining narrative of that turbulent period see MILTON S. GOULD, *A CAST OF HAWKS* (1985).

²⁰ *Billings*, 7 Cal. at 19.

of the people of the State, unless they are secured by some constitutional provision which comes within our judicial cognizance.”²¹

The following year, however, Justice Terry had a libertarian change of heart. In *Ex parte Newman* he joined Justice Burnett to strike down a recently adopted Sunday closing law, both on the ground that it constituted religious discrimination in violation of article I, section 4, and on the ground that it interfered with the “right to acquire property” protected by section 1.²² “[M]en have a natural right,” he now declaimed, “to do anything which their inclinations may suggest, if it be not evil in itself, and in no way impairs the rights of others.”²³ To hold otherwise would mean that the Legislature could “fix the days and hours for work, and enforce their observance by an unbending rule which shall be visited alike upon the weak and the strong.”²⁴ In response to the accusation that this seemed a departure from his view in *Billings*, Terry responded that he was merely bowing to precedent.²⁵

This time it was Stephen Field, soon to be appointed by President Lincoln to the U.S. Supreme Court, who dissented, invoking the same argument of judicial modesty that Justice Terry had abandoned. “The Legislature,” he proclaimed, “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.”²⁶

²¹ *Id.* at 21.

²² *Ex parte Newman*, 9 Cal. 502 (1858).

²³ *Id.* at 507.

²⁴ *Id.* at 508.

²⁵ *Id.* at 510.

²⁶ *Id.* at 520 (Field, J., dissenting). It was no answer to say, as Terry did, that people do not need protection against overwork, for “[l]abor is in a great degree dependent upon capital, and unless the exercise of the power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise.” *Id.* Field’s views while serving on the California Supreme Court seem difficult to reconcile with his later views on the U.S. Supreme Court. Compare his dissenting opinion in the *Slaughterhouse Cases*, 83 U.S. 36 (1873) (arguing that a state law centralizing all animal-slaughter operations in New Orleans to prevent cholera-causing contamination of the water supply intruded on butchers’ right to pursue their occupation).

Several years later, in *Ex parte Andrews*,²⁷ judicial modesty prevailed. The Legislature had enacted a new Sunday closing law, virtually identical to the one struck down in *Newman*, but the composition of the court had changed. Chief Justice Burnett was no longer there, nor was Justice Terry, who was forced to leave the court after killing U.S. Senator Broderick in a famous duel.²⁸ Field had become chief justice, and two new justices, Baldwin and Cope, had joined the court. Justice Baldwin, with scarcely a nod to *Newman*, wrote an opinion for a unanimous court upholding the statute on the basis of the reasoning contained in Field's prior dissent.²⁹ The right to acquire property, he declaimed, does not deprive the Legislature of the "power of prescribing the mode of acquisition, or of regulating the conduct and relations of the society in respect to property rights."³⁰ The Legislature may "repress whatever is hurtful to the general good," and that body "must generally be the exclusive judge of what is or is not hurtful," including "moral as well as physical" harm:

[I]t is impossible for us to see why that department may not protect and regulate labor and the relations of the different members of society so that one class may not injure a dependent class — the master the apprentice — the husband the wife — the parent the child — or why, if it be in the interest of the whole society that no labor not necessary should be done on a given day, it may not prohibit it on that day.³¹

Deference to legislative judgment was reflected also in *Ex parte Smith*, upholding the conviction of two women for violating a Sacramento ordinance which prohibited the playing of musical instruments or the presence of women in saloons after midnight.³² In rejecting their constitutional attack based on article I, section 1,³³ Justice Sanderson's opinion for a unanimous court relied heavily upon social contract theory:

²⁷ *Ex parte Andrews*, 18 Cal. 678 (1861).

²⁸ *Supra* note 19.

²⁹ *Andrews*, 18 Cal. at 685.

³⁰ *Id.* at 682.

³¹ *Id.* at 682–83.

³² *Ex parte Smith*, 38 Cal. 702 (1869).

³³ The court also rejected challenges under article I, section 11, *infra* Part II, which required that "laws of a general nature shall have a uniform operation," and under the Fourteenth Amendment to the federal Constitution. *Id.* at 712.

[W]hen men who come together for the purpose of adopting a form of government and establishing a system of laws, stipulate that the rights of life, liberty, property, and the pursuit of safety and happiness are inalienable . . . they are not to be understood as meaning that those rights shall not be at all interfered with by the law-making power. On the contrary, their language is to be interpreted in view of the object which has called it forth, or as meaning that those rights are not to be interfered with, except so far as the ends and objects of government may require.”³⁴

And, the power to determine which legislation is necessary and appropriate to accomplish the ends of government is lodged with the Legislature. If the Legislature abuses that power “the remedy lies . . . with the people, through the ballot-box; and, if that proves ineffectual, a further remedy lies in revolution, or the right which the people have to change their form of government”³⁵ If the legislative body considered that the presence of women in bars after midnight “is of a vicious and immoral tendency,” that was sufficient, though Justice Sanderson also made clear that he considered their judgment “as sound, and their action as not only just and reasonable, but as eminently wise and salutary.”³⁶

2. *The Development of “Substantive Due Process”: The “Lochner Era”*

In the aftermath of the Civil War, the tension between judicial “restraint” and judicial “activism” heightened nationwide. State legislatures throughout the country responded to the burgeoning industrial revolution with increased regulation of business, and state courts responded to the regulation with increased wariness. Even before the war some state courts, relying on due process or “law of the land” clauses in their state constitutions, began to develop doctrinal grounds for checking what seemed to them to be excessive or unwarranted governmental power, beyond the “proper” limits of the police power which all state legislatures were said to possess.³⁷

³⁴ *Id.* at 705.

³⁵ *Id.* at 707.

³⁶ *Id.* at 709.

³⁷ See, e.g., *Wynehamer v. State of New York*, 13 N.Y. 378 (1856); see Edwin Corwin, *Due Process of Law before the Civil War*, in *AMERICAN CONSTITUTIONAL HISTORY: ESSAYS BY EDWARD S. CORWIN* (Alpheus T. Mason and Gerald Garvey, eds., 1964); Peter

Following adoption of the Fourteenth Amendment, some state courts relied upon the Due Process clause contained in that Amendment to strike down economic regulations which they considered to be outside the proper boundaries of legislative control,³⁸ and it was not long before the U.S. Supreme Court followed their lead.

In *Munn v. Illinois* the court rejected an attack on a state law regulating the rates of grain elevators, basing its decision on the common law precedents upholding regulation of private property “affected with a public interest” and deference to legislative judgment as to the type of regulation necessary.³⁹ The court nevertheless warned that the states’ “police power” had its limits, and that its exercise was subject to judicial determination.⁴⁰ That warning was repeated in *Mugler v. Kansas*, stating (in dicta) that a purported exercise of the police power which had no “real or substantial relation” to public health, morals, or safety could run afoul of the Due Process Clause of the Fourteenth Amendment.⁴¹ In 1897 these warnings came to fruition in *Allgeyer v. Louisiana*, in which the Supreme Court held a Louisiana statute prohibiting contracts of marine insurance except with a company licensed to do business within the state to be invalid as infringing upon the liberty of contract protected by the Due Process Clause.⁴² Reliance on the Due Process Clause as a substantive limitation on state regulation reached its peak eight years later in *Lochner v. New York* which held invalid a New York statute that limited the hours of work for bakers.⁴³

J. Galie, *State Courts and Economic Rights*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 76–87 (1988). Indeed, notwithstanding the U.S. Supreme Court’s subsequent rejection of substantive due process in the economic arena, that doctrine continued to thrive under many state constitutions over the years and well into modern times. *Id.*

³⁸ See, e.g., *In re Application of Jacobs*, 98 N.Y. 98 (1885) (invalidating a statute which prohibited the manufacturing or preparation of tobacco in tenements in cities of 500,000 or more residents). By the time the U.S. Supreme Court decided *Allgeyer v. Louisiana*, *infra* note 42, ten other states had followed the New York approach. See BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 58–59 (1980).

³⁹ *Munn v. Illinois*, 94 U.S. 113, 126–134 (1877).

⁴⁰ *Id.* at 134.

⁴¹ *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

⁴² *Allgeyer v. Louisiana*, 165 U.S. 578, 591–93 (1897).

⁴³ *Lochner v. New York*, 198 U.S. 45 (1905).

The “*Lochner* era” prevailed for approximately the next thirty years, during which the U.S. Supreme Court invalidated a wide range of federal and state regulatory statutes in the name of the Due Process Clause. Use of that rationale did not always result in invalidation — there was still room for regulation which, in the eyes of the justices, bore an adequate relationship to the “proper” goals of the police power, such as regulating hours of work for women⁴⁴ — and the Due Process Clause was not the only doctrinal instrument of invalidation. The Equal Protection Clause played a role, as did the Impairment of Contracts clause and the “Dormant Commerce Clause,” read as limiting state regulation that infringed upon federal authority to regulate interstate commerce. But it was the Due Process Clause that gave business its most formidable weapon against state regulation.

The *Lochner* era ended in the 1930s, beginning with dicta in *Nebbia v. New York* deferential to legislative judgment,⁴⁵ and then with *West Coast Hotel v. Parrish*, in which the court, overruling prior precedent, upheld a state minimum wage law for women.⁴⁶ In doing so it resoundingly rejected *Lochner*’s jurisprudential underpinnings and adopted a highly deferential view toward legislative policymaking in the commercial arena which prevails to this day, both under the Due Process Clause and under the Equal Protection Clause. The court will uphold economic regulation so long as there is a “rational basis” for believing it to serve a legitimate legislative goal.

3. *The Lochner Era in California*

The California Supreme Court, in a series of cases beginning in 1890 and continuing for several decades, exhibited a skepticism toward economic regulation that paralleled developments in the U.S. Supreme Court and in other states. Between 1890 and 1920 the court struck down over a dozen statutes and ordinances aimed at regulating business activity in one way or another, including laws limiting hours of work on city projects;⁴⁷ a statute

⁴⁴ *Muller v. Oregon*, 208 U.S. 412 (1908); see also *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding law establishing ten-hour day for factory workers).

⁴⁵ *Nebbia v. New York*, 291 U.S. 502, 537–38 (1934).

⁴⁶ *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

⁴⁷ *Ex parte Kuback*, 85 Cal. 274 (1890) (invalidating Los Angeles ordinance prohibiting more than eight hours of work a day, as well as any work by Chinese, on city contracts). The court made no mention of its decision six years earlier, in *Ex parte Moynier*,

prohibiting barber shops from being open, or barbers from working, on Sundays and other holidays;⁴⁸ a county ordinance prescribing building requirements and other conditions for the operation of facilities for “insane persons, or persons affected with inebriety, or other nervous diseases”;⁴⁹ a statute requiring that as to all liens the contract price shall be payable in money;⁵⁰ ordinances in both San Francisco and Los Angeles prohibiting or limiting the creation of new cemeteries;⁵¹ a statute requiring that boxes used to ship fruit contain a statement designating the county and locality within which the fruit was grown;⁵² a Los Angeles ordinance prohibiting gas works within a defined area;⁵³ a statute making it a misdemeanor to sell tickets to performances in excess of the price originally charged by management;⁵⁴ a San Francisco ordinance prohibiting the setting of fires on one’s own property without a permit;⁵⁵ an ordinance requiring a permit for solicitation of donations to charities;⁵⁶ and a statute prohibiting an

65 Cal. 33 (1884), upholding a city ordinance requiring a license to operate a laundry during evening hours, stating that “we cannot say that [the restriction] is not necessary for the proper police and sanitary condition of the city.” *Id.* at 36. Subsequently, in 1909, the court upheld a statute prohibiting the employment of miners underground for more than eight hours a day, on the basis of special health and safety hazards associated with the occupation, *In re Martin*, 157 Cal. 51 (1909); and in 1912 the court upheld restrictions on hours of work by women in certain establishments, on the basis of special concerns for the health and safety of women, *In re Miller*, 162 Cal. 687 (1912).

⁴⁸ *Ex parte Jentzsch*, 112 Cal. 468 (1896).

⁴⁹ *Ex parte Whitwell*, 98 Cal. 73 (1893) (ordinance requiring that the building be constructed of either brick or iron, or iron and stone, that it not be located within 400 yards of any dwelling or school, that the named diseases be treated in different buildings, and that males and females not be treated in the same building).

⁵⁰ *Stimson Mill Co. v. F.W. Braun*, 136 Cal. 122 (1902).

⁵¹ *Ex parte Bohlen*, 115 Cal. 372 (1896) (ordinance prohibiting additional burials in cemeteries within city limits, but permitting new cemeteries); *County of Los Angeles v. Hollywood Cemetery Ass’n*, 124 Cal. 344 (1899); *cf. Odd Fellows’ Cemetery Ass’n v. City and County of San Francisco*, 140 Cal. 226 (upholding San Francisco ordinance prohibiting cemeteries within city limits, distinguishing prior Los Angeles case on the basis that San Francisco was smaller geographically).

⁵² *Ex parte Hayden*, 147 Cal. 649 (1905).

⁵³ *In re Smith*, 143 Cal. 368 (1904).

⁵⁴ *Ex parte Quarg*, 149 Cal. 79 (1906).

⁵⁵ *In re McCapes*, 157 Cal. 26 (1909).

⁵⁶ *Ex parte Dart*, 172 Cal. 47 (1916).

employer from entering into a contract requiring an employee to surrender to him tips or gratuities received.⁵⁷

The doctrinal basis for these decisions was often fuzzy, and apparently of little consequence. Decisions referred variously to article I, section 1 of the state Constitution,⁵⁸ to the due process clauses of the state and federal constitutions,⁵⁹ to the state constitutional prohibition against special laws,⁶⁰ and in some cases simply to treatises which described limitations upon the “police power” considered to be inherent in the nature of constitutional government:

The constitutional guaranty securing to every person the right of “acquiring, possessing, and protecting property,” . . . includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter These rights are in fact inherent in every natural person, and do not depend on constitutional grant or guaranty. Under our form of government by constitution, the individual, in becoming a member of organized society, unless the constitution states otherwise, surrenders only so much of these personal rights as may be considered essential to the just and reasonable exercise of the police power in furtherance of the objects for which it exists. . . .

The police power is broad in its scope, but . . . it extends only to such measures as are reasonable in their application and which tend in some appreciable degree to promote, protect, or preserve the public health, morals, or safety, or the general welfare. The prohibition of an act which the court can clearly see has no tendency to affect, injure, or endanger the public in any of these particulars, and which is entirely innocent in character, is an act beyond the pale of this limitation, and it is therefore not a legitimate exercise of police power.⁶¹

⁵⁷ *Ex parte Farb*, 178 Cal. 592 (1918). The court made it rather clear in its opinion that it disapproved of tipping, referring to it as “organized blackmail.” *Id.* at 594. *Farb* was later disapproved in *Cal. Drive-In Rest. Ass’n v. Clark*, 22 Cal. 2d 287, 295 (1943).

⁵⁸ *E.g.*, *Stimson Mill Co. v. Braun*, 136 Cal. at 125 (1902).

⁵⁹ *Ex parte Farb*, 178 Cal. at 600.

⁶⁰ *Ex parte Jentzsch*, 112 Cal. at 471 (1896) (finding no justification for banning work on Sundays by barbers while allowing others to work).

⁶¹ *Ex parte Quarg*, 149 Cal. at 81–82 (citing Cooley’s treatise on Statutory Limitations and Barbour on Rights).

Rarely did the court articulate the reasoning behind its conclusions, other than to say it saw no basis for the particular regulation. In some cases it appeared the court was concerned that the regulation was motivated by special interests seeking protection against competition,⁶² but that was seldom the explicit grounds for decision. In the case which led to the invalidation of the Los Angeles ordinance prohibiting gas works in a described area, for example, the area was Arroyo Seco, a rural community between Los Angeles and Pasadena, described as a “rocky waste between two and three hundred yards in width.”⁶³ It contained only fifteen residences, and none within yards of petitioner Smith’s gas works. It seemed apparent to Justice Shaw, who concurred in the majority opinion, that the ordinance was “manifestly intended to prohibit and suppress the particular business of the petitioner,”⁶⁴ but Justice Henshaw, writing for the majority, insisted that “the motives prompting its enactment are of no consequence” and that the only question was whether “the conditions . . . justify the enactment.”⁶⁵ Without elaboration, he found they did not.

In some of these cases the court’s conclusion seems quite strange through a modern lens — for example, the case invalidating the fire permit requirement just three years after the San Francisco earthquake and fire, on the basis of a property owner’s right to control his own property.⁶⁶ While the opinions in such cases frequently paid lip service to the need for deference to the legislative process, the court insisted on its authority to determine the facts underlying the need for the legislation. On occasion there was a dissenting voice,⁶⁷ but most of the decisions were unanimous.

By the second decade of the twentieth century, however, perhaps responding to the Progressive revolution, there were signs that the state

⁶² *E.g., Ex parte Hayden*, 147 Cal. at 653 (opining that a statute requiring fruit boxes to bear identification of the county and location where the fruit was grown seemed to benefit only certain producers with favorable localities).

⁶³ *In re Smith*, 143 Cal. at 370–371.

⁶⁴ *Id.* at 374 (Shaw, J., concurring).

⁶⁵ *Id.* (majority opinion).

⁶⁶ *In re McCapes*, 157 Cal. 26.

⁶⁷ *E.g., Ex parte Bohen*, 115 Cal. at 379 (McFarland, J., dissenting from a decision invalidating ordinances that prohibited or limited new cemeteries, stating that “the ordinance in question operates uniformly upon all of the class who come within its provisions”).

Supreme Court's attitude toward regulation was becoming more accepting of legislative judgment. In *In re Martin* the court rejected a state constitutional attack on a 1909 statute prohibiting employment of miners underground for more than eight hours a day and requiring that the hours be consecutive, reasoning that the legislation was within the "police power" because the work involved was particularly dangerous.⁶⁸ In doing so it followed the lead of the U.S. Supreme Court in *Holden v. Hardy*, which had upheld a nearly identical statute against attack under the Fourteenth Amendment.⁶⁹ The California court distinguished *Lochner*, which was decided after *Holden*, on the basis that the "primary consideration is whether or not the occupation possesses such characteristics of danger to the health of those engaged in it as to justify the legislature in concluding that the welfare of the community demands a restriction."⁷⁰ Rejecting petitioner's argument that the statute violated the protections of the California Constitution respecting "special legislation" because it did not include other equally dangerous occupations, the court said, "Whether these other occupations present the same dangers to health . . . and whether, if they do, these dangers can best be met by restricting the hours of labor, are primarily questions for the legislature."⁷¹

In *In re Miller* the court upheld a 1911 statute limiting the hours of work for females in certain establishments, including hotels, against attack under article I, section 1.⁷² The court cited the U.S. Supreme Court's post-*Lochner* decision in *Muller v. Oregon*⁷³ along with cases from other states, but with an emphasis on legislative discretion:

⁶⁸ *In re Martin*, 157 Cal. 51, 56 (1909).

⁶⁹ *Holden v. Hardy*, 169 U.S. 366 (1898).

⁷⁰ *In re Martin*, 157 Cal. at 55.

⁷¹ *Id.* at 57.

⁷² *In re Miller*, 162 Cal. 687 (1912). Petitioner also challenged the statute as a discrimination against women under article XX, section 18 ("No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession."). The court dismissed that challenge on the ground that "as in case of the other constitutional guaranties, the provision is subject to such reasonable regulation as may be imposed in the exercise of the police powers." *Id.* at 692, 695-97. This part of the court's holding has since been disapproved.

⁷³ *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding the constitutionality of a law restricting the hours worked by women in laundries).

[A] large discretion is vested in the legislature to determine what measures are necessary [to promote general health and welfare]. Upon this question of fact, as also with regard to the facts upon which a lawful classification and discrimination depend, . . . the rule is well settled that the legislative determination that the facts exist which make the law necessary, must not be set aside or disregarded by the courts, unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which the courts may properly take notice. . . . If reasonable men, upon a consideration of the facts might rationally reach the conclusion that the enforcement of the statute would tend to promote or preserve, in some appreciable degree, the public health or general welfare, the law must be accredited as a proper exercise of the police power, although other reasonable persons might take a different view.⁷⁴

A similar deferential approach characterized the court's 1917 opinion in *Ex parte Barmore*, upholding a Los Angeles city ordinance making it unlawful to solicit custom or patronage within a railroad depot for any hotel or for the transportation of persons or baggage, since the city council "may well have thought that active solicitation of patronage within depots would interfere unduly with the peaceable and convenient use of depots by arriving and departing passengers."⁷⁵ The effect of the decision was to override a contract that petitioner Barmore had with the Southern Pacific Railroad to do precisely what the ordinance prohibited.⁷⁶

⁷⁴ *In re Miller*, 162 Cal. at 695–96. See also *In re Wong Wing*, 167 Cal. 109 (1914) (*per curiam* opinion rejecting an attack on a San Francisco ordinance limiting the hours in which laundries could engage in washing and ironing to the period from 7 a.m. to 6 p.m., assertedly in the interest of protection against fires).

⁷⁵ *In re Barmore*, 174 Cal. 286, 288 (1917).

⁷⁶ *Id.* at 289. Cf. *Frost v. City of Los Angeles*, 181 Cal. 22 (1919), invalidating, as beyond the state's police power, a statute providing for denial of permits to furnish water unless it was, "under all the circumstances and conditions . . . the purest and most healthful obtainable or securable." Justice Shaw's opinion for the court observed wryly: "Apparently this part of the law is based on the theory that it is better for the urban population of the state that they should die of thirst than that they should quench it with ordinary healthful water, which is not the very purest that can possibly be obtained." *Id.* at 28.

4. *Economic Regulation and the “Rational Basis” Test in California*

The effect of these decisions was to move the court to a position quite close to the modern “rational basis” test for assessing the constitutionality of economic regulation, an approach which it continued to follow during the 1920s and the 1930s. In 1925, for example, in *Miller v. Board of Public Works*, the court upheld a Los Angeles zoning ordinance establishing an area for single family residences, stating:

[T]he police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.⁷⁷

And, in 1936, in *Max Factor & Co. v. Kunsman*, the court upheld California’s Fair Trade Act requiring retailers who sold trademarked goods to abide by minimum resale price terms specified in the manufacturer’s sales contract.⁷⁸ “[T]his court has neither the power nor the duty to determine the wisdom of any economic policy,” the court said, in language reminiscent of Justice Holmes’s dissent in *Lochner*; “that function rests solely with the legislature.”⁷⁹

Still, echoes of the *Lochner* era continued well into the 1930s and beyond. In the same year that it decided *Kunsman* the California Supreme Court held an Oakland ordinance prohibiting laundry operations, including sales and delivery, after 6 p.m., to deprive a laundry owner of his liberty and property without due process of law, in violation of the state and federal constitutions, and to deprive him of the equal protection of the

⁷⁷ *Miller v. Bd. of Pub. Works*, 195 Cal. 477, 485 (1925). See also *Magruder v. Redwood City*, 203 Cal. 665 (1928) (upholding ordinance excluding certain businesses from residential areas).

⁷⁸ *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446 (1936).

⁷⁹ *Id.* at 454. See also *Agric. Prorate Comm’n v. Super. Ct.*, 5 Cal. 2d 550 (1936) (upholding the constitutionality of the state’s Prorate Act, which provided lemon growers with an opportunity through petition to the Agricultural Prorate Commission to establish a prorated market if they faced “agricultural waste”); *In re Fuller*, 15 Cal. 2d 425 (1940) (upholding the constitutionality of the Small Loan Act, regulating the amount of interest small loan lenders are permitted to charge).

laws.⁸⁰ Still later, in *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners*, the Supreme Court invalidated legislation which mandated minimum prices for dry cleaning services, partly on the ground that the legislation benefited only the industry and not the public, and partly because the Legislature had delegated authority to establish minimum prices to an administrative body composed of industry representatives.⁸¹

The opinion in *Thrift-D-Lux* was 4–3, with a vigorous dissent by Justice Traynor that accused the majority of reverting to *Lochner*.⁸² In 1959, in *Allied Properties v. Department of Alcoholic Beverage Control* a new court majority distinguished *Thrift-D-Lux* in a case upholding minimum price provisions for alcoholic beverages, and *Thrift-D-Lux* has not been heard of since.⁸³ When, in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control*, the court was invited to reconsider *Allied Properties* in light of numerous decisions by other state courts holding fair trade laws unconstitutional, the court declined the invitation.⁸⁴ Justice Tobriner's opinion for the court, referring to developments in the U.S. Supreme Court, distinguished between cases in which "appeal is made to liberties which derive merely from shifting economic arrangements" and "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society."⁸⁵ As to the former, the question is only whether the statute "reasonably relates to a legitimate governmental purpose," and in making that determination, "[w]e must not confuse reasonableness with wisdom. The doctrine that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely has long since been discarded."⁸⁶

⁸⁰ *In re Mark*, 6 Cal. 2d 516 (1936) (distinguishing the court's prior holding in *In re Wong Wing* as involving a limitation only on clothes processing in the laundry).

⁸¹ *State Bd. of Drycleaners v. Thrift-D-Lux Cleaners, Inc.*, 40 Cal. 2d 436, 444, 448 (1953).

⁸² *Id.* at 455 (Traynor, J., dissenting).

⁸³ *Allied Props. v. Dep't Alcoholic Beverage Control*, 53 Cal. 2d 141, 151 (1959).

⁸⁴ *Wilke & Holzheiser, Inc. v. Dep't Alcoholic Beverage Control*, 65 Cal. 2d 349 (1966).

⁸⁵ *Id.* at 359.

⁸⁶ *Id.* (citing *Ferguson v. Skrupa*, 372 U.S. 726, 728–30 (1963)).

B. NON-ECONOMIC LIBERTIES

1. *Non-Economic Liberties in the U.S. Supreme Court*

Following the demise of *Lochner* the U.S. Supreme Court shied away from substantive due process doctrine, not only in the arena of economic regulation but also with respect to claims of constitutional protection for non-economic liberties. Instead, confronted by claims the court found meritorious, the court turned increasingly to the Equal Protection Clause of the Fourteenth Amendment. While the New Deal court was extremely deferential to application of the Equal Protection Clause in the context of economic regulation, it gradually developed a doctrinal justification for greater scrutiny of classifications in the case of liberty interests explicitly protected by the federal Bill of Rights and applicable to the states through the Fourteenth Amendment or otherwise deemed “fundamental,” as well as of classifications that involved adverse treatment of “discrete and insular minorities.” For example, in *Skinner v. Oklahoma*, in 1942, the court found unconstitutional a law requiring surgical sterilization of individuals convicted of three or more crimes involving “moral turpitude,” not because the right to procreate was protected by substantive due process, but because the law discriminated in violation of the Equal Protection Clause with respect to the exercise of a fundamental liberty.⁸⁷

Then, in 1965, the court confronted a case in which the protection of what the court was prepared to consider a fundamental liberty interest could not convincingly be decided on the basis of the Equal Protection Clause. The case was *Griswold v. Connecticut*, and the liberty interest was the right of access to contraceptives.⁸⁸ More precisely, the case involved the rights of Planned Parenthood and a physician to counsel the use of contraceptives, in violation of a statute which made that a crime; but the underlying liberty interest was that of the potential users.⁸⁹ A majority of the court were of the view that the statute was unconstitutional, but the right to use contraceptives did not seem to fall within any of the rights specifically enumerated in the Bill of Rights, and to rely on substantive due process to fill in the gap was anathema to most of the court. The result was an “opinion

⁸⁷ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁸⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁹ *Id.* at 485.

of the Court” by Justice Douglas, rejecting reliance on substantive due process, and instead relying upon perceived “penumbras” emanating from the specific Bill of Rights guarantees.⁹⁰

Penumbras aside, “privacy” was always a somewhat awkward label for the interests the court sought to protect in *Griswold* and its progeny. While the ban on contraception triggered visions of police spying upon people in their bedrooms, the right to obtain and use contraceptives in order to further one’s own choices about sex and reproduction was really the heart of the issue. A much more convincing explanation, provided by Justice Harlan’s concurring opinion in *Griswold*, was that the concept of substantive due process had not died, or if it had it could be resurrected in the service of protecting “liberty” of a different sort than the abstract right of contract protected in *Lochner*.⁹¹ It could be used, with stricter scrutiny than the mere “rational basis” test supposedly applicable to all legislation, to protect, through the Due Process Clause, aspects of liberty deemed in some sense “fundamental.”

Justice Harlan’s vision in *Griswold* became the accepted rationale for the court’s opinion in *Roe v. Wade*,⁹² and it became the dominant doctrine in dealing with claims for constitutional protection for rights beyond those specifically enumerated in the Bill of Rights. The notion of “privacy” as the doctrinal tool for protecting such rights fell by the wayside. But not in California.

2. “Privacy” Under the California Constitution

Article I, section 13 of the California Constitution, in language virtually identical to that contained in the Fourth Amendment to the federal Constitution, prohibits unreasonable searches or seizures and requires probable cause for the issuance of a warrant.⁹³ Similarity of language notwithstanding,

⁹⁰ *Id.*

⁹¹ *Id.* at 499–502 (Harlan, J., concurring).

⁹² *Roe v. Wade*, 410 U.S. 113 (1973).

⁹³ CAL. CONST. art. I, § 13. In its present form, the section reads:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

the California Supreme Court in the 1970s declared that the California provision imposes a “more exacting standard” than its federal counterpart;⁹⁴ and in a number of cases read it to provide greater protection than the Fourth Amendment as interpreted by the U.S. Supreme Court.⁹⁵ In addition, the California Supreme Court has held this section to apply in some circumstances in which the Fourth Amendment would not apply for lack of state action.⁹⁶ Article I, section 13 is principally invoked by criminal defendants as a basis for the exclusion of evidence, and in that context article I, section 28 (f)(2) of the state Constitution, a product of the initiative process, now precludes California courts from excluding evidence that would be admissible under the federal standard.⁹⁷ Other remedies for violation of article I, section 13, however, are still available,⁹⁸ but in the non-criminal context it is the “privacy” language of article I, section 1 that has provided California courts with a textual basis for extending protection for privacy interests,⁹⁹ not only with respect to informational privacy, but with respect

The provision derives from article I, section 19 of the 1849 Constitution, with minor nonsubstantive changes in 1974.

⁹⁴ *People v. Brisendine*, 13 Cal. 3d 528, 545 (1975).

⁹⁵ *E.g.*, *People v. Krivda*, 8 Cal. 3d 623 (1973) (dismissal of action based on evidence obtained through warrantless search of a garbage can); *Brisendine*, 13 Cal. 3d 528

⁹⁶ *E.g.*, *People v. Zelinski*, 24 Cal. 3d 357 (1979) (search by privately employed store guards).

⁹⁷ CAL. CONST. art. I, § 28(f)(2) (adopted June 8, 1982; nonsubstantive amendments adopted 2008). This section reads:

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

⁹⁸ *See, e.g.*, *People v. Cook*, 41 Cal. 3d 373 (1985) (injunction limiting warrantless surveillance of backyard from police helicopter).

⁹⁹ *Compare, e.g.*, *Burrows v. Super. Ct.*, 13 Cal. 3d 238 (1975) (interpreting article I, section 13 to require exclusion of bank records obtained by prosecutor without warrant) *with* *White v. Davis*, 13 Cal. 3d 275 (1975) (interpreting article I, section 1 to preclude civil discovery order of bank records without notice and opportunity for account holder to object). The two opinions were filed the same month.

to autonomy as well, beyond the federal guarantees.¹⁰⁰ While informational privacy and autonomy are analytically distinct — informational privacy having to do with preventing others from knowing matters one would wish to keep private, autonomy having to do with the right to engage in particular activity whether others know about it or not — the two share an overlapping intellectual and jurisprudential history.

3. *Informational Privacy in California*

The ballot argument in support of the 1972 privacy amendment advised voters that there were “no effective restraints on the information activities of government and business” and proceeded to define the “right of privacy” in broad terms:

The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us . . . This right should be abridged only when there is a compelling public need . . .¹⁰¹

The first case to consider the application of the new right of privacy was *White v. Davis* in 1975.¹⁰² Hayden White, a professor of history at UCLA, instituted a taxpayer’s suit against Edward M. Davis, the Los Angeles chief of police, seeking to enjoin expenditures to support what he alleged to be

¹⁰⁰ There have been occasional cases in which the court has relied upon the state Due Process Clause, rather than the privacy clause, as a basis for finding a particular interest to be fundamental so as to trigger strict scrutiny under the state’s Equal Protection Clause. See, e.g., *Hawkins v. Super. Ct.*, 22 Cal. 3d 584 (1978) (right of defendant to preliminary hearing found to be fundamental so as to trigger scrutiny of a prosecutor’s decision to seek indictment by a grand jury). And in the recent *In re Marriage Cases*, 43 Cal. 4th 757, 810 (2008), the court found the right to marry a person of one’s choice to be fundamental both under the privacy clause and the Due Process Clause; see *infra* Part I-C.

¹⁰¹ *BALLOT PAMP., PROPOSED STATS. & AMENDS. TO CAL. CONST. WITH ARGUMENTS TO VOTERS, GEN. ELECTION 26* (Nov. 7, 1972).

¹⁰² *White v. Davis*, 13 Cal. 3d 757 (1975).

conduct of covert intelligence gathering activities at the university. These activities were alleged to include the placement of informers and undercover agents in classrooms, student organizations, and meetings for the purpose of submitting reports to the police chief and the development of files, unrelated to any illegal activity. The trial court having sustained a demurrer without leave to amend, the question before the California Supreme Court was whether these allegations stated a cause of action.

The court, in a unanimous opinion by Justice Tobriner, held that the conduct alleged implicated rights of free expression and association protected by both federal and state constitutions, and independently implicated the privacy amendment which had been adopted while the case was pending.¹⁰³ The ballot argument in support of the amendment, the court said, made three points clear:

First, the statement identifies the principal “mischief” at which the amendment is directed: (1) “government snooping” and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose . . . or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records. Second, the statement makes clear that the amendment does not purport to prohibit all incursion into individual privacy but rather any such intervention must be justified by a compelling interest. Third, the statement indicates that the amendment is intended to be self-executing, i.e., that the constitutional provision, in itself, “creates a legal and enforceable right of privacy for every Californian.”¹⁰⁴

In the same year it decided *White v. Davis* the court applied the privacy provision to hold that bank customers had a protectable privacy interest in financial information which they disclosed to a bank, so as to prevent a court from allowing discovery of that information in a suit against the bank by a third party without notice and opportunity to object and seek a protective

¹⁰³ *Id.* at 768, 776.

¹⁰⁴ *Id.* at 775.

order.¹⁰⁵ That case, *Valley Bank of Nevada v. Superior Court*, has led to the application of article I, section 1 in a variety of civil litigation contexts.

Ten years after *White v. Davis* the Supreme Court again considered the application of article I, section 1 to informational privacy, this time arising out of an attempt by the City of Long Beach to administer polygraph tests to a group of employees working in a boat launch area where thefts had occurred from launch machines.¹⁰⁶ In a suit for injunctive relief brought by the labor union which represented the employees, the court held that the City's orders that the employees submit to polygraph examinations as a condition of their employment "intruded upon the employees' constitutionally protected zone of individual privacy and also violated their right to equal protection under the law."¹⁰⁷ The equal protection analysis was triggered by the fact that while separate state statutes prohibited compulsory polygraph examinations for private employees and for public safety officers, the statutory scheme left other public employees unprotected.¹⁰⁸ The privacy analysis focused on article I, section 1:

If there is a quintessential zone of human privacy it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality. . . . A polygraph examination is specifically designed to overcome this privacy by compelling communication of "thoughts, sentiments, and emotions" which the examinee may have chosen not to communicate.¹⁰⁹

Since the polygraph examinations intruded upon the fundamental right of privacy, the burden was on the City to demonstrate that the classifications resulting from the statutory scheme were "justified by a compelling governmental interest and that the distinctions are necessary to further that purpose."¹¹⁰ The court concluded the City had not met that burden.

In 1994 the California Supreme Court for the first time confronted directly the question whether state action was required for the application of article I, section 1, or whether it protected privacy interests against

¹⁰⁵ *Valley Bank of Nevada v. Super. Ct.*, 15 Cal. 3d 652 (1975).

¹⁰⁶ *Long Beach City Emps. Ass'n v. City of Long Beach*, 41 Cal. 3d 937 (1986).

¹⁰⁷ *Id.* at 956.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 944.

¹¹⁰ *Id.* at 948.

nongovernmental entities as well. In *White v. Davis*, the court had listed, as one of the “mischiefs” against which the privacy amendment was aimed, the “overbroad collection and retention of unnecessary personal information by government and business interests,”¹¹¹ and subsequent decisions by the Court of Appeal, relying upon the frequent use of the phrase “government and business” in the ballot argument in favor of the amendment, had consistently concluded that the constitutional right of privacy could be enforced against private parties.¹¹² In *Hill v. National Collegiate Athletic Association* (NCAA) the court confirmed that reading, holding that the athletic association’s drug testing program for athletes was subject to article I, section 1 privacy right analysis.¹¹³ Observing that the language of the section was not determinative of the issue, the court turned to the ballot arguments as the best evidence of voter intent.¹¹⁴ It found the repeated references to “information-amassing practices of both ‘government’ and ‘business,’” as well as references to credit card purveyors, insurance companies, and private employers,¹¹⁵ to be persuasive evidence of how the voters were likely to have understood the measure.¹¹⁶ The court noted that “[i]n its day-to-day operations, the NCAA is in a position to generate, retain, and use personal information about student athletes and others. In this respect, it is no different from a credit card purveyor, an insurance company, or a private employer”¹¹⁷

The NCAA had pointed out that the court had assumed a state action requirement for application of certain other provisions in article I,

¹¹¹ *White*, 13 Cal. 3d at 775 (emphasis added).

¹¹² See *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829–830 (1976) (improper disclosure of academic transcript by private university); *Wilkinson v. Times-Mirror Corp.*, 215 Cal. App. 3d 1034, 1041–42 (1989) (publishing company’s preemployment drug testing program).

¹¹³ *Hill v. NCAA*, 7 Cal. 4th 1, 20 (1994).

¹¹⁴ *Id.* at 16.

¹¹⁵ “Each time we apply for a credit card or a life insurance policy, file a tax return, interview for a job, or get a driver’s license, a dossier is opened and an informational profile is sketched.” *Id.* at 59 (quoting *BALLOT PAMP., PROPOSED STATS. & AMENDS. TO CAL. CONST. WITH ARGUMENTS TO VOTERS, GEN. ELECTION 26* (Nov. 7, 1972)).

¹¹⁶ *Id.* at 16–19. Cf. J. Clark Kelso, *California’s Constitutional Right to Privacy*, 19 PEPP. L. REV. 327 (1992) (arguing that the history in the Legislature, which made no reference to private application, ought to govern).

¹¹⁷ *Hill*, 7 Cal. 4th at 19.

including the prohibition against unreasonable search and seizure¹¹⁸ and the guarantee of due process,¹¹⁹ and argued that the same requirement should apply to the privacy provision in section 1, but the court rejected that argument, noting that “those decisions were not premised on the *mere location* of the respective provisions in the constitutional text, but on their distinct language and histories.”¹²⁰

So far the opinion was unanimous, but matters became more contested when the court moved to consider how the privacy provision was to apply. The Court of Appeal, following language in *White v. Davis* and subsequent cases, which in turn followed the language of the ballot argument, had applied a “compelling interest” test, and held on that basis that the NCAA’s program was unconstitutional.¹²¹ But Chief Justice Lucas, joined by four other justices, rejected that test as being overly rigid, and not compelled either by the ballot argument or by prior case law except “[w]here the case involves an obvious invasion of an interest fundamental to personal autonomy, *e.g.*, freedom from involuntary sterilization or the freedom to pursue consensual familial relationships.” In other cases, a general balancing test was to be used.¹²²

In addition to calling for a balance of interests, the majority created an analytical schema by which the balance was to be determined. The plaintiff, in order to establish a constitutional violation, would have to show three things: (1) the identification of a “specific, legally protected privacy interest”; (2) a “reasonable expectation of privacy,” taking into account the surrounding circumstances; and (3) a “serious” invasion of the plaintiff’s privacy interests.¹²³ Upon such a showing, the defendant could present evidence of “competing interests,” and the plaintiff would then have opportunity to

¹¹⁸ *People v. Zelinski*, 24 Cal. 3d 357, 365 (1979).

¹¹⁹ *Garfinkle v. Super. Ct.*, 21 Cal. 3d 268, 281–282; *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 366 (1974).

¹²⁰ *Hill*, 7 Cal. 4th at 19. Justices Panelli, Arabian, and Baxter joined the chief justice’s opinion. Justice Kennard wrote separately, agreeing with the majority’s analysis but disagreeing with the disposition; she would have remanded to the lower court to give the plaintiffs opportunity to litigate on the basis of the court’s newly established standards. *Id.* at 58 (Kennard, J., concurring and dissenting).

¹²¹ *Hill v. NCAA*, 18 Cal. App. 4th 1290, 1304 (1990) (citing *White*, 13 Cal. 3d at 776).

¹²² *Hill*, 7 Cal. 4th at 34, 37.

¹²³ *Id.* at 35–37.

rebut by demonstrating the existence of less intrusive alternatives.¹²⁴ Moreover, the striking of the balance might be different in the case of a private entity, the majority said, because government action poses greater danger to freedoms, and because an individual generally has greater choice and alternatives in dealing with private actors than when dealing with governments.¹²⁵ In the end, after a long and somewhat meandering opinion, the court upheld the NCAA's drug testing program as constitutional.¹²⁶

Hill appeared to redraw the balance suggested by prior case law. In lieu of a "compelling interest" standard which placed the burden of justifying an intrusion on privacy upon the defendant, *Hill* created a series of obstacles which a plaintiff would have to overcome in order to require the defendant to come forward with justification. Justice George, while concurring in the result, objected strongly both to the court's rejection of the "compelling interest" standard and to the court's "entirely new legal framework that, from all appearances, has no precedent in any past constitutional decision of this state or any other jurisdiction."¹²⁷ He found the first "element" — the identification of a legally protected privacy interest — to be unobjectionable, but he insisted that requiring the plaintiff to establish that his expectation of privacy was "reasonable" and "serious" before the defendant was under an obligation to provide justification introduced an "undesirable and unfortunate inflexibility into the constitutional analysis that, if faithfully applied, is likely to bar privacy claims that properly should be permitted to go forward."¹²⁸ Justice Mosk also dissented. Applying a "compelling interest" standard, he would have found the NCAA testing program unconstitutional.¹²⁹

The role of the tripartite test created in *Hill* was clarified several years later in another drug-testing case, *Loder v. City of Glendale*.¹³⁰ The City, as part of its "war on drugs," was insisting that all job applicants and all candidates for promotion be subjected to urinalysis testing for marijuana

¹²⁴ *Id.* at 37–38.

¹²⁵ *Id.* at 38–39.

¹²⁶ *Id.* at 57.

¹²⁷ *Id.* at 66 (George, C.J., dissenting in part).

¹²⁸ *Id.*

¹²⁹ *Id.* at 110 (Mosk, J., dissenting).

¹³⁰ *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997).

and alcohol. Plaintiff Lorraine Loder, in a taxpayer suit, sought to enjoin expenditure of funds for the program on the basis that it violated both federal and state constitutions. The lead opinion, by Chief Justice George, found it unnecessary to consider the state privacy provision as to the suspicionless testing of current city employees applying for promotion, since that part of the program was held to violate Fourth Amendment standards declared by the U.S. Supreme Court.¹³¹ Concluding, however, that the program as applied to job applicants would not violate the Fourth Amendment as construed by the high court, Chief Justice George proceeded to analyze the issue under the California privacy provision. In the process of doing so he restated and impliedly accepted the *Hill* limitations on the requirement for a showing of “compelling interest” to justify invasions of privacy; but at the same time he made clear that the three “elements” set forth in *Hill* (legally protected privacy interest, reasonable expectation of privacy, and serious invasion) “should not be interpreted as establishing significant *new* requirements or hurdles that a plaintiff must meet [before] consideration of the legitimacy or importance of a defendant’s reasons for engaging in the allegedly intrusive conduct and without balancing the interests supporting the challenged practice against the severity of the intrusion imposed by the practice.”¹³² Rather, they should be viewed “simply as ‘threshold elements’ that may be utilized to screen out claims that do not involve a significant intrusion on a privacy interest,” but not to “eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy

¹³¹ *Id.* at 887. The opinion’s explanation for considering the federal Constitution first was that there were pertinent federal precedents, whereas the state court had not previously addressed the issue of employment-related testing under the state Constitution. *Id.* at 866. For both principled and practical reasons I beg to differ. There is in principle no justification for reaching out to decide a federal constitutional issue if the issue can be resolved on the basis of state law, any more than there is for reaching out to decide a constitutional issue if the matter can be resolved through statutory interpretation. And as a practical matter, decision based on the federal Constitution where the case could be resolved on the basis of state law leaves open the possibility that the U.S. Supreme Court will disagree and remand for consideration under the state Constitution, resulting in needless appellate litigation; and in any event the failure to confront interpretation of the state Constitution inhibits the development of state constitutional law.

¹³² *Id.* at 890–91.

interest.”¹³³ And in a footnote, the opinion stated that the same analytical framework would apply to private entities, though “involvement of a governmental entity might affect the degree of the intrusion imposed by particular conduct and the importance of the interests served by the conduct.”¹³⁴

By that standard, the City of Glendale’s drug testing program as applied to applicants was deemed to have met the *Hill* threshold, but the chief justice’s lead opinion went to hold that it did not violate the privacy provision of article I, section 1, because an employer has a “substantial interest in conducting suspicionless drug testing of a job applicant,” and drug testing of applicants as part of an otherwise lawful preemployment medical examination represents “much less of an intrusion on reasonable expectations of privacy than does drug testing in other contexts.”¹³⁵ The chief justice’s opinion was joined only by Justice Werdegar. Justice Kennard, concurring and dissenting, would have held the suspicionless testing of applicants to violate the Fourth Amendment, without passing on the California Constitution,¹³⁶ and Justice Mosk, applying a “compelling interest” standard, would have held the testing of applicants to violate both constitutions.¹³⁷ Justices Chin, Baxter, and Brown dissented, finding both parts of the City’s drug testing program valid.¹³⁸

Chief Justice George’s “clarification” of the three *Hill* “elements” was subsequently confirmed in *Sheehan v. San Francisco 49ers*,¹³⁹ but disagreement continued over application of the clarified analysis. Plaintiffs, who were longtime 49ers season ticket holders, brought suit complaining that the National Football League’s recently instituted policy of requiring patrons at their football games to submit to a patdown search before entering the stadium violated their privacy rights under the California Constitution. The trial court sustained the defendant’s demurrer without leave to amend, and the Court of Appeal affirmed on the ground that the plaintiffs

¹³³ *Id.* at 893.

¹³⁴ *Id.*

¹³⁵ *Id.* at 897–98.

¹³⁶ *Id.* at 918–22 (Kennard, J., concurring and dissenting).

¹³⁷ *Id.* at 900 (Mosk, J., concurring and dissenting).

¹³⁸ *Id.* at 922 (Chin, Baxter, and Brown, JJ., dissenting).

¹³⁹ *Sheehan v. S.F. 49ers*, 45 Cal. 4th 992 (2009).

consented to the pat-down by not simply walking away. The Supreme Court unanimously reversed, but in separate opinions which reflected continuing tension over how to deal with privacy claims. The lead opinion by Justice Chin, joined by Justices Kennard, Baxter, and Corrigan, found that the record, which consisted in its entirety of the complaint and the demurrer, did not contain enough information to establish as a matter of law that the complaint fails to state a cause of action,¹⁴⁰ but went on to suggest a variety of ways in which the 49ers might nevertheless prevail. While accepting the lower court's premise that a person who attends an entertainment event may be deemed to consent only to security measures that are "reasonable under the circumstances," and not to "any security measures the promoters may choose to impose no matter how intrusive or unnecessary," the record was not sufficient to establish what the circumstances were.¹⁴¹ Observing that in the absence of an answer the nature and weight of "competing social interests" could not be determined, the opinion noted that "the pursuit of safety, like the pursuit of privacy, is a state constitutional right."¹⁴² And while it is relevant to consider the existence of less restrictive alternatives, a private entity is not required to show that it has adopted the least restrictive alternative: "The state constitutional right of privacy does not grant courts a roving commission to second-guess security decisions at private entertainment events or to micromanage interactions between private parties."¹⁴³ Therefore, the court concluded, further factual inquiry was necessary.

Justice Werdegar, joined by Justice Moreno and Chief Justice George, took the majority opinion to task for appearing to prejudge the outcome of the case.¹⁴⁴ Resolution of the case on demurrer, she pointed out, meant not only that the defendants had not yet submitted their justifications for the search; it meant also that plaintiffs did not have the opportunity to rebut asserted justifications or to propose less intrusive alternatives.¹⁴⁵ She criticized the majority for "delving into matters that are beyond our province"

¹⁴⁰ *Id.* at 996.

¹⁴¹ *Id.* at 1001.

¹⁴² *Id.* at 1000.

¹⁴³ *Id.* at 1002.

¹⁴⁴ *Id.* at 1005 (Werdegar, J., concurring).

¹⁴⁵ *Id.* at 1004.

in ruling on a demurrer, including its allusion to the state Constitution's "safety" provision, and its dicta on the respective roles of the courts and private entities in evaluating measures alleged to infringe on privacy: "I am unwilling to substitute for the constitutional right the people [who voted for the privacy amendment] endorsed a reflective faith in the governmental and private actors they deemed wanting."¹⁴⁶ And, while the majority simply "assumed" the Sheehans had sufficiently alleged a serious invasion of privacy interests," she and her concurring colleagues were prepared to say it was clear they had done so.¹⁴⁷

The balancing approach outlined in *Hill* as clarified in *Loder* and *Sheehan* has been invoked by the court in subsequent cases in a variety of contexts. For example, in *Pioneer Electronics v. Superior Court*, in the context of a consumers' right class action involving allegedly defective DVD players, the court held that plaintiffs were entitled, precertification, to the names and contact information of other customers who had complained to the seller provided the other customers were given notice and opportunity to seek protective orders, and that (contrary to the decision of the Court of Appeal) article I, section 1 did not require their affirmative consent.¹⁴⁸ The Supreme Court, emphasizing the "broad discretion" of the trial court in evaluating the application of *Hill* criteria, upheld the trial court's determination that the customers had no reasonable expectation that the information would be kept private in such a context unless they affirmatively consented; that there was no "serious" invasion of privacy; and that in any event the plaintiffs' interest in obtaining contact information as well as the public interest in supporting consumer rights litigation outweighed arguments for requiring affirmative assent.¹⁴⁹ Similarly, in *International Federation of Professional and Technical Engineers, Local 21 v. Superior Court*, the court held that the public's interest in knowing the salaries paid to public employees outweighed the privacy interests of the employees, with the result that a newspaper publisher was entitled, under the California Public Records Act, to obtain the names, job titles and gross salaries of

¹⁴⁶ *Id.* at 1005–06.

¹⁴⁷ *Id.* at 1006–07.

¹⁴⁸ *Pioneer Elec. v. Super. Ct.*, 40 Cal. 4th 360, 374–75 (2007).

¹⁴⁹ *Id.* at 371, 373–75.

city employees who earned at least \$100,000 in a specified fiscal year.¹⁵⁰ A pending case, involving the right of a union representing public employees to obtain the names and addresses of employees in the bargaining unit who are not union members, is likely to shed further light on the balancing approach.¹⁵¹

C. INDIVIDUAL AUTONOMY UNDER THE CALIFORNIA CONSTITUTION

The line between “privacy” in the sense of protecting information about one’s self and one’s thoughts from the scrutiny of others and “privacy” in the sense of protecting against intrusion upon one’s bodily integrity and personal autonomy, or personhood, can be a blurry one. It was blurry for the U.S. Supreme Court in and after *Griswold*, and it has been a bit blurry for the California Supreme Court as well. The ballot argument in favor of the privacy initiative refers broadly to the right of privacy as “the right to be left alone It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose.”¹⁵² The legislative history of what became the ballot proposition contains references to the federal constitutional right of privacy, including *Griswold* and its progeny, but the ballot arguments do not.¹⁵³

Nonetheless, the California Supreme Court, in *City of Santa Barbara v. Adamson*, with little analysis, concluded that “privacy” under article I, section 1 included a right “to live with whomever one wishes or, at least, to live in an alternative family with persons not related by blood, marriage or adoption,” so as to require a compelling governmental interest in order to justify a zoning ordinance which prohibited more than five persons from living together in a dwelling zoned for “single family” unless they were so

¹⁵⁰ Int’l Fed’n of Prof’l & Technical Eng’rs, Local 21 v. Super. Ct., 42 Cal. 4th 319 (2007). See also *Hernandez v. Hillside, Inc.*, 47 Cal. 4th 272 (2009).

¹⁵¹ *County of Los Angeles v. L.A. Cnty. Emp. Relations*, 192 Cal. App. 4th 1409 (2011), *petition for review granted*, 262 P.3d 853 (U.S. June 15, 2011).

¹⁵² *BALLOT PAMP., PROPOSED STATS. & AMENDS. TO CAL. CONST. WITH ARGUMENTS TO VOTERS, GEN. ELECTION 26* (Nov. 7, 1972).

¹⁵³ See *Kelso, supra* note 116, at 468, 473, 475, 477; *Hill v. NCAA*, 7 Cal. 4th at 28.

related.¹⁵⁴ In doing so, the court virtually ignored federal Supreme Court precedent which had reached a different conclusion under the federal Constitution.¹⁵⁵ And in *Committee to Defend Reproductive Rights v. Myers* the court held that “privacy” included a woman’s right to choose to have an abortion.¹⁵⁶

In fact, three years before the California privacy amendment and four years before *Roe v. Wade*, the California Supreme Court in *People v. Belous* had recognized *Griswold* as standing for a principle that embraced reproductive rights.¹⁵⁷ Thus, when the court came to consider the validity under the state Constitution of a restriction on funding of abortions under Medicaid, in *Myers*, the attorney general did not challenge the proposition that under article I, section 1 “all women in this state — rich and poor alike — possess a fundamental right to choose whether or not to bear a child.”¹⁵⁸ He argued, rather, that the state court should follow the lead of the U.S. Supreme Court in *Harris v. McRae*, holding that government violates no federal constitutional precept when it simply declines to extend a public benefit to women who wish to exercise their constitutional right by having an abortion.¹⁵⁹

In rejecting the attorney general’s argument, Justice Tobriner’s opinion for the majority reconfirmed the proposition that the court has a “solemn and independent constitutional *obligation* to interpret the safeguards guaranteed by the California Constitution in a manner consistent with the governing principles of California law,” and that in fulfilling that duty “we cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions.”¹⁶⁰

Among the governing principles of California law was the doctrine of unconstitutional conditions, to the effect that when government excludes

¹⁵⁴ *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130–31 (1980).

¹⁵⁵ *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). *See also Adamson*, 27 Cal. 3d at 139–40 (Manuel, J., dissenting).

¹⁵⁶ *Comm. to Defend Reprod. Rights v. Myers*, 29 Cal. 3d 252 (1981).

¹⁵⁷ *People v. Belous*, 71 Cal. 2d 954, 963 (1969).

¹⁵⁸ *Myers*, 29 Cal. 3d at 262 (discussing *Harris v. McRae*, 448 U.S. 297 (1980)).

¹⁵⁹ *Id.* at 257.

¹⁶⁰ *Id.* at 261–62.

from benefit programs potential recipients solely on the basis of their exercise of constitutional rights in a manner the state does not approve, or does not wish to subsidize, it bears the burden of demonstrating (1) that the imposed conditions relate to the purpose of the legislation which confers the benefit or privilege; (2) that the utility of imposing the condition manifestly outweighs any resulting impairment of constitutional rights; and (3) that no less offensive alternatives are available. This doctrine had been invoked previously in *Danskin v. San Diego Unified School District*¹⁶¹ to strike down exclusion of subversive groups from the use of school buildings for public meetings, and was developed in *Bagley v. Washington Township Hospital District*,¹⁶² holding unconstitutional a condition of employment which prohibited employees of a local agency from taking part in campaigns relating to the recall of an elected official of the agency, and in numerous other cases as well.¹⁶³

In *Myers*, Tobriner noted that the federal rule was different. “[F]or at least the past decade,” he observed, “the federal decisions in this area have not been a reliable barometer of the governing California constitutional principles.”¹⁶⁴ The U.S. Supreme Court’s reasoning in *McRae*, to the effect that the exclusion of abortion benefits was permissible because it left an indigent woman no worse off than if there were no federally provided health care, “cannot be reconciled” with this line of cases. Justice Tobriner concluded that the statutory restrictions under consideration failed to meet any of the *Danskin–Bagley* requirements. First, the restriction, which had the effect of preventing poor women from obtaining an abortion to end a pregnancy which could threaten their health or even life, had no relationship to the declared primary purpose of the Medi-Cal program “to alleviate the hardship and suffering incurred by those who cannot afford needed medical care.”¹⁶⁵ Second, the utility of imposing the restriction did not outweigh the “severe impairment” of the right of procreative choice protected by article I, section 1, which is fundamental because of its relationship to the “woman’s health and personal bodily autonomy, and

¹⁶¹ *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536 (1946).

¹⁶² *Bagley v. Wash. Twp. Hosp. Dist.*, 65 Cal. 2d 499 (1966).

¹⁶³ See *Myers*, 29 Cal. 3d at 264–65 nn.7–14.

¹⁶⁴ *Id.* at 267.

¹⁶⁵ *Id.* at 271–72.

her right to decide for herself whether to parent a child.”¹⁶⁶ Indeed, it was “doubtful whether the restrictions in this case serve any constitutionally legitimate, let alone compelling, state interest.”¹⁶⁷ And third, even if the restriction were viewed, as urged by the attorney general, as an effort to aid poor women who have already decided to bear a child but cannot afford the expenses of childbirth, that goal could be readily achieved without burdening their right of procreative choice.¹⁶⁸ While the state is not obligated to fund the exercise of constitutional rights, “once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion.”¹⁶⁹

In 1997, in *American Academy of Pediatrics v. Lungren*, the court was again challenged to depart from federal precedent in the application of the privacy amendment, this time to a state statute requiring pregnant minors to secure parental consent or judicial authorization before obtaining an abortion.¹⁷⁰ The U.S. Supreme Court had upheld similar statutes against federal constitutional attack, on the ground that they did not “unduly burden” the right to an abortion, and the California statute was modeled on the Pennsylvania statute which had been upheld by the federal court.¹⁷¹ The California Supreme Court initially upheld the state statute as well, by a vote of 4–3,¹⁷² but before that decision became final the composition of the court changed: Justices Lucas, Mosk and Arabian, all of whom had been part of the majority, left the court to be replaced by Justices Chin, Werdegar, and Brown; and while Justice Brown remained with what had been the majority view, Justice Werdegar joined Chief Justice George and Justices Chin and Kennard to produce a contrary holding. Justice Kennard,

¹⁶⁶ *Id.* at 273–82.

¹⁶⁷ *Id.* at 276.

¹⁶⁸ *Id.* at 283.

¹⁶⁹ *Id.* at 284–85. See also *In re Valerie N.*, 40 Cal. 3d 143 (1985) (holding that the right to procreative choice protected by article I, section 1 includes the right to be sterilized, through the proxy choice of a conservator, as a necessary means of preventing conception).

¹⁷⁰ *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997).

¹⁷¹ *Id.* at 324 n.11 (listing decisions in which the U.S. Supreme Court has considered parental notice and consent provisions).

¹⁷² *Am. Acad. of Pediatrics v. Lungren*, 12 Cal. 4th 1007 (1996).

concurring in the result, wrote separately, leaving George, joined by Chin and Werdegar, to write the plurality controlling opinion.

Chief Justice George's plurality opinion emphatically rejected the need to follow federal precedent, emphasizing that the California Constitution "is, and always has been, a document of independent force," subject to different interpretation, "even when the terms of the California Constitution are textually identical to those of the federal Constitution."¹⁷³ As related to the case at hand there was a "clear and substantial difference" in the applicable text, since the state Constitution, unlike the federal, contains explicit protection for "privacy."¹⁷⁴ And, in a series of cases that included *Myers*, it had been established that "in many contexts the scope and application of the state constitutional right of privacy is broader and more protective of privacy than the federal constitutional right of privacy as interpreted by the federal courts."¹⁷⁵

Turning to California law, the court found that the plaintiffs' privacy claim clearly met the "threshold elements" set forth in *Hill*. *Myers* had made clear that the "autonomy privacy" protected by article I, section 1 includes a pregnant woman's right to choose whether to have an abortion, and while the status of plaintiffs as minors was relevant in assessing the state's justification for the statute, it did not defeat their threshold showing of a "specific, legally protected privacy interest."¹⁷⁶ As a general matter minors had been held entitled to constitutional protection in other contexts; article I, section 1 specifically refers to "all people" as having the rights specified by that provision; and the ballot argument in support of the privacy amendment referred to the privacy rights of "every man, woman, and child in this state."¹⁷⁷ Nor did the general statutory rule requiring a

¹⁷³ *Am. Acad. of Pediatrics*, 16 Cal. 4th at 325 (citing *People v. Brisendine*, 13 Cal. 3d 528 (1975), and *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990)).

¹⁷⁴ *Id.* at 326.

¹⁷⁵ *Id.* In addition to *Myers*, the court referred to *Hill v. NCAA*, 7 Cal. 4th 1, 20 (holding that the state Constitution, unlike the federal, applies to private as well as state action), to *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 134 (1980) (holding that the state right of privacy protects the right to reside with unrelated persons), and to numerous cases after *Myers* in which the court emphasized the broader protection afforded by the state Constitution. See *supra* notes 113–29, 154–55, and accompanying text.

¹⁷⁶ *Am. Acad. of Pediatrics*, 16 Cal. 4th at 332, 337.

¹⁷⁷ *Id.* at 334.

minor to obtain parental consent for medical care or the existence of numerous abortion/parental consent statutes in other states demonstrate that the plaintiffs' expectation of privacy was not "reasonable," since it "plainly would defeat the voters' fundamental purpose in establishing a *constitutional* right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right."¹⁷⁸ Finally, the plaintiffs' showing was sufficient to meet *Hill's* third threshold requirement of a "serious invasion of a privacy interest," since the impact of the statute upon a pregnant minor was clearly more than "de minimis or insignificant."¹⁷⁹

Because the statute impinged upon an "interest fundamental to personal autonomy," it could be justified under California law only by the demonstration of a "compelling" state interest which could not be served by less intrusive means.¹⁸⁰ The U.S. Supreme Court had declined to apply strict scrutiny to a similar statute on the ground that the state has a heightened interest in regulating the activities of minors;¹⁸¹ but Justice George's opinion rejected that analysis, reasoning that "[b]ecause the statute's impact on minors is taken into account in assessing the importance of the state interest ostensibly served by the infringement, in our view it is not appropriate *additionally* to lower the applicable constitutional standard under which the statute is to be evaluated simply because the privacy interests at stake are those of minors."¹⁸²

In assessing the existence of a "compelling" state interest, the court needed to resolve a conflict with respect to the facts asserted in justification of the statute. The statute itself contained legislative findings, borrowed practically verbatim from the findings reflected in other state statutes which had been upheld by the U.S. Supreme Court, to the effect that the psychological consequences of an abortion on a minor can be severe, that minors often lack the ability to make fully informed choices, that parents

¹⁷⁸ *Id.* at 338–39 (emphasis in original).

¹⁷⁹ *Id.* at 339.

¹⁸⁰ *Id.* at 340.

¹⁸¹ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976).

¹⁸² *Am. Acad. of Pediatrics*, 16 Cal. 4th at 342.

ordinarily possess information that would be helpful to a physician in making a judgment about abortion, and that parents may better ensure that a daughter who has had an abortion receives adequate medical treatment.¹⁸³ But the trial court had held extensive hearings and made findings, based on the evidence introduced, to the effect that the statute would not serve, but rather would impede the state's interests in protecting the health of minors and enhancing the parent-child relationship. "As a general rule," the Supreme Court said, "it is not the judiciary's function . . . to reweigh the 'legislative facts' underlying a legislative enactment," but "[w]hen an enactment intrudes upon a constitutional right . . . greater judicial scrutiny is required."¹⁸⁴ Taking note of "numerous, analogous statutory provisions authorizing a minor, without parental consent, to make medical and other significant decisions with regard to her own and her child's health and future, as well as the overwhelming evidence introduced at trial," the court concluded that the state had failed to establish that the statute was necessary to further the otherwise compelling interests asserted in its support.¹⁸⁵

Without doubt the most controversial decision recognizing a fundamental right has been *In re Marriage Cases*, involving the constitutionality of a statute prohibiting marriage between persons of the same sex.¹⁸⁶ While its principal focus was on the state Constitution's Equal Protection Clause, Chief Justice Ron George's opinion for the majority began by addressing the right to marry, which had been declared in previous cases to be fundamental,¹⁸⁷ and concluded that under both article I, section 1 (the right to privacy) and under article I, section 7 (due process of law) there exists a fundamental right to marry a person of one's choice, and that this right includes a right to state recognition of the marital relationship — a right on the part of same-sex couples as well as heterosexual couples to establish "an *officially recognized and*

¹⁸³ *Id.* at 324–25.

¹⁸⁴ *Id.* at 348–49.

¹⁸⁵ *Id.* at 356–57.

¹⁸⁶ *In re Marriage Cases*, 43 Cal. 4th 757 (2010).

¹⁸⁷ *E.g.*, *In re Valerie N.*, 40 Cal. 3d at 161 ("The right to marriage and procreation are now recognized as fundamental, constitutionally protected interests. These rights are aspects of the right to privacy which . . . is express in section 1 of article I of the California Constitution" (citations omitted)); *Williams v. Garcetti*, 5 Cal. 4th 561, 577 (1993) (referring to "rights not explicitly listed in the Constitution [as] the right 'to marry, establish a home and bring up children'").

protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.”¹⁸⁸ Later in its opinion the court relied upon the fundamentality of the right of homosexual couples to marry as well as the “suspect” nature of the classification involved to hold that “strict scrutiny” was appropriate, and that the limitations of the statute could not be justified by a compelling governmental interest.¹⁸⁹

II. EQUALITY UNDER THE CALIFORNIA CONSTITUTION

The idea of equality under the law, we have come to learn, is complicated. Treating people and groups of people differently is essential to most legislation, and not all differential treatment gives rise to justifiable claims of constitutional discrimination. Implicit in judicial application of a general equality principle are two fundamental issues: what sort of justification is required in order to support treating particular individuals, or groups of individuals, in a different manner from other individuals or groups; and to what extent is the existence of that justification a matter for determination by the courts, rather than by the Legislature? Within these broad questions lurk other, particular, questions. When the justification for a classification depends upon factual assumptions, to what extent and in what manner should courts undertake to determine, independently of the Legislature, the existence of such “constitutional facts”? Under what circumstances will supportable generalizations about a group justify treating that group differently, in the face of individual differences? Should courts inquire into the actual motivations behind a statute, and if so, how? These, and other related questions, have become accepted components of modern equal protection analysis, and in the U.S. Supreme Court have given rise to “levels of scrutiny,” dependent upon concepts like “fundamental rights” and “suspect class.”

¹⁸⁸ *Marriage Cases*, 43 Cal. 4th at 781 (emphasis in original).

¹⁸⁹ *Id.* at 843, 847, 854 (concluding that sexual orientation is a suspect class; that fundamental interests are involved, further requiring strict scrutiny; and that the state’s interest is not a compelling one for equal protection purposes).

But much of this modern analysis is fairly recent. The federal Constitution contained no mention of equality prior to the adoption of the Fourteenth Amendment, and while the U.S. Supreme Court began to develop jurisprudence under the Due Process Clause in *Lochner*, it took nearly a century before the U.S. Supreme Court came to address the meaning of the Equal Protection Clause in any significant way.¹⁹⁰ Meanwhile state courts, including the California Supreme Court, were left to their own devices, operating with whatever language their state constitutions provided. It should not be a surprise that their decisions, from a more modern perspective, appear to be a bit primitive and unrefined.

Article I, section 7 of the California Constitution, in language patterned after the Due Process Clause of the Fourteenth Amendment to the federal Constitution, provides in part: “A person may not be . . . denied equal protection of the laws . . .”¹⁹¹ But that is a relatively recent addition to the state Constitution, dating from a general constitutional revision in 1974. Prior to that time, the equality principle was represented by other, even more inscrutable, provisions.

Article I, section 11 of the 1849 Constitution provided that “[a]ll laws of a general nature shall have a uniform operation”; and this provision, slightly modified, is retained in the present Constitution as article IV, section 16(a).¹⁹² The 1879 Constitution added a provision prohibiting “local or special laws” in thirty-two enumerated areas and “[i]n all other cases

¹⁹⁰ *Cf.* *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150 (1897) (invalidating statute requiring railroads, but not other defendants, to pay attorneys’ fees to successful plaintiffs in certain cases). In 1911, just four years after the Supreme Court gave an expansive reading to the Due Process Clause in *Lochner*, the court said of the Equal Protection Clause that a classification is presumed valid “if any state of facts reasonably can be conceived to sustain it.” *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911). As late as 1927, Justice Holmes referred to equal protection as “the usual last resort of constitutional arguments.” *Buck v. Bell*, 274 U.S. 200 (1927).

¹⁹¹ CAL. CONST. art. I, § 7.

¹⁹² CAL. CONST. of 1849, art. I, § 11; CAL. CONST. art. IV, § 16(a). That section now reads: “All laws of a general nature have uniform operation.” The word “shall” was deleted as part of a 1966 revision, but the change appears to have made no difference in interpretation. *See, e.g., People v. Soto*, 171 Cal. App. 3d 1158 (1985) (asserting that article IV, section 16(a) “will not tolerate a criminal law so lacking in definition that each defendant is left to the vagaries of individual judges and juries”).

where a general law can be made applicable.”¹⁹³ That provision, streamlined, now appears as article IV, section 16(b).¹⁹⁴ The 1879 Constitution also added a “privileges and immunities” clause, presently contained in article I, section 7(b).¹⁹⁵ In addition to these general provisions, the 1879 Constitution contained a specific prohibition of discrimination on account of sex.¹⁹⁶ These, before 1974, constituted the textual basis for protection of equality.¹⁹⁷

¹⁹³ CAL. CONST. of 1879, art. IV, § 25.

¹⁹⁴ CAL. CONST. art. IV, § 16(b) (“A local or special statute is invalid in any case if a general statute can be made applicable.”).

¹⁹⁵ CAL. CONST. of 1879, art. I, § 21; CAL. CONST. art. I, § 7(b). That section now reads: “A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.”) A similar provision was contained in the Iowa Constitution upon which article I, section 11 of the California Constitution of 1849 was based, but for reasons unclear the framers of that Constitution omitted it in 1849. See the opinion of Justice Sanderson in *Brooks v. Hyde*, 37 Cal. 366, 377–78 (1869), suggesting that the first clause (uniform operation) considered by itself was “unintelligible,” and its meaning only clarified by the second clause (privileges and immunities); so that he found it a “little surprising” that the 1849 delegates, if unwilling to accept both clauses, should choose the former.

¹⁹⁶ “No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession.” CAL. CONST. of 1879, art. XX, § 18. In 1974 the language was amended to its current form: “A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.” CAL. CONST. art. I, § 8.

¹⁹⁷ While these provisions recognized the principle of equality in some contexts, in other contexts California’s constitutional history was not so benign. The 1879 Constitution reflected the prevailing anti-Chinese bias of the Workingmen’s Party, calling upon the Legislature to take steps to protect the state “from the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or . . . otherwise dangerous . . . to the . . . State, and to impose conditions upon which persons may reside in the state, and to provide the means and mode of their removal from the state . . .” CAL. CONST. of 1879, art. XIX, § 1 (repealed 1952). Section 4 of that article declared that “Asiatic coolieism is a form of slavery [and] all contracts for coolie labor shall be void.” *Id.* § 4. In addition, and more directly, section 2 prohibited corporations from employing “any Chinese or Mongolian,” and section 3 prohibited Chinese from employment on public works. *Id.* §§ 2, 3. These and similar provisions were quickly invalidated by the federal courts. See, e.g., *In re Parrott*, 1 F. 481 (C.C.D. Cal. 1880) (voiding section 2); *Baker v. City of Portland*, 2 F. Cas. 472 (C.C.D. Or. 1879) (No. 777) (voiding a similar Oregon statute).

But what is a “general law,” so as to require that it have “uniform operation”? When, in 1861, the Legislature saw fit to enact a statute directing a trial court to order a change in venue for a particular criminal defendant from San Francisco to Auburn, the Supreme Court in *People ex rel. Smith v. Judge of the Twelfth District* held the law did not violate this provision because it was a special law, not a law of a “general nature,” and that the Legislature “has the plenary power to pass special laws where special reasons exist.”¹⁹⁸ The requirement for uniformity, the court said, is only that the law apply equally “under the same facts,” not where the facts are different.¹⁹⁹ And in rejecting a challenge to the lack of “uniformity” in a Sacramento ordinance which banned women from saloons after midnight, the court observed: “It was not intended that all differences founded upon class or sex should be ignored. This must be so from the very nature of things, and from the universal custom and practice of law-makers.”²⁰⁰

After the 1879 changes, banning “local or special laws . . . where a general law can be made applicable”²⁰¹ and prohibiting denial of “privileges and immunities,”²⁰² the court began to grapple with the questions posed by these changes: What makes a law “local or special”? What determines whether a general law “can be made applicable”? And how are the “privileges and immunities” that are entitled to protection defined? Decisions tended to deal with these questions on an *ad hoc* and somewhat formalistic basis. A statute making it a misdemeanor for a person to engage in the business of baking between 6 p.m. on Saturday and 6 p.m. on Sunday was invalid as a “special law . . . for the punishment of crimes and misdemeanors” where a general law (*i.e.*, one banning all Sunday work) could (arguably) be made applicable.²⁰³ But a statute which banned business on Sundays while exempting “hotels, boarding houses, barber shops, baths,

¹⁹⁸ *People ex rel. Smith v. Judge of the Twelfth Dist.*, 17 Cal. 547, 554 (1861).

¹⁹⁹ *Id.* at 555. The court also held, rather remarkably, that the law did not violate separation of powers. *Id.* at 556–62.

²⁰⁰ *Ex parte Smith*, 38 Cal. 702, 711 (1869); *see also supra* notes 32–34 and accompanying text.

²⁰¹ CAL. CONST. of 1879, art. IV, § 25.

²⁰² CAL. CONST. of 1879, art. I, § 21.

²⁰³ *Ex parte Westerfield*, 55 Cal. 550–51 (1880) (citing CAL. CONST. of 1879, art. IV, § 25 and further stating that “[i]f there be authority to restrain the labor on some one day it must be, if at all, under a general law restraining labor on that day”).

markets, restaurants, taverns, livery stables or retail drug stores” was a “general law, uniform in its operation,” and granted no “privileges or immunities” in violation of the state Constitution.²⁰⁴ The earlier case was distinguished as involving a “special law.”²⁰⁵ And a Sunday closing law applying only to barber shops and bath-houses was invalid as a special law and a denial of privileges and immunities.²⁰⁶

Meanwhile, a law that required certain categories of cities to negotiate with property owners before exercising the power of eminent domain while allowing other cities to exercise that power was an invalid “special law,”²⁰⁷ but a law banning the sale of alcoholic beverages to Indians was “general and uniform in its operation” because “it affects in the same manner all persons belonging to the class to which it refers.”²⁰⁸ That, however, hardly addressed the underlying objection to the law, which was that it singled out Indians as a class from all other people. The court responded to that objection by saying that the Legislature had power to restrict the sale of alcoholic beverages to “certain classes of persons who are peculiarly liable to be injured or demoralized” by such indulgence, concluding:

Whatever may be true in respect to particular individuals of that race, it is certainly true that Indians, as a class, are not refined and civilized in the same degree as persons of the white race; and for that reason are less subject to moral restraint, and, therefore, not only less able to resist the desire for such liquors, but also more liable to be dangerous to themselves or others when under the influence of intoxicating liquors. It was, doubtless, in view of considerations like these that, in the judgment of the legislature, it was thought wise to give to persons of the Indian race, as well as the community in which they move, the protecting influence of this statute.²⁰⁹

Although the state “privileges or immunities” clause has sometimes been cited as a basis for invalidating legislation, along with the prohibition

²⁰⁴ *Ex parte Koser*, 60 Cal. 177, 188, 189–90 (1882). *Accord In re Sumida*, 177 Cal. 388, 392–93 (1918) (upholding an ordinance similar to that in *Ex parte Koser*).

²⁰⁵ *Ex parte Koser*, 60 Cal. at 191–92.

²⁰⁶ *Ex parte Jentsch*, 112 Cal. 468 (1896).

²⁰⁷ *City of Pasadena v. Stimson*, 91 Cal. 238, 251–52 (1891).

²⁰⁸ *People v. Bray*, 105 Cal. 344, 348 (1894).

²⁰⁹ *Id.* at 349.

on special laws,²¹⁰ it has seldom received independent focus or analysis in the opinions of the court.

A. “REASONABLE” VS. “ARBITRARY” CLASSIFICATIONS

In 1894, in *Darcy v. Mayor of San Jose*, the Supreme Court offered a bit of coherence to the analysis of legislative classifications.²¹¹ At issue was a statute requiring the mayor and common council of “all cities” with a population between 10,000 and 25,000 to fix the salaries for police officers and captains at no less than \$100 per month, not to exceed \$125 per month. Darcy, a police officer in San Jose, brought suit to enforce the statute. As against the City’s argument that the statute in question was a prohibited “special law,” Darcy maintained that it was in fact a “general law” because it applied to all cities within the class.²¹² The court, rejecting Darcy’s argument, observed that “by this logic no limitation is imposed upon the power of the legislature by the numerous constitutional provisions against special and local laws. . . . [I]f they can be thus easily evaded, how ineffectual and farcical they are.”²¹³ Instead, the court quoted from and adopted as a “correct statement of the rule” a decision of the New Jersey Supreme Court, applying a similar provision in that state’s constitution:

There must be a substantial distinction, having a reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation.²¹⁴

There being “no rational ground” for the classification at issue, it was “arbitrary and unauthorized.”²¹⁵

²¹⁰ *E.g.*, *Ex parte Jentzsch*, 112 Cal. 468.

²¹¹ *Darcy v. Mayor of San Jose*, 104 Cal. 642 (1894).

²¹² *Id.* at 644–45.

²¹³ *Id.* at 645.

²¹⁴ *Id.* at 646 (quoting *State ex rel. Richards v. Hammer*, 42 N.J.L. 435, 439 (1880)).

²¹⁵ *Id.* at 648–49. The court has since declared that classifications on the basis of population are permissible unless “no state of facts can reasonably be conceived to justify the classification made.” *Bd. of Educ. v. Watson*, 63 Cal. 2d 829, 837 (1966).

Classifications that implicated political rights were treated differently, foreshadowing the subsequent development of strict scrutiny for classifications involving fundamental rights. In *Britton v. Board of Election Commissioners* the court struck down California's primary election law prohibiting selection of delegates or participation in primary elections of any political party which did not receive at least 3 percent of the total vote in the previous election.²¹⁶ Referring to the Privileges and Immunities Clause and the requirement for all laws of a general nature to have a uniform operation, as well as to the state constitutional guarantee of the rights of assembly and petition, the court asked, rhetorically, "How can it be said that a law which protects by legislation a certain number of citizens forming one political party, and deprives a fewer number of citizens forming another political party of the same protection, is not violative of these provisions?"²¹⁷

With respect to economic legislation, however, and in the absence of factors triggering "strict scrutiny," decisions after *Darcy* display substantial deference to legislative judgment, much like the decisions of the U.S. Supreme Court. In 1915, the California Supreme Court upheld a San Francisco ordinance requiring that operators of "jitneys" — defined as motor vehicles carrying passengers between fixed points in the city for a charge of ten cents or less — were required to have a license and post a bond against liability for accidents.²¹⁸ Rejecting the argument of jitney owners that this was a "special law," discriminating against jitneys compared to other vehicles, the court said:

The question of classification is primarily one for the legislative power, to be determined by it in the light of its knowledge of all the circumstances and requirements[. T]he presumption in the courts is in favor of the fairness and correctness of the determination by the legislative department, and the courts are not privileged to overturn that determination unless they can plainly see the same was without warrant in the facts.²¹⁹

²¹⁶ *Britton v. Bd. of Election Comm'rs*, 129 Cal. 337 (1900).

²¹⁷ *Id.* at 342–43 (invoking CAL. CONST. of 1879, art. I, §§ 10, 11, 21).

²¹⁸ *In re Cardinal*, 170 Cal. 519 (1915).

²¹⁹ *Id.* at 521. In a previous case, *Ex parte King*, 157 Cal. 161, 164 (1910), the court had expressed similar deference in upholding a ban on "itinerant saloons" established

By 1940, the California Supreme Court had accepted the formulation of extreme deference to legislative judgment reflected in some U.S. Supreme Court opinions:

When the classification made by the legislature is called into question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge and other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.²²⁰

And in 1948, the court, reviewing prior case law, declared broadly: “[I]t is clear that the test for determining the validity of a statute where a claim is made that it unlawfully discriminates against any class is substantially the same under the state prohibitions against special legislation and the equal protection clause of the federal Constitution.”²²¹

From time to time, as in the U.S. Supreme Court, it appears that some form of heightened scrutiny has been at work even when it is not explicitly recognized or articulated in the court’s opinion. For example, in *Department of Mental Hygiene v. Kirchner*,²²² the state Supreme Court held that a statute imposing liability upon the spouse, parent or child for the care in a state institution of a mentally ill person or inebriate involved an “arbitrary” classification in violation of the equal protection principle.²²³ On

temporarily outside a city or town but in the vicinity of labor camps where workers were employed on public works. *But cf.* *Town of St. Helena v. Butterworth*, 198 Cal. 230 (1926) (invalidating an ordinance which imposed a license tax of \$15 per quarter on the business of traveling wholesalers but exempted wholesalers with a fixed business. The court relied on the state Privileges and Immunities Clause of article I, section 21, saying, “We are unable to perceive any rational reason for such discrimination in favor of the one class as against the other.” *Id.* at 232–33 (citing CAL. CONST. of 1879, art. I, § 21). The court distinguished its prior opinion in *Ex parte Haskell*, 112 Cal. 412 (1896), which had upheld a Chico ordinance imposing a license tax on persons selling various named products “outside of those conducting regular places of business.”

²²⁰ *In re Fuller*, 15 Cal. 2d 425, 437 (1940) (quoting *Borden’s Farm Products, Inc. v. Baldwin*, 293 U.S. 194, 209 (1934)). The “if any state of facts can be conceived” test dates back earlier, at least to *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911).

²²¹ *County of Los Angeles v. S. Cal. Tel. Co.*, 32 Cal. 2d 378, 390 (1948).

²²² 60 Cal. 2d 716 (1964).

²²³ *Dep’t of Mental Hygiene v. Kirchner*, 60 Cal. 2d 716 (1964).

certiorari to the U.S. Supreme Court, that court issued an order stating that it could not be determined from the state court's opinion whether its holding was based on the federal Equal Protection Clause or the equivalent provision of the California Constitution or both.²²⁴ Accordingly, it vacated the California Supreme Court's judgment and remanded the cause to that court "for such further proceedings as may be appropriate under state law."²²⁵ On remand, the California Supreme Court affirmed that it would reach the same conclusion exclusively on the basis of the state Constitution, article I, section 11 (uniform operation of general laws) and article I, section 21 (privileges or immunities), and reiterated its former decision as filed.²²⁶ Neither of the California court's opinions contained in-depth focus on the standard that was being applied, but it is difficult to reconcile the result with the highly deferential rational basis test.

In the late 1970s the court flirted briefly with an explicitly more expansive role for the courts in determining the "rationality" of classifications.²²⁷ In *Brown v. Merlo*, the court held invalid, under both federal and state constitutions, California's "automobile guest statute," which "deprive[d] an injured automobile guest of any recovery for the careless driving of his host unless the injury resulted from the driver's willful misconduct or intoxication."²²⁸ Justice Tobriner's opinion for a unanimous court, finding this to be an "arbitrary and unreasonable classification," stated in a lengthy and substantive footnote:

Although by straining our imagination we could possibly derive a theoretically "conceivable" . . . state purpose that might support

²²⁴ *Dep't of Mental Hygiene v. Kirchner*, 380 U.S. 194, 196 (1965).

²²⁵ *Id.* at 201.

²²⁶ *Dep't of Mental Hygiene v. Kirchner*, 62 Cal. 2d 586, 588 (1965); CAL. CONST. of 1879, art. I, §§ 11, 21.

²²⁷ In *Hawkins v. Super. Ct.*, 22 Cal. 3d 584 (1978), Justice Mosk, joined by Justice Newman, wrote a concurring opinion to his own majority opinion, arguing for adoption of an "intermediate" test to be applied when rights are "important" though not "fundamental," or when a classification is "sensitive" but not "suspect." Such an intermediate standard would call for justification of the classification on the basis that it "significantly" furthers "important" state interests. *Id.* at 601-02 (Mosk, J., concurring). Justice Mosk's proposal, which is similar to the position of Justice Tobriner in the cases discussed in this paragraph, has never been adopted.

²²⁸ *Brown v. Merlo*, 8 Cal. 3d 855, 859 (1973).

this classification scheme, we do not believe our constitutional adjudicatory function should be governed by such a highly fictional approach to a statutory purpose. We recognize that in past years several federal equal protection cases have embraced such excessively artificial analysis in applying the traditional “rational basis” equal protection test. More recently, however, the United States Supreme Court has drawn back from such an absolutely deferential position and has again demanded that statutory classifications bear some substantial relationship to an actual, not “constructive,” legislative purpose Professor Gunther has pointed out this development . . . in a recent law review article, and has suggested that such movement may well herald a “newer equal protection” providing a “new bite” for the traditional “rational basis” test. *Whatever the accuracy of Professor Gunther’s prediction with respect to the interpretation of the federal equal protection clause, we believe that it would be inappropriate to rely on a totally unrealistic “conceivable” purpose to sustain the present statute in the face of our state constitutional guarantees.*²²⁹

The Legislature responded to *Brown v. Merlo* by amending the guest statute to apply only to vehicle owners riding as passengers. When the amended statute came before the California Supreme Court, Justice Tobriner wrote an opinion which again struck the statute down, holding that it was “not reasonably related to the dual legislative goals of protecting hospitality and eliminating collusive fraud.”²³⁰ But Justice Tobriner’s opinion was joined by only three other justices, McComb, Mosk, and Burke, the last sitting on assignment to fill a then-existing vacancy on the court. Justice Sullivan, who had joined in *Brown v. Merlo*, dissented, insisting that the owner provision could be justified by goals and purposes “wholly different from those which were considered in overturning the guest statute”; and, going further, he expressed second thoughts about the “new” equal protection analysis reflected in the *Brown* footnote.²³¹

²²⁹ *Id.* at 866 n.7 (emphasis added; citations omitted).

²³⁰ *Schwalbe v. Jones*, 534 P.2d 73 (1975).

²³¹ *Id.* at 81 n.2. Justice Sullivan, rather curiously, made reference to his then-recent opinion in *D’Amico v. Board of Medical Examiners*, 11 Cal. 3d 1 (1974), applying

Justice Sullivan's dissent was joined by Chief Justice Wright and Justice Clark. Before Justice Tobriner's opinion could become final, the vacancy which existed at the time it was filed was filled by appointment of Justice Richardson, and these four voted to grant rehearing. The ensuing opinion, written by Justice Sullivan, upheld the statute on the basis of what it characterized as "the basic and conventional standard for reviewing economic and social welfare legislation," and disapproved the language in *Brown v. Merlo* insofar as it suggested a different test.²³² "We are persuaded," Justice Sullivan said, "that to elevate the aforesaid language into doctrinal concept, and thus to dilute the traditional standard which we have here expressed, would result in the substitution of judicial policy determination for established constitutional principle."²³³ Only Justice Tobriner, joined by Justice Mosk, dissented.²³⁴

But then the composition of the court changed again, and in *Cooper v. Bray* the court, in an opinion by Justice Tobriner joined by Chief Justice Bird and Justices Mosk, Manuel, and Newman, overruled *Schwalbe*, finding the owner/guest exclusion to be without rational basis, based on a "serious and genuine judicial inquiry."²³⁵ Justices Richardson and Clark dissented.²³⁶

Cooper v. Bray has not been overruled, but the court's view of the appropriate criteria for evaluating rational basis may have been. A footnote in *Warden v. State Bar* declares:

At the time *Cooper v. Bray* and similar cases were decided by this court, there was some suggestion in the academic literature that the United States Supreme Court might be moving toward the adoption of a so-called "newer equal protection," which would provide a "new bite" . . . and some of the analysis in those opinions may reflect that milieu. Since that time, the United States Supreme Court has . . . reaffirmed the deferential nature of the restrained

a rational relationship test to overturn a statute denying licensure as medical practitioners to osteopaths.

²³² *Schwalbe v. Jones*, 16 Cal. 3d 514, 517, 518 n.2 (1976).

²³³ *Id.* at 518 n.2.

²³⁴ *Id.* at 525 (Tobriner, J., dissenting).

²³⁵ *Cooper v. Bray*, 21 Cal. 3d 841, 848, 855 (1978).

²³⁶ *Id.* at 856 (Richardson, J., dissenting).

“rational relationship” equal protection standard [and] under both the federal and state equal protection clauses, the rational relationship test remains a restrained, deferential standard, albeit one that continues to provide protection against classifications that do not bear a rational relationship to a reasonably conceivable, legitimate purpose.²³⁷

Why the standard for “rational basis” under the California Constitution should conform to varying views in the United States Supreme Court was not discussed, nor is the answer clear. Possibly the addition of explicit “equal protection” language in 1974 acted as a gravitational pull on the court’s application of identical federal language. There are arguments for and against rational basis with a “bite,” and perhaps someday the California court will confront those arguments more directly. Meanwhile, the requirement that the basis for the classification be “reasonably conceivable” provides a degree of flexibility. Stay tuned.

B. THE CALIFORNIA CONSTITUTION AND “SUSPECT CLASSES”

1. *Sex Discrimination under the California Constitution*

As noted above, the California Constitution since 1879 has prohibited persons from being “disqualified from entering or pursuing a business, profession, vocation, or employment because of sex.”²³⁸ In the first case to consider the application of that provision, the California Supreme Court read it strictly, invalidating a San Francisco ordinance which prohibited the employment of women as waitresses between the hours of 6 p.m. and 6 a.m. in places where alcoholic beverages were sold, and rejecting arguments based on morality or the protection of females.²³⁹ “All these are considerations of policy,” said the controlling opinion, “the determination of which belonged to the convention framing and the people adopting the

²³⁷ *Warden v. State Bar*, 21 Cal. 4th 628, 648 n.12 (1999).

²³⁸ CAL. CONST. art. I, § 8 (appearing in its original form as CAL. CONST. of 1879, art. XX, § 18).

²³⁹ *In re Maguire*, 57 Cal. 604 (1881).

Constitution The policy of the ordinance is inconsistent with the policy intended and fixed by the Constitution. They cannot both stand.”²⁴⁰

Soon after *Maguire*, however, the court began to backtrack. In *Ex parte Felchlin*, the court with little discussion upheld a city licensing scheme that imposed a license fee of \$150 per month on bars that employed women in any capacity while imposing a fee of only \$30 per quarter on bars that did not;²⁴¹ and the following year, in *Ex parte Hayes*, the court upheld an ordinance flatly prohibiting the issuance of liquor licenses in places where women served as waitresses.²⁴² When, in 1915, the court upheld a law limiting hours of work for women in certain occupations, it declared broadly that the constitutional provision is “subject to such reasonable regulations as may be imposed in the exercise of police powers.”²⁴³

In the 1971 case of *Sail’er Inn, Inc. v. Kirby*, the court unanimously returned to what *Maguire* held to be the original understanding of the prohibition against disqualification for sex.²⁴⁴ Overruling *Hayes*, and declaring that the general hazards of an occupation “cannot be a valid ground for excluding [women] from those occupations,” it held that long-standing prohibition against the employment of women as bartenders was invalid.²⁴⁵

The court in *Sail’er Inn* also found the challenged law to be invalid under Title VII of the Civil Rights Act of 1964²⁴⁶ and under the equal protection clauses of both the federal and state constitutions.²⁴⁷ While the U.S. Supreme Court, at the time *Sail’er Inn* was decided, had not yet settled on a characterization of sex for purposes of determining the level of scrutiny, Justice Peters’s decision for the California court found sex to be a “suspect class,” triggering strict scrutiny.²⁴⁸ It did so on the basis that sex was an “immutable trait”; that it bore no relation to a person’s ability to perform or contribute to society; and that it was historically associated

²⁴⁰ *Id.* at 608–09.

²⁴¹ *Ex parte Felchlin*, 96 Cal. 360 (1892).

²⁴² *Ex parte Hayes*, 98 Cal. 555 (1893).

²⁴³ *In re Miller*, 162 Cal. 687 (1912); *see supra* notes 72–74.

²⁴⁴ *Sail’er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 8 (1971).

²⁴⁵ *Id.* at 10 n.7.

²⁴⁶ *Id.* at 13.

²⁴⁷ *Id.* at 22.

²⁴⁸ *Id.* at 20.

with legal and social disabilities.²⁴⁹ While the federal Supreme Court has since adopted a position of “intermediate scrutiny” for sex classifications, the California Supreme Court adheres to the characterization of sex as a suspect class, triggering strict scrutiny.²⁵⁰ The court has also held that an employee claiming she was dismissed for refusing to submit to sexual harassment could rely on article I, section 8 as an expression of public policy, rendering her dismissal tortious.²⁵¹

2. *Sexual Orientation as Suspect Class*

In *In re Marriage Cases*, the California Supreme Court struck down a ban on same-sex marriages, holding that as a matter of state constitutional law sexual orientation is a suspect class, triggering strict scrutiny under California’s Equal Protection Clause.²⁵² The Court of Appeal had held that, while gays and lesbians had historically suffered legal and social disabilities as a class, and that while sexual orientation, like sex, bears no relation to a person’s ability to perform or contribute to society, strict scrutiny was not appropriate because of that court’s doubt whether this characteristic is “immutable.”²⁵³ The Supreme Court disagreed. Noting that a person’s religion and alienage are both considered suspect classes for equal protection purposes, though neither is immutable, it held that “[b]ecause a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.”²⁵⁴

The court in that case also rejected the attorney general’s argument that “suspect” classification should be reserved for minorities who are

²⁴⁹ *Id.* at 9, 18, 19.

²⁵⁰ See *In re Marriage Cases*, 832 n.55 (2008) (“Past California decisions, by contrast [to U.S. Supreme Court decisions] have applied the strict scrutiny standard when evaluating discriminatory classifications based on sex and have not applied an intermediate scrutiny standard under equal protection principles in any case involving a suspect (or quasi-suspect) classification” (citations omitted)).

²⁵¹ *Rojo v. Kliger*, 52 Cal. 3d 65 (1990). Compare *Ross v. RagingWire Telecomm.*, 42 Cal. 4th 920 (2008) (Privacy provision in article I, section 1 did not render employer’s termination of employee for marijuana use contrary to public policy).

²⁵² *In re Marriage Cases*, 43 Cal. 4th 757, 840–41 (2010).

²⁵³ *In re Marriage Cases*, 143 Cal. App. 4th 873, 922 (2006).

²⁵⁴ *In re Marriage Cases*, 43 Cal. 4th at 841–42.

unable to use the political process to address their needs, and that this was not true of the gay and lesbian community in California.²⁵⁵ Conceding that some California decisions had referred to a group's "political powerlessness" as a factor, the court said "our cases have not identified a group's *current* political powerlessness as a necessary prerequisite for treatment as a suspect class," for if that were the case, "it would be impossible to justify the numerous decisions that continue to treat sex, race, and religion as suspect classifications." Rather,

[T]he most important factors in deciding whether a characteristic should be considered a constitutionally suspect basis for classification are whether the class of persons who exhibit a certain characteristic historically has been subjected to invidious and prejudicial treatment, and whether society now recognizes that the characteristic in question generally bears no relationship to the individual's ability to perform or contribute to society. Thus, "courts must look closely at classifications based on that characteristic lest *outdated* social stereotypes result in invidious laws or practices." This rationale clearly applies to statutory classifications that mandate differential treatment on the basis of sexual orientation.²⁵⁶

3. *De Facto Discrimination and the School Busing Amendment*

The U.S. Supreme Court held, in *Washington v. Davis*, that the federal Equal Protection Clause prohibits only purposeful discrimination; discriminatory results are not enough to support a finding of violation.²⁵⁷ In the South, where segregated schools long existed by virtue of law — "de jure" — a finding of discriminatory purpose was seldom difficult, and the only problem was one of the appropriate remedy. Where there was a background of de jure discrimination, the court upheld the use of affirmative injunctions, including busing of children, as an appropriate remedy. But in the North, where there was no history of *de jure* discrimination but often a pattern of segregation *de facto*, linked to segregated housing, proving discriminatory purpose was often difficult.

²⁵⁵ *Id.* at 842–43.

²⁵⁶ *Id.* at 843 (quoting *Sail'er Inn*, 5 Cal. 3d at 18 (1971)).

²⁵⁷ *Washington v. Davis*, 426 U.S. 229 (1976).

In 1963, in *Jackson v. Pasadena School District*, the California Supreme Court stated that school boards have an obligation to take reasonable steps to alleviate school segregation “regardless of its cause.”²⁵⁸ But in that case purposeful segregation was found, so the statement could be considered dicta. Thirteen years later, however, in *Crawford v. Board of Education*, the court confirmed that statement in a case in which purposeful segregation had not been shown, as a matter of California legal principles, and upheld a trial court decision ordering busing of children as an appropriate remedy.²⁵⁹ Many parents reacted strongly to the busing order, and as a result article I, section 7 of the Constitution was amended by an initiative measure in 1979 providing that public entities in the state had no “obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation”;²⁶⁰

²⁵⁸ *Jackson v. Pasadena City Sch. Dist.*, 59 Cal. 2d 876, 881 (1963).

²⁵⁹ *Crawford v. Bd. of Educ.*, 17 Cal. 3d 280, 301–02, 310 (1976).

²⁶⁰ CAL. CONST. art. I, § 7(a). Before the amendment, section 7(a) read simply, “A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.” Following the 1979 amendment, section 7(a) now reads:

A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such

and the amendment was upheld by the U.S. Supreme Court against federal constitutional attack.²⁶¹ The 1978 amendment has no application beyond the school context, but the California court's view of the unconstitutionality of de facto segregation has not been resurrected in other contexts.

3. *Affirmative Action and Proposition 209*

In 1996, negative reaction to affirmative action led to the proposal and adoption of an initiative measure — Proposition 209, the “California Civil Rights Initiative” — adding a new section to the state Constitution, article I, section 31. The gist of that section appears in the broad declaration of subsection (a):

The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.²⁶²

In its first opinion applying section 31, *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the Supreme Court adopted a broad interpretation of

provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979–80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

²⁶¹ Crawford v. Bd. of Educ., 458 U.S. 527 (1982).

²⁶² CAL. CONST. art. I, § 31.

“preferential treatment,” striking down a San Jose ordinance that sought to increase the participation of minority and women contractors on public works by establishing “participation goals” based on the availability of qualified minority and women contractors, and by requiring “reasonable efforts” to meet those goals, including notice to minority and women contractors, follow-up contact, and, if the contractor were rejected, a statement of written reasons for the rejection.²⁶³ The majority opinion by Justice Brown, joined by Justices Mosk, Baxter, and Chin, discussed at length the historical and judicial background of affirmative action, and in effect applauded the decision of voters to do away with it.²⁶⁴ Justice Kennard and Chief Justice George, joined by Justice Werdegar, joined in the result but declined to join Justice Brown’s opinion, which Chief Justice George criticized as being unnecessarily broad.²⁶⁵ George’s opinion, relying upon what voters were told in the voter pamphlet, agreed that San Jose’s ordinance constituted preferential treatment, but at the same time suggested that section 31 did not prohibit all modes of outreach to minority and women contractors, and offered suggestions of alternatives that would be permissible.²⁶⁶

Ten years later, in *Coral Construction, Inc. v. City and County of San Francisco*, the Supreme Court revisited section 31 in a case involving a quite similar ordinance, and rejected the City’s arguments that section 31 was invalid under the federal Equal Protection Clause because of the U.S. Supreme Court’s so-called “political structure doctrine.”²⁶⁷ The court

²⁶³ *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000)

²⁶⁴ *Id.* at 563–64.

²⁶⁵ *Id.* at 576–77 (George, C.J., concurring and dissenting).

²⁶⁶ *Id.* at 592, 596–98.

²⁶⁷ *Coral Constr., Inc. v. City and County of San Francisco*, 50 Cal. 4th 315, 332 (2010). Essentially, the “political structure doctrine” holds that the federal Constitution is violated when a facially neutral law singles out a racial issue for special treatment and at the same time alters the political process in such a way as to entrench unique structural burdens on minorities’ future ability to obtain beneficial legislation. See *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982). The court’s rejection of the applicability of that doctrine was by a vote of 8–1, with Justice Moreno dissenting. *Coral Construction*, 50 Cal. 4th at 342 (Moreno, J., dissenting). The structural burden doctrine was the basis for Judge Henderson’s initial injunction against Proposition 31, but the Ninth Circuit rejected that argument in *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 707–09 (9th Cir. 1997), and again, more recently, in *Comm. to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012).

also rejected an argument by the City that its ordinance was valid under subsection (e) of section 31 as “action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.”²⁶⁸ The court did, however, overturn summary judgment in favor of plaintiffs on a third argument by the City: that its action was required by the federal Equal Protection Clause in order to remedy prior, intentional acts of discrimination.²⁶⁹ The City would be allowed to try and establish, on remand, that it had purposefully or intentionally discriminated against minority or women contractors, that the purpose of the ordinance was to provide a remedy for such discrimination, that the ordinance was narrowly tailored to achieve that purpose, and that a race- and gender-conscious remedy was necessary as the only, or at least the most likely, means of rectifying resulting injury.²⁷⁰ It is apparent that section 31 stands as a formidable barrier to the use of race- or gender-conscious criteria in the public sector, possibly more of a barrier than under the Equal Protection Clause.

SOME CONCLUDING THOUGHTS

The California Supreme Court was an early leader in recognizing the separate nature of state constitutions and accepting responsibility for independent construction of provisions relating to individual rights. Carrying out that responsibility is not an easy task, especially when the provisions under construction are worded the same or very similar to analogous provisions of the federal Constitution. In such cases it may be tempting for a state court simply to follow the lead of the U.S. Supreme Court, and by doing so

The argument is still alive, however. The Sixth Circuit, in a narrowly divided *en banc* opinion, has held that a Michigan measure similar to Proposition 209 is unconstitutional on the basis of the political structure doctrine (*Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 2012 WL 5519918 (2012), and the issue may be headed to the U.S. Supreme Court.

²⁶⁸ *Coral Construction*, 50 Cal. 4th at 335. The City relied upon “affirmative action” language contained in applicable federal regulations, but the majority (8–1 with Justice Moreno dissenting) interpreted that language as not requiring racial preferences. *Id.* at 334–35.

²⁶⁹ *Id.* at 335.

²⁷⁰ *Id.* at 337–38.

avoid both the challenge of developing an independent jurisprudence and exposure to the charge of “judicial activism.”

My previous piece published in these pages, on Freedom of Expression, dealt with constitutional provisions very similar to the First Amendment, and demonstrated how in that context the California Supreme Court has for the most part met that challenge in an open and creative way. The state constitutional provisions which are the focus of this piece might be said to provide the court with an easier route to an independent jurisprudence. This is especially true of article I, section 1, which has no federal counterpart. But developing an independent jurisprudence even when it is not tied to analogous federal constitutional language is a challenging enterprise. If it is to be conducted with integrity it requires the court to engage in an enterprise not unlike the interpretive enterprise that the U.S. Supreme Court has confronted under the federal Constitution. That enterprise entails difficult questions that are often not readily answered by examination of the text or by historical facts. It may require the court to identify what values are being protected by the constitutional framework, and to decide to what extent courts, as distinguished from legislatures, have responsibility for protecting those values. We have become accustomed to translating these questions into doctrinal language like “fundamental rights” and “suspect classes,” “strict scrutiny” and “rational basis,” but these categories, useful as they may be, are in turn judicial constructs which do not inhere in constitutional language or history. Their definition, and their application, ultimately require judges to consider arguments, and to make choices, among competing visions for a democratic society that recognizes both majority rule and minority rights.

In giving definition to concepts of “liberty” and “equality” over the years, the California Supreme Court has of necessity been engaged in that task. To a modern critical eye it may not have always performed with consistency or clarity, but that is understandable, given the complexities of the problems, changing social views, and the inevitable differences in outlook among justices. For what it is worth, both as a former justice and as a student of the law, I would give the court’s historical record in developing an independent state jurisprudence high marks.

CONFERENCE
PANEL

CONFERENCE PANEL

THE GOLDEN LABORATORY:

Legal Innovation in Twentieth-Century California

EDITOR'S NOTE

For the first time, the Annual Meeting of the American Society for Legal History has included a panel of scholars sponsored by the California Supreme Court Historical Society and its journal, *California Legal History*. The 2012 Annual Meeting also appears to be the first at which a panel has been devoted specifically to legal history in California. This panel was one of 35 offered at this year's conference — held at the Four Seasons Hotel in St. Louis from November 8 to 10 — at which papers were presented by scholars from 46 U.S. and 12 foreign universities.

As indicated by its title, “The Golden Laboratory: Legal Innovation in Twentieth-Century California,” the panel represents the continuing dedication by the CSCHS to the theme of California's leading role in American jurisprudence.¹ This panel also represents the first occasion on which we

¹ See, for example, the panel program presented by the CSCHS at the 2006 Annual Meeting of the California State Bar, “California — Laboratory of Legal Innovation,” published in the CSCHS *Newsletter*, Autumn/Winter 2006, Supplement pages 1–4, available at http://www.cschs.org/images_features/cschs_2006-autumn-winter.pdf.

have brought California-directed legal research to the attention of an international scholarly audience at a venue outside of California.

Sponsorship of this panel furthers several of our objectives: encouraging emerging legal historians to undertake new research in the field of California legal history, giving prominence to scholars who do so, and making known the results of their work, both to their colleagues in person and to a broader readership in print and online. At my invitation, Professor Reuel Schiller of UC Hastings College of the Law, a member of the journal's Editorial Board, undertook with enthusiasm the role of chairing the panel and "shepherding" the project through the process of approval and presentation. Professor Lawrence Friedman of Stanford University, also a member of the journal's Editorial Board (and a past president of the ASLH), who had generously agreed to serve as the panel's commentator, was forced by a family medical emergency to leave the conference early and return to California. The three scholars selected for the panel — Mark Brilliant, S. Deborah Kang, and Felicia Kornbluh — who have already achieved recognition in the field of legal history, were thereby given the opportunity and the impetus to develop further the California aspects of their individual areas of interest, as demonstrated by their papers on the following pages.

— SELMA MOIDEL SMITH

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FROM INTEGRATING STUDENTS TO REDISTRIBUTING DOLLARS:

*The Eclipse of School Desegregation by
School Finance Equalization in 1970s California*

MARK BRILLIANT*

My current book project examines the relationship between opposition to school desegregation through busing, school finance equalization litigation and reform, Proposition 13 and the tax revolt, and the increasing concentration of income and wealth in the hands of the nation's richest one percent that pundits, policy makers, and scholars have begun to refer to as America's new Gilded Age. In my paper, I want to explore a piece of this particular constellation of interrelated developments, namely, the connection between the rise of school busing to promote school desegregation and the rise of school finance litigation and reform, which scored its first major victory in the California Supreme Court in 1971 in the case of *Serrano v. Priest*.

Criticism of the largely property tax revenue basis for funding K–12 schools is almost as old as public schools themselves. Alluding to the

* Mark Brilliant is an associate professor in the Department of History and in the Program in American Studies at the University of California, Berkeley. He wishes to extend a special thanks to Reuel Schiller for his invitation to join the panel at the 2012 American Society for Legal History Annual Meeting from which this paper is drawn and for commenting so thoughtfully on its contents, as well as the California Supreme Court Historical Society for sponsoring the panel. The author requests that this paper be read as a slightly expanded version of his conference paper and as a work-in-progress.

inequalities in per pupil expenditures between local school districts rooted in their differing property values, no less than Horace Mann himself denounced the notion that “mere circumstance of local residence” should shape a child’s access to equality of educational opportunity.¹ Mann’s concern anticipated similar reservations voiced by northern members of Congress during Reconstruction and the Gilded Age, Populists, Progressives, and New Dealers, and found expression, almost verbatim, in the California Supreme Court’s *Serrano* decision, which rejected the state’s school financing scheme for making “the quality of a child’s education a function of the wealth of his parents and neighbors.”²

Given this longstanding criticism, why did it take until the 1970s before school finance reform gained traction, beginning in California and then spreading across the country? The answer, I contend, can be found in the combination of two contemporaneous developments: opposition to school busing to promote desegregation and the burgeoning tax revolt over rising property taxes. The former spurred support for school finance reform whose proponents — from both the left and right — often expressed preference for the redistribution of property tax dollars over the redistribution of students through busing, while the latter prompted efforts to search for alternative sources of revenue for financing public schools.

On January 16, 1970, Daniel Patrick Moynihan delivered a soon-to-become infamous memorandum to President Richard Nixon. “The time may have come when the issue of race could benefit from a period of ‘benign neglect,’” Moynihan wrote. By “race,” Moynihan meant the “position of Negroes” — “*the* central domestic political issue.”³ And at the center of

¹ Mann quoted in Robert A. Gross and John Esty, “The Spirit of Concord,” *Education Week*, October 5, 1994.

² Goodwin Liu, “Education, Equality, and National Citizenship,” *Yale Law Journal* 116:2 (2006): 331–411; Charles Postel, *The Populist Vision* (New York: Oxford University Press, 2007); David Tyack, Robert Lowe, and Elisabeth Hansot, *Public Schools in Hard Times: The Great Depression and Recent Years* (Cambridge: Harvard University Press, 1987); *Serrano v. Priest*, L.A. No. 29820, 5 Cal. 3d 584, August 31, 1971.

³ “Memorandum for the President from Daniel P. Moynihan,” January 16, 1970, John D. Ehrlichman Papers, Box 30, Folder Committee for Educational Quality [2 of 2], Richard Nixon Presidential Library (hereafter, RN).

the race issue in the early 1970s was busing, which Nixon would describe in 1971 as “by far the hottest” domestic issue.⁴

California turned up the heat on the busing controversy less than a month after Moynihan’s memorandum. On February 11, 1970, Los Angeles County Superior Court judge Alfred Gitelson ruled in the case of *Crawford v. Board of Education of the City of Los Angeles*. “Negro and Mexican children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be,” Gitelson announced. His decision drew no distinction between “segregation not compelled by law (allegedly *de facto*)” and segregation “compelled by law (allegedly *de jure*).”⁵ Moreover, in the sprawling city of Los Angeles, it required extensive busing to implement. Little wonder, then, that the *Los Angeles Times* described *Crawford* as “the most significant court decision on racial segregation outside the South.”⁶

California governor Ronald Reagan was more blunt. He denounced the decision as “utterly ridiculous . . . shatter[ing] the concept of the neighborhood school as the cornerstone of our educational system.”⁷ Later that year, Reagan reiterated his vigorous opposition to “forced busing,” insisting instead that “quality education must be provided for every child” within his or her neighborhood school.⁸ Caspar Weinberger, Reagan’s director of finance, had suggested how to help make this happen the year before when he called for property taxes — which he described as “one of the most regressive” — to be reduced and replaced with increased income, commercial real estate, and sales taxes. In turn, these taxes, “which are directly related to ability to pay,” Weinberger maintained, would support 80 percent of public school costs.⁹ Similarly, a Reagan Administration “Issue Paper”

⁴ White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

⁵ *Crawford v. Board of Education of the City of Los Angeles*, “Minute Order of Court’s Intended Findings of Fact, Conclusions of Law, Judgment, and for Preemptory Writ of Mandate,” February 11, 1970.

⁶ “L.A. Schools Given Integration Order,” *Los Angeles Times*, February 12, 1970.

⁷ “Press Release #101,” February 17, 1970, Box GO 74, Folder Busing — General, 1970 (2/3), Ronald Reagan Governor’s Papers, Ronald Reagan Library (hereafter, RR).

⁸ Ronald Reagan, speech to the California Real Estate Association, October 5, 1970, Box GO 160, Folder Education-Finance-K-14 (1970), RR.

⁹ Caspar Weinberger, press release, July 22, 1969, Box GO 160, Folder Education-Finance-K-14 (1970), RR.

on education called for property tax reform and greater support for “less affluent” school districts in March 1970, just one day before Reagan vowed to “take all legal steps possible to oppose mandatory student busing.”¹⁰

Richard Nixon concurred with his fellow California Republican’s busing diagnosis and school finance prescription. Indeed, if Nixon’s *opposition* to school desegregation through busing, represented the “neglect” half of Moynihan’s “benign neglect” advice, his *support* for school finance reform represented the “benign” half.¹¹ In a nationally televised address on busing delivered on March 24, 1970, Nixon blasted *Crawford* as the “most extreme” desegregation decree issued by any court to date owing to its failure to distinguish between unconstitutional de jure segregation and “undesirable” (but not unconstitutional) de facto segregation. Where de facto segregation existed, rooted in “residential housing patterns,” Nixon maintained, it was better to employ “limited financial resources for the improvement of education . . . rather than buying buses, tires and gasoline to transport young children miles away from their neighborhood schools.”¹²

Nixon’s preference was to redistribute those “limited financial resources” to improve education — to desegregate dollars, rather than desegregate students. He spelled this out just a few weeks earlier in a “Message on Education Reform” in which he denounced the absence of “equal educational opportunity in America.” This absence was felt most in school districts with a “low [property] tax base,” which “find it difficult or impossible to provide adequate support to their schools.” Declaring school finance inequality a “national concern,” Nixon called for “narrowing the gap” between “rich and poor states and rich and poor school districts.”¹³

To this end, he issued Executive Order 11513, establishing “The President’s Commission on School Finance,” chaired by Neil McElroy, formerly secretary of defense during the Eisenhower Administration. Nixon’s action

¹⁰ Issue Paper No. 1 (Education), March 2, 1970, Box GO 160, Folder Education-Finance-K-14 (1970), RR; Draft of form letter to constituents, March 3, 1970, GO 74, Folder Busing — General, 1970 (2/3), RR.

¹¹ White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

¹² Richard Nixon, “Statement by the President on Elementary and Secondary School Desegregation,” March 24, 1970, Daniel Patrick Moynihan Papers, Box 23, Folder Desegregation, RN.

¹³ Richard Nixon, “Message on Education,” March 3, 1970, Daniel Patrick Moynihan Papers, Box 20, Folder Commission on School Finance [1 of 7], RN.

stemmed from the advice of Robert Finch, secretary of health, education, and welfare, whose recommendation came at a time when, as Finch recollected, “busing” was “driving us nuts.”¹⁴ The Commission’s tasks included considering alternatives to the property tax for financing public schools, whose regressivity Nixon and other leading members of his administration would repeatedly criticize over the course of the early 1970s.¹⁵

Nixon’s call for school finance reform as a preferred alternative to school busing for promoting equality of educational opportunity reinforced efforts already afoot by lawyers who hailed from the opposite side of the ideological spectrum from him. On August 23, 1968, attorneys from the Western Center on Law and Poverty in Los Angeles and the San Francisco Neighborhood Legal Assistance Foundation filed the case of *Serrano v. Priest* in Los Angeles County Superior Court. The suit challenged the federal and state constitutionality of the “substantial disparities” in per pupil expenditures between school districts that stemmed from differing property values from one district to another. These disparities in per pupil expenditures were, Serrano’s lawyers added, racially discriminatory. A “disproportionate number” of non-white students resided in property-poor districts, which levied higher property tax rates but generated lower property tax dollars to fund their public schools owing to their lower property value base.¹⁶

As *Serrano* and similar cases began to unfold, the *Washington Post* observed how “northern liberals” were embracing school finance equalization litigation as a way to “stay ‘liberal’ without being in favor of busing.”¹⁷ This observation was borne out by Terry Hatter, executive director of the

¹⁴ Robert H. Finch, “View from the Lieutenant Governor’s Office,” Oral History Interview, Conducted 1983 by Harry P. Jeffrey, Jr., California State Fullerton Oral History Program, for the California Government History Documentation Project, the Reagan Era, 93.

¹⁵ Executive Order 11513, March 3, 1970, Ex FG 273, Box 1, Folder President Commission on School Finance, RN.

¹⁶ *Serrano v. Priest*, Superior Court of the County for Los Angeles, No. 938254, “Suit to Secure Equality of Educational Opportunity Under the Equal Protection Clause of United States Constitution and California Law and Constitution,” August 23, 1968, Collection of Briefs, Pleadings, Memoranda, and Other Documents from Plaintiff’s Attorney in *Serrano v. Priest* Case, UCLA Law Library (hereafter, *Serrano* Case Files).

¹⁷ “School Revenue Crisis,” *Washington Post*, November 28, 1971, in FI, Box 72, RN.

Western Center on Law and Poverty, which helped initiate *Serrano*. “In busing,” Hatter declared, “we found a lot of emotionalism, but very little movement toward equal education.” By contrast, with school finance reform, “we have a chance at equal education.”¹⁸ Hatter’s colleague, Derrick Bell, criticized *Brown v. Board of Education* for its emphasis on how segregation harmed black, but not white, students. In part for this reason, Bell gravitated toward school finance equalization over desegregation, despite his earlier involvement with the NAACP in desegregation litigation.¹⁹ Roy Innis, national director of the Congress for Racial Equality, agreed. “The best approach to providing quality education for black children,” he maintained, “lies in equalizing the money spent on the education of all children” — desegregating dollars, as opposed to desegregating students. “No one ever learned anything on a bus.”²⁰ A few years later, Detroit’s Democratic and African-American mayor Coleman Young, agreed. “I shed no tears for cross-district busing,” Young quipped about the United States Supreme Court’s 1974 *Milliken* decision that overturned a cross-district busing plan to promote desegregation between Detroit and its suburbs. “I don’t think there’s any magic in putting little white kids alongside little black kids if the little white kids and little black kids over here have half a dollar for their education and the little black kids and little white kids over there are getting a dollar.”²¹ To these substantive reservations about busing, *Serrano* attorney Harold Horowitz added a pragmatic one in his marginal comments on one of the briefs in the case in May 1970. “Remedying inequalities from financing,” Horowitz wrote, “are simpler than from racial imbalance — not the practical problems as in *Crawford*.”²²

¹⁸ Hatter quoted in transcript of KNXT broadcast, August 31, 1971, Collection of Newspaper Articles and Radio and Television News Transcript Regarding *Serrano v. Priest*, *Serrano* Case Files.

¹⁹ Derrick A. Bell, Jr., “School Segregation: Constitutional Right or Obsolete Policy,” paper presented at the Seminar on Public Policy (Center for Urban Studies, Harvard University), May 16, 1974.

²⁰ “CORE Head Praises Michigan Property Tax Switch,” *Atlanta Journal*, November 18, 1971.

²¹ Young quoted in James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and its Troubled Legacy* (New York: Oxford University Press, 2001), 180.

²² Appellants’ Reply Brief, May 5, 1970, Collection of Briefs, Pleadings, Memoranda, and Other Documents from Plaintiff’s Attorney in *Serrano v. Priest* Case, *Serrano* Case Files.

The qualms Hatter, Bell, Innis, and Young expressed about *Brown* coincided (in part) with Richard Nixon's, who criticized what he called the "smug paternalism" and "racist overtones" implicit in the "assumption [of desegregation] that blacks or others of minority races would be improved by association with whites."²³ Similarly, the prioritization of school finance equalization litigation over desegregation through busing expressed by Hatter, Bell, Innis, Young, and Horowitz, as well as those "northern liberals," in general, to whom the *Washington Post* alluded, also echoed Nixon, Reagan, and members of their administrations.

In a meeting with Nixon in December 1971, John Ehrlichman lauded school finance reform as a way to move beyond busing and enter a "new era" in American education divorced from the "preoccupations of the past."²⁴ In fact, that new era had already arrived a few months earlier, and Ehrlichman praised Nixon for having anticipated it with his School Finance Commission. On August 30, 1971, the California Supreme Court issued the nation's first ruling against the constitutionality of a state's school financing system. "We have determined that [California's] funding scheme invidiously discriminates against the poor," read the nearly unanimous (6 to 1) decision in *Serrano v. Priest*. "Affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes. Poor districts, by contrast, have no cake at all." Such a system of school financing was unconstitutional.²⁵

President Nixon applauded the *Serrano* decision. The case, he declared shortly after it had been decided, was "a shocker" but a "good thing." It would, he believed, propel efforts already under way to reform the "lousy," regressive property tax-based system of public school financing. This, in turn, would help tamp down the "property tax revolt" that was "very real," inextricably bound with the school "finance problem," and gathering momentum across the country.²⁶ "Taxpayer rebellion against increases in the

²³ Richard Nixon, "Statement by the President on Elementary and Secondary School Desegregation," March 24, 1970, Daniel Patrick Moynihan Papers, Box 23, Folder Desegregation, RN.

²⁴ White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

²⁵ *Serrano v. Priest*, L.A. No. 29820, 5 Cal. 3d 584, August 31, 1971.

²⁶ White House Tape Collection, September 30, 1971, Conversation 78-2, RN; Nixon quoted in Gareth Davies, *See Government Grow: Education Politics from Johnson to Reagan* (Lawrence: University of Kansas Press, 2007), 206.

property tax” was growing, declared *U.S. News and World Report* in November 1971.²⁷ This was most evident in the record rates of rejection of local bond and tax proposals, as Senator Henry Jackson wrote Elliott Richardson, secretary of health, education and welfare, a few weeks later, which, when coupled with *Serrano*, reflected “a crisis in financing education.”²⁸

Lewis Engman, assistant director of Nixon’s Domestic Council, and Roy Morrey, staff assistant to the council, cautioned against misconstruing the cause of the burgeoning property tax revolt. Yes, public education costs were growing at a rate that outstripped the rate of GNP growth, in general, and in cities, in particular (owing to their higher concentrations of poor and special needs students, declining tax bases, and greater tax dollar competition for other services). However, public opinion polls, Engman and Morrey maintained in a memorandum to John Ehrlichman, nevertheless indicated support for increased funding for education — just not from the “hides of property tax payers.”²⁹

The property tax, in other words, was the problem. It represented a relic of a time when real property was an accurate proxy for wealth and income in a way that it had ceased to be. No longer an “appropriate measure of ability to pay,” Engman wrote in another memorandum to Ehrlichman, the property tax had grown “extremely unpopular,” in part owing to its “highly inequitable,” regressive nature. Among the “wide range” of corroborating evidence, Engman cited a 1967 study that demonstrated how property owners who earned less than \$2,000 per year paid 6.9 percent of their income in property taxes, while property owners who earned more than \$15,000 annually paid only 2.4 percent. Compounding the property tax’s regressivity problem was its rise, from 2.7 percent of per capita income in 1960 to 4 percent of per capita income in 1970. California property taxes had gone up at an even greater clip than the rest of the country’s,

²⁷ “Financial Crisis for Public Schools,” *U.S. News and World Report*, November 8, 1971, 48–50.

²⁸ Sen. Henry Jackson to Elliott Richardson, December 1, 1971, Lewis Engman Papers, Box 5, Folder Taxation, School Finance Initiative [2 of 2], RN. For a similar claim made about California specifically, see, Assemblyman Alan Sieroty, et al., to Reagan, April 30, 1970, Box GO 160, Folder Education-Finance-K-14 (1970), RR.

²⁹ Lewis Engman and Roy Morrey to John Ehrlichman, “A Possible School Finance Initiative,” October 20, 1971, Lewis Engman Papers, Box 5, Folder Taxation, School Finance Initiative [1 of 2], RN.

fully one-third greater.³⁰ Engman's memorandum was internal. Other Nixon administration officials, however, blasted the property tax's regressivity publicly.³¹

Serrano thus not only brought the "school finance" problem into "particular focus," as Engman and Morrey observed, and offered a "liberal" alternative to desegregation through busing, but it also presented the opportunity for the Nixon administration to respond to the tax revolt and reap the electoral reward of that response. For that reason, Engman wrote Ehrlichman in December 1971, Nixon needed to push for property tax reform before "the Democrats pre-empt the issue. . . . It is a good issue for the man in the street, but we will lose credibility unless we propose legislation early."³²

Serrano, combined with the escalating property tax revolt, was thus prompting searches for alternative sources of school funding that may "radically restructure the very foundations of public education," wrote the *U.S. News and World Report*.³³ In fact, one of those searches was already under way in the White House. Indeed, even before the California Supreme Court ruled in *Serrano*, White House aide Gerald Miller wrote Lewis Engman about the "major concern" brewing over school finance and the "concomitant problem" of property taxation. Property taxes not only fell particularly hard on "low income persons," but they were an "inadequate vehicle" for financing education.³⁴

To fix this, Engman and Morey proposed a school finance initiative for the administration to pursue: a federal Value Added Tax (VAT) that would serve as a more "equitable" substitute for reduced, local property taxes.

³⁰ Lewis Engman to John Ehrlichman, December 1, 1971, Lewis Engman Papers, Box 5, Folder Taxation, School Finance Initiative [2 of 2], RN.

³¹ See, e.g., Secretary of Education Sidney Marland in "New Education Funding Urged," *Atlanta Constitution*, October 13, 1971 and Elliott Richardson in "Financial Crisis for Public Schools," *U.S. News and World Report*, November 8, 1971, 48–50.

³² Lewis Engman to John Ehrlichman, December 1, 1971, Lewis Engman Papers, Box 4, Folder Taxation, School Finance, Property Taxes, RN; Reagan, too, drew a link between *Serrano* and tax reform, calling the latter a step in the direction of meeting the requirements spelled out in the former, Transcript, press conference, September 7, 1971, Box P3, Folder Press Conference Transcripts 7/7/71 through 10/20/71, RR.

³³ "Financial Crisis for Public Schools," *U.S. News and World Report*, November 8, 1971, 48–50.

³⁴ Gerald Miller to Lewis Engman, August 13, 1971, Lewis Engman Papers, Box 4, Folder Taxation, School Finance, Property Taxes, RN.

Despite his initial skepticism — as he put it, “property tax relief is a helluv’an issue. It’s terribly boring” — Nixon quickly warmed to the idea, especially as he realized how it offered an end-run around busing. Meeting with Nixon and Ehrlichman in December 1971, Moynihan responded to Nixon’s comment that busing was the “hottest” domestic issue by suggesting that it “could unravel the last twenty years in race relations.” He then praised Nixon, through his Department of Justice, for having made great strides in desegregating public schools in the South — for having “finally delivered on *Brown*.” However, he added, with attention shifting to the North, whose schools lacked the South’s history of de jure segregation, Nixon should stake out a different approach to equality of opportunity. Ehrlichman suggested school finance reform, linking it to *Serrano* as an alternative to busing to resolve “inequality in educational opportunity.” Nixon agreed. Here was an “idealistic” issue that could “assume historic proportions,” he replied: “stop forcing people together” and instead ensure that all students have an “equal shot where there is no inferior education.” A federal initiative to relieve the property tax burden was essential, as Nixon put it in his inimitable way, “so that we can finance the little bastard kids.”³⁵

Over the course of the next month, Nixon promoted his property tax relief / school finance reform initiative. Meeting with the Commission on School Finance he had created in 1970, he suggested a VAT as a possible source of “massive federal assistance” and alternative to escalating property taxes.³⁶ One week later, in his January 20, 1972 State of the Union address, he railed against “soaring” property taxes as “one of the most oppressive and discriminatory of all taxes.” They were also, according to a handful of recent court rulings, a “discriminatory and unconstitutional” basis for funding schools. In response, Nixon vowed to make “revolutionary” recommendations to “relieve the burden of property taxes and provid[e] both fair and adequate financing for our children’s education.”³⁷

Though Nixon did not mention a federal VAT in his State of the Union speech, he did mention it in the charge he issued to the bipartisan Advisory Commission on Intergovernmental Relations (ACIR) that same day.

³⁵ White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

³⁶ White House Tape Collection, January 13, 1972, Conversation 647-10, RN.

³⁷ Richard Nixon, State of the Union Address, January 20, 1972, <http://stateoftheunion.onetwothree.net/texts/19720120.html> (last accessed Nov. 26, 2012).

Calling school finance reform “one of the greatest challenges this Nation faces today,” Nixon asked the ACIR to consider whether a federal VAT would serve as the “best substitute” for local property taxes and, if so, to suggest ways to “eliminate otherwise regressive aspects” of it.³⁸ Income tax credits, Engman wrote on behalf of the Nixon Administration, represented one such way.³⁹ *Washington Post* columnist Stewart Alsop praised Nixon’s efforts, describing Nixon’s proposed federal VAT as the “most surprising, most interesting and most generally gutsy of President Nixon’s bombshells for the election year.”⁴⁰

In fact, this bombshell never detonated. As 1972 drew to a close, the ACIR rejected Nixon’s suggestion for a federal substitute source of revenue for local property taxes. Though “deeply conscious” of the “discriminatory aspects” of the property tax basis for funding public schools, the cases challenging this approach to public school finance, and the “growing aversion” to increasing property taxes to meet the rising costs of public education, ACIR chair, Robert Merriam, wrote Nixon in December 1972, his Commission did not believe a “massive Federal [VAT] program” was “necessary” or “desirable.” Instead, the ACIR insisted that state governments should assume a greater share of the burden of financing public schools from local governments. This would, in turn, “greatly facilitate property tax relief.”⁴¹

With that, Nixon’s push for a federal government–led initiative for a “complete overhaul of our property taxes and our whole system for financing public education” ground to a halt. Nixon’s 1972 State of the Union address promise to find a federal government solution to the “school finance crisis that [also] provided property tax relief” was now “highly unlikely” to be fulfilled, wrote Engman.⁴² Nor, as it soon turned out, would it be fulfilled by another arm of the federal government: the United States Supreme Court. On March 21, 1973, in the case of *San Antonio v. Rodriguez*, the

³⁸ Richard Nixon to Robert Merriam, January 20, 1972, Ex FG 273, Box 1, Folder President’s Commission on School Finance 11/1/71 [1 of 2], RN.

³⁹ Lewis Engman to Louis Petro, February 18, 1972, Lewis Engman Papers, Box 4, Folder Taxation, School Finance Correspondence [2 of 2], RN.

⁴⁰ Stuart Alsop, “Nixon’s Tax Bombshell,” *Washington Post*, December 10, 1971.

⁴¹ Robert Merriam to Richard Nixon, December 14, 1972, Lewis Engman, Box 3, Folder Taxation, School Finance, ACIR, RN.

⁴² Lewis Engman to David Parker, December 12, 1972, Lewis Engman Papers, Box 4, Folder School Finance, President’s Message.

Court refused to apply the logic of *Serrano* to the *federal* constitutionality of inequitable school funding between property-rich and property-poor districts within states.⁴³

With the federal government and Constitution now effectively removed from the scene, the locus of school finance equalization reform shifted to state courts and state legislative houses based on state constitutional educational provisions. (Since then, some 45 states have faced state constitution-based legal challenges to their heavily property tax-based school financing systems.⁴⁴) As school finance litigation and legislation waxed — at least at the state level — school desegregation waned over the course of the 1970s.

Whereas state-based cases challenging school finance inequality accelerated after *Rodriguez* foreclosed a federal challenge, nothing analogous at the state level involving desegregation emerged in the aftermath of the Supreme Court's 1974 *Milliken* decision, which found no federal constitutional support for cross-district busing to promote desegregation. Legal scholar James Ryan attributes this difference to the "perceived practical and political difficulties with desegregation — difficulties that must not have seemed as formidable with regard to school finance reform."⁴⁵ Put another way, school finance reform was, as Ryan puts it, "an easier pill to swallow" than school desegregation through busing. Ryan's explanation echoes what proponents of school finance reform had to say in its defense over school desegregation through busing, which, in turn, helps explain how and why the former eclipsed the latter as *the* educational civil rights issue beginning in the 1970s.

On the heels of *Serrano*, California governor Ronald Reagan identified school financing and property tax relief as the state's "most urgent" issues. He exhorted the state legislature to "eliminate the chronic crisis in public school financing by shifting the burden from the homeowner to a broader

⁴³ *San Antonio v. Rodriguez*, No. 71-1332, 411 U.S. 1, March 21, 1973.

⁴⁴ *Rebell*, 2.

⁴⁵ James E. Ryan, "Sheff, Segregation, and School Finance Litigation," *New York University Law Review* 74 (May 1999): 566.

based tax.” If the Legislature failed to act, he warned, the “people may act themselves through the initiative process.”⁴⁶

Reagan was wrong. The California Legislature did respond to *Serrano*, but that did *not* stop Californians from taking the initiative with the initiative process. Assembly Bill 65, signed by Reagan’s successor, Jerry Brown, in 1977, increased the money that property-poor school districts spent on students, in part, by transferring some of the property tax dollars generated in property-rich districts. The following year, on June 6, 1978, nearly two-thirds of Californians cast ballots in favor of Proposition 13, which drastically cut and capped property tax rates, property assessments, and by extension, property tax dollars collected. It also triggered the nationwide tax revolt, as states across the country adopted tax limitation measures, and ushered in the anti-tax, anti-government ethos that would become synonymous with the Reagan revolution in American politics.

These developments — school finance equalization and property tax reduction — were not simply contemporaneous, but rather connected, at least according to some observers. As veteran California journalist Peter Schrag has noted, by compelling a redistribution of property tax revenues from property-rich to property-poor districts, *Serrano* “undermined one powerful reason to vote against” Proposition 13, namely, the adverse impact that a loss of local property tax dollars would have on the caliber and control of local schools. For this reason, Schrag concludes, *Serrano* “appears to have been a significant factor” in Proposition 13’s passage.⁴⁷

Though the causal relationship between *Serrano* and Proposition 13 is the subject of some debate — and even more uncertain is just who exactly benefited from *Serrano* and its progeny (i.e., to what extent did poor and minority students reside in property-poor districts, as so many proponents of school finance equalization litigation presumed) — the impact of *Serrano* and Proposition 13 on California is less debatable.⁴⁸ *Serrano*

⁴⁶ Reagan quoted in Lou Cannon, *Governor Reagan: His Rise to Power* (New York: Public Affairs, 2003), 363.

⁴⁷ Peter Schrag, *Paradise Lost: California’s Experience, America’s Future* (Berkeley: University of California Press, 1999), 148. For a contrary view, see Isaac William Martin, *The Permanent Tax Revolt: How the Property Tax Transformed American Politics* (Stanford: Stanford University Press, 2008).

⁴⁸ Jon Sonstelie, Eric Brunner, and Kenneth Ardon, *For Better or For Worse? School Finance Reform in California* (Public Policy Institute of California, 2000): “Although

ultimately led to legislation that equalized (more or less) public funding of K–12 public education by redistributing property tax dollars across the state from property-rich to property-poor districts. Proposition 13, however, limited the amount of property tax dollars that could be collected. Before Proposition 13, California ranked in the top ten states in per pupil expenditures in public schools. By the mid-1990s, California ranked in the bottom ten, where it remained over a decade later.⁴⁹ Though California's schools were more equally financed across districts thanks to *Serrano*, they were much less generously financed than they had been relative to other states. In short, the combination of Proposition 13 and *Serrano* saw California public school financing leveled down.

Beyond California, as school finance litigation proliferated after *Serrano* and the tax revolt spread after Proposition 13, America's public schools, while more equally financed, became less generously financed relative to the burdens they had to bear, in particular, a massive post-1965 immigration and a steady shift of new jobs from heavy industry and manufacturing toward technology and finance. Between 1949 and 1970, expenditures on elementary and secondary schools as a percent of GDP doubled from 2.3 to 4.6. In the forty years since then, this percentage has flattened or declined on an annual basis, fluctuating between 3.8 and 4.7.⁵⁰

In the post-*Serrano*, post-Proposition 13 era, California has gone from having among the highest college-going rates in the United States in 1970 to being ranked second to last among states in the percentage of high school seniors who enroll in four-year colleges in the early twenty-first century.⁵¹

many low-income and minority families lived in low spending school districts, just as many lived in high-spending ones. As a result reductions in revenue inequalities across districts did not help disadvantaged students as a whole." As for Proposition 13's impact, "By limiting property taxes, Proposition 13 eventually led to per pupil spending reductions" (3).

⁴⁹ Peter Schrag, "Proposition 13 Turns 30: Compounding California's Mess Something Awful," *California Progress Report*, June 4, 2008.

⁵⁰ http://nces.ed.gov/programs/digest/d11/tables/dt11_028.asp (last accessed Nov. 26, 2012).

⁵¹ John Aubrey Douglas, "Treading Water: What Happened to America's Higher Education Advantage," in *Globalization's Muse: Universities and Higher Education Systems in a Changing World* (Berkeley: Berkeley Public Policy Press, 2009), 168; "California at a Crossroads: Confronting the Looming Threat to Achievement, Access and Equity at the University of California and Beyond," (Chief Justice Earl Warren Institute on Race,

Moreover, as its college-going rates have plunged relative to other states, California's income inequality has spiked at rates that outstrip the national rate of growth in income inequality. In 1970, California's income inequality was comparable to the national average. Nearly forty years later, it was greater than all but five states.⁵² For economic historian Claudia Goldin and Lawrence Katz, the declining growth rate in educational attainment nationwide since the late 1970s is a "major contributor" to increasing inequality in family income.⁵³ To what extent does this hold true for California? And, if so, to what extent does it stem from the connections I have suggested here between opposition to school desegregation through busing, school finance equalization litigation and reform, Proposition 13 and the tax revolt? These are some of the questions that the book, which this paper is an early step toward, will seek to answer.

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Ethnicity and Diversity, October 27, 2006), http://berkeley.edu/news/berkeleyan/2006/11/images/Brown_Edley.pdf (last accessed Nov. 26, 2012).

⁵² Steven A. Camarota and Karen Jensenius, "A State Transformed: Immigration and the New California" (Washington, D.C.: Center for Immigration Studies, June 2010), <http://www.cis.org/california-education> (last accessed Nov. 26, 2012).

⁵³ Claudia Goldin and Lawrence Katz, *The Race Between Education and Technology* (Cambridge: The Belknap Press of Harvard University Press, 2008), 325.

IMPLEMENTATION:

How the Borderlands Redefined Federal Immigration Law and Policy in California, Arizona, and Texas, 1917–1924

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Implementation is worth studying precisely because it is a struggle over the realizing of ideas. It is the analytical equivalent of original sin; there is no escape from implementation and its attendant responsibilities. What has policy wrought? Having tasted of the fruit of the tree of knowledge, the implementer can only answer, and with conviction, it depends . . .

— Jeffrey L. Pressman and Aaron Wildavsky¹

In their classic study, *Implementation: How Great Expectations in Washington are Dashed in Oakland*, political scientists Jeffrey L. Pressman

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¹ Jeffrey L. Pressman and Aaron Wildavsky, *Implementation: How Great Expectations in Washington are Dashed in Oakland; or, Why It’s Amazing that Federal Programs Work at All, This Being a Saga of the Economic Development Administration as Told By Two Sympathetic Observers Who Seek to Build Morals on a Foundation of Ruined Hopes*, 3rd ed. (Berkeley: University of California Press, 1984), 180.

and Aaron Wildavsky stress that we cannot understand public policies without examining their implementation. Pressman and Wildavsky's own focused exploration of one federal agency — the Oakland office of the Economic Development Administration (EDA) — not only reveals the weaknesses of the policy-making process (as suggested by the subtitle of the book, "Why It's Amazing that Federal Programs Work at All") — but also provides important insights into policy formation itself. Implementation, its failures, successes, and everything in-between, informs the shaping and reshaping of public policy; as Pressman and Wildavsky observe, implementation "reformulate[s] as well as [carries] out policy."²

While Pressman and Wildavsky focus specifically on EDA implementation of public works and small business projects during the 1960s, their findings provide a powerful analytical framework for understanding implementation in a variety of policy arenas. Since the late nineteenth century, American immigration policy, I will argue, was very much a product of its implementation by the Bureau of Immigration on the U.S.–Mexico border. This article will focus on the policy innovations that developed as a result of the Bureau's efforts to enforce the Immigration Act of 1917 and the Passport Act of 1918 on the nation's southern boundary. As southwestern immigration officials began administering these new laws, their efforts were hampered by a lack of money, manpower, and materiel as well as enormous opposition from border residents (whether Asian, European, Mexican, or American) who were accustomed to crossing the international boundary without restriction.³

In response to these enforcement challenges, southwestern immigration officials often waived the rules or created new ones that made their lives and the lives of border residents much easier. The most prominent of these was the wartime labor importation program, initiated to overcome the objections of southwestern industries to the restrictive provisions of the Immigration Act of 1917 and the Passport Act of 1918.⁴ In addition, the agency

² Ibid., 180.

³ George J. Harris, Acting Supervising Inspector, El Paso, to Commissioner General, November 28, 1917, file 54152/1E, RG 85, National Archives. See also Dr. Cleofas Calleros, interview by Oscar J. Martínez, September 14, 1952, interview 157, transcript, Institute of Oral History, University of Texas at El Paso.

⁴ Mark Reisler, *By the Sweat of Their Brow: Mexican Immigrant Labor in the United States, 1900–1940* (Westport: Greenwood Press, 1976).

modified the new regulations for ordinary border residents as well as the rich and powerful. When thousands of locals complained about the literacy test provisions of the Immigration Act of 1917, the Bureau created what I will refer to as “border waivers” for illiterate Mexican nationals who lived on both sides of the border. As the administrators of the Passport Act of 1918, southwestern immigration officials devised additional exemptions, specifically a border crossing card program for local residents. Although the border crossing card primarily assisted Mexican nationals and Mexican Americans, it also benefited Americans and Europeans, as well as Asian, Asian-American, and Asian-Mexican merchants. Together, these policy innovations — to the chagrin of anti-immigration advocates — sustained the transnational character of the borderlands.

All of this is not to deny the Bureau’s vigorous efforts to bar Mexican, Asian, and European nationals from admission for permanent residence or to expel unwanted illegal immigrants in this period. Instead, this study demonstrates that, during World War I and well into the 1920s, the Bureau was concerned not only with the restriction of immigrants but also with the regulation of the local border population. While immigration historians have provided extensive accounts of those migrants seeking entry for permanent residence (formally referred to as “immigrants” by the Bureau of Immigration), this paper shifts the focus of attention from immigrants to border crossers (categorized as “non-immigrants”). This population typically included laborers, tourists, local residents, dignitaries, and businessmen who crossed and re-crossed the border on a regular basis for short periods of time. In a stunning departure from the exclusionary intent underlying the Immigration Act of 1917 and the Passport Act of 1918, Bureau of Immigration officials effectively nullified provisions of these laws in order to craft a series of border crossing policies for these border residents and businesses.

This examination of the Bureau’s policy innovations challenges a major scholarly and popular conception that the normative function of the nation’s immigration policy (and, in turn, the Bureau of Immigration) was to maintain the dividing lines between desirable and undesirable peoples, legal and illegal immigrants, and Americans and non-Americans. Proceeding from this notion, scholars have produced two competing interpretations of the agency’s history. On the one hand, some scholars emphasize the

ways in which the Bureau of Immigration and the Border Patrol, during the Progressive Era, succeeded in implementing the nation's restrictive immigration laws, thereby closing the nation's borders to the entry of unwanted immigrants.⁵ On the other hand, some studies highlight the contingencies and weaknesses of border enforcement. In his recent study of the Bureau of Immigration, Patrick Ettinger argues that Asian and European immigrants routinely evaded the immigration laws and confounded the Bureau's enforcement efforts between 1891 and 1930.⁶ While both sets of scholars have enriched our understanding of the Bureau of Immigration, they describe immigration law enforcement in bipolar terms — as “strong” or “weak,” or as “hard” or “contingent.” In so doing, they neglect to consider whether the Bureau's operations might be described in more complex and dynamic terms. On this latter point, Pressman and Wildavsky's study is significant because it demonstrates that agencies don't simply succeed or fail; instead, agencies, as I will argue, create new ideas, new policies, and new laws.

This study further departs from the current literature by demonstrating how local, transnational, and even global concerns frequently overrode national imperatives in shaping immigration laws and policies for the borderlands. Thus, whereas current accounts of immigration policy history assume an alignment between Bureau officials in the Southwest, their supervisors in Washington, D.C., and nativist forces in Congress,⁷ this essay reveals the conflicts between local and federal agency officials, and the competing demands faced by immigration inspectors in the borderlands. More specifically, this article focuses on agency officials stationed in California, Arizona, and Texas — a region long distinguished by its cultural diversity, transnational infrastructure, global trading partners, world-

⁵ See for example, Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004); Kelly Lytle-Hernandez, *Migra! A History of the U.S. Border Patrol* (Berkeley: University of California Press, 2010).

⁶ Patrick Ettinger, *Imaginary Lines: Border Enforcement and the Origins of Undocumented Immigration, 1882–1930* (Austin: University of Texas Press, 2010). See also, Daniel Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton: Princeton University Press, 2002); Keith Fitzgerald, *The Face of the Nation: Immigration, the State, and the National Identity* (Stanford: Stanford University Press, 1996).

⁷ See for example, Ngai, *Impossible Subjects*; Lytle-Hernandez, *Migra!*; and Ettinger, *Imaginary Lines*.

renowned tourist industries, and multinational labor force — who recognized the dissonance between the neat dividing lines delineated by the federal immigration laws and the global realities on the ground. Despite their own attempts to defend the nation-building enterprise of immigration restrictionists, southwestern agency officials quickly realized that they were unevenly matched against the sheer volume of migrants who sought to cross the line each day and the global economic and social forces that brought them to the nation's borders in the first place.⁸ In this context, the agency constructed an immigration policy for the borderlands, a policy that departed from the restrictionist tenets of the federal immigration and passport laws but met the needs of border residents.

The first part of this article offers a snapshot of the U.S.–Mexico borderlands. It describes the major demographic, economic, and social trends that created an intricate network of transnational relationships along the U.S.–Mexico border from approximately 1900 until 1920. Yet, as the second section argues, the creation of these very links became a cause for concern among federal, state, and local officials during World War I. Due to wartime xenophobia and fears about an enemy invasion through Mexico, Congress and the Bureau of Immigration adopted a more restrictive approach to border control. Through the passage of the Immigration Act of 1917 and the Passport Act of 1918, the Bureau of Immigration sought to bar the entry of unwanted immigrants and enemy aliens. The passage of legislation in Congress, however, did not guarantee its seamless or effective implementation on the ground. As the final sections reveal, the realities of the borderlands — the thousands of migrants seeking to cross and recross the border each day, the ceaseless demand for migrant labor, and the constant protests of border residents — eroded the restrictive intent underlying Progressive Era immigration legislation. As a result, Bureau of Immigration officials in the Southwest exercised their administrative discretion, waived provisions of the Immigration Act of 1917 and the Passport Act of 1918, and fashioned policies that opened the line to the border crossers.

⁸ For an account of the nativist attitudes of early Bureau of Immigration officials see, Erika Lee, *At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943* (Chapel Hill: University of North Carolina Press, 2003), 47–74.

Until World War I, the economic and social needs of the borderlands, rather than immigration regulations, served as the forces driving migration between Mexico and the United States. As historian Mario T. García explains, Mexican immigration was “inextricably linked with the growth of American industrial capitalism.”⁹ The primary southwestern industries — railroads, mining, ranching, and agriculture — met their labor needs with migrant workers.¹⁰ As these industries triggered the growth of border towns, immigrants, once again, met the burgeoning demand for workers in both the primary (the rail, mining, and ranching industries) and secondary economic sectors (including manufacturing, wholesale and retail trade, and construction).¹¹ Given the proximity of Mexico, the passage of the Chinese Exclusion Acts (which barred the entry of Chinese laborers in the late nineteenth century), and political upheavals in early twentieth-century Mexico (including the redistributive land policies of the Díaz regime and the Mexican Revolution), Mexican nationals constituted the bulk of the immigrant work force.¹²

Recognizing the importance of immigration to the border economy, federal officials took a highly uneven approach to border enforcement at

⁹ Mario T. García, *Desert Immigrants: The Mexicans of El Paso, 1880–1920* (New Haven: Yale University Press, 1981), 1.

¹⁰ *Ibid.*, 3.

¹¹ *Ibid.*

¹² The Chinese Exclusion Act of 1882 suspended the immigration of Chinese laborers for ten years. An 1884 amendment required all Chinese non-laborers to present certificates from the Chinese government and endorsed by the American consul in order to re-enter the country. The Scott Act of 1888 prohibited the return of a laborer once he had left the United States. The Geary Act of 1892 extended the original exclusion act for another ten years; required Chinese immigrants to apply for a certificate of residence; and created the first internal passport system. Finally, the 1904 amendment to the Chinese Exclusion Act permanently barred the admission of Chinese laborers. See Lucy Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995); Charles McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994); John Wunder, “The Chinese and the Courts in the Pacific Northwest: Justice Denied?” *Pacific Historical Review* 52:2 (May, 1983): 191–211; Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley: University of California Press, 1971). On the turn to Mexican immigrant labor after the passage of the Chinese Exclusion Acts, see García, *Desert Immigrants*, 2, 33.

the turn of the last century.¹³ While immigration inspectors were vigilant in the application of the Chinese exclusion laws, they simultaneously adopted a *laissez-faire* stance toward Mexican migration across the line.¹⁴ Indeed, at the urging of corporations such as the Southern Pacific Railroad, Congress exempted Mexican immigrants from the head taxes stipulated under the Immigration Acts of 1903 and 1907.¹⁵ While southwestern officials possessed other statutory means to restrict Mexican immigration, they chose not to exercise this authority on a regular basis.¹⁶ Instead, they allowed most Mexican immigrants to cross the international line without inspection.¹⁷ Some immigration officials, according to historian George Sánchez, even recruited migrant workers for southwestern industries in exchange for bribes.¹⁸ As a result of its lax approach to immigration law enforcement, the Bureau of Immigration itself sustained the transnational character of the borderlands.

The porousness of the border not only facilitated the migration of Mexicans north to the United States; it also allowed them to return home or engage in an ongoing pattern of circular migration. Indeed, while many of the 1.5 million Mexican nationals who entered the United States

¹³ Ettinger, *Imaginary Lines*, 123–144.

¹⁴ Prior to 1917, the Bureau of Immigration focused its enforcement efforts on the Chinese. For an account of the agency's operations on the U.S.–Mexico border in the early twentieth century, see Smith, "Early Immigrant Inspection along the U.S.–Mexican Border," 2; Ettinger, *Imaginary Lines*. But see Grace Peña Delgado, *Making the Chinese Mexican: Global Migration, Localism, and Exclusion in the U.S.–Mexico Borderlands* (Stanford: Stanford University Press, 2012), 82–84, for a discussion of the contingencies in the enforcement of the Chinese exclusion laws.

¹⁵ The Immigration Acts of 1903 and 1907 respectively charged a head tax of \$2.00 and \$4.00. Lawrence A. Cardoso, *Mexican Emigration to the United States, 1897–1931: Socio-economic Patterns* (Tucson: University of Arizona Press, 1980), 34; David E. Lorey, *The U.S.–Mexican Border in the Twentieth Century: A History of Economic and Social Transformation* (Wilmington: SR Books, 1999), 69–71.

¹⁶ Cardoso, *Mexican Emigration to the United States*, 34.

¹⁷ Benjamin Heber Johnson, *Revolution in Texas: How a Forgotten Rebellion and Its Bloody Suppression Turned Mexicans into Americans* (New Haven: Yale University Press), 72.

¹⁸ George J. Sánchez, *Becoming Mexican American: Ethnicity, Culture, and Identity in Chicano Los Angeles, 1900–1945* (New York: Oxford University Press, 1995), 51–53. See also, Mario Barrera, *Race and Class in the Southwest: A Theory of Racial Inequality* (Notre Dame: University of Notre Dame Press, 1979), 71–72.

between 1910 and 1920¹⁹ settled permanently,²⁰ demographers and historians agree that hundreds of thousands more entered on a temporary basis, crossing and re-crossing the border as laborers, merchants, or casual visitors. This category of migrants, referred to by the Bureau of Immigration as non-immigrants or non-statistical entrants, outnumbered immigrants (or those entering for permanent residence) by a factor of three to one.²¹ These massive demographic shifts attested to the openness of the border in this period and, more broadly, played a pivotal role in the formation of transnational communities all along the international line.

While Mexican nationals constituted the largest group of migrants crossing and re-crossing the border each day, Anglo-Americans, Asian Americans, Europeans, Japanese and Chinese nationals, and Japanese and Chinese Mexicans, among others, also took advantage of the border's permeability. In the late nineteenth century, many of these migrants traveled back and forth across the border to work for the mining, rail, and agriculture industries that had developed, sometimes in tandem, on both sides of the line.²² Given the racial segmentation of the workforce, these industries

¹⁹ This massive migration was one of the most important events on the U.S.–Mexico border in the early twentieth century. Linda B. Hall and Don M. Coerver, *Revolution on the Border: The United States and Mexico, 1910–1920* (Albuquerque: University of New Mexico Press, 1988), 126. Lorey estimates that, between 1910 and 1930, “almost 10 percent of Mexico’s population migrated north to the United States.” Lorey, *The U.S.–Mexico Border*, 69. On the causes of the migration, see García, *Desert Immigrants*, 33; Rodolfo Acuña, *Occupied America: A History of Chicanos* (New York: Harper and Row, 1988), 145; Barrera, *Race and Class in the Southwest*, 68–69.

²⁰ This settlement resulted in a dramatic increase in the Mexican-born population from 110,393 in 1900 to 700,541 in 1920. Cardoso, *Mexican Emigration to the United States*, 35. García, *Desert Immigrants*, 35.

²¹ Indeed, Hall and Coerver assert that those entering for permanent residence “formed by far the smallest category of migrants.” Hall and Coerver, *Revolution on the Border*, 130. See also García, *Desert Immigrants*, 35. Lorey estimates that, from 1910 to 1920, 206,000 Mexican nationals entered as legal immigrants while 628,000 arrived as temporary workers. Lorey, *The U.S.–Mexico Border*, 70.

²² Along the Arizona–Sonora border, for example, the major industries — mining, ranching, and agriculture — grew in tandem. American capital funded the construction of mining facilities on both sides of the line; irrigation projects in Mexico that supported farms in the United States; and ranching ventures that participated in transnational grazing arrangements. In Tijuana, American entrepreneurs and Mexican politicians worked together to develop the town’s entertainment industry, constructing gambling halls, race tracks, theaters and spas. Hall and Coerver, *Revolution on the Border*, 29, 41;

sought Anglo-American workers to fill skilled and managerial posts north and south of the border.²³ And while Mexican nationals composed the bulk of the industrial workforce north of the border, European, Chinese, and Japanese laborers supplemented the pool of unskilled workers in the United States and Mexico.²⁴

As Asian, European, and Mexican nationals settled in border communities, they often lived transnational lives. Mexican nationals regularly crossed the line to shop for subsistence items in the United States; indeed, these crossings were an absolute necessity, as one State Department official observed: “If they [Mexicans] are refused entry into the United States the Mexican population along the border would starve and the greater number of the shop keepers on the American side would be bankrupted.”²⁵ At the same time, Mexican immigrants and Mexican Americans in El Paso

Rachel St. John, *Line in the Sand: A History of the Western U.S.–Mexico Border* (Princeton: Princeton University Press, 2011), 148–173; Samuel Truett, “Transnational Warrior: Emilio Kosterlitzky and the Transformation of the U.S.–Mexico Borderlands,” in Samuel Truett and Elliott Young, eds., *Continental Crossroads: Remapping U.S.–Mexico Borderlands History* (Durham: Duke University Press, 2004), 249; Paul J. Vanderwood, *Juan Soldado: Rapist, Murderer, Martyr, Saint* (Durham: Duke University Press, 2004), 83, 87; Paul J. Vanderwood, *Satan’s Playground: Mobsters and Movie Stars at America’s Greatest Gaming Resort* (Durham: Duke University Press, 2010).

²³ Hall and Coerver, *Revolution on the Border*, 93–101; García, *Desert Immigrants*, 5; Thomas E. Sheridan, *Los Tucsonenses: The Mexican Community in Tucson, 1854–1941* (Tucson: University of Arizona Press, 1986), 6.

²⁴ For more information about Chinese and Japanese border crossers and border residents, see the following: Donald H. Estes, “Before the War: The Japanese in San Diego,” *Journal of San Diego History* 24:4 (1978): 425–455; Katherine Benton-Cohen, *Borderline Americans: Racial Division and Labor War in the Arizona Borderlands* (Cambridge: Harvard University Press, 2009); Robert Chao Romero, *The Chinese in Mexico, 1882–1940* (Tucson: University of Arizona Press, 2010); Julia Maria Shiovone Camacho, *Chinese Mexicans: Transpacific Migration and the Search for a Homeland, 1910–1960* (Chapel Hill: University of North Carolina Press, 2012); Delgado, *Making the Chinese Mexican*; Eric Walz, “The Issei Community in Maricopa County: Development and Persistence in the Valley of the Sun, 1900–1940,” *The Journal of Arizona History* 38 (1997): 1–22; Lawrence Michael Fong, “Sojourners and Settlers: The Chinese Experience in Arizona,” *The Journal of Arizona History* 21 (1980): 1–30; Evelyn Du-Hart, “Immigrants to a Developing Society: The Chinese in Northern Mexico, 1874–1932,” *The Journal of Arizona History* 21 (1980): 49–86.

²⁵ Ralph J. Totten, Consul General at Large, El Paso, Texas, “Report on Conditions on the Mexican Border,” January 20, 1918, file 54152/11, RG 85, National Archives, 15; see also, Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1918*, 317–319.

retained their ties to Mexico thanks to Spanish-language newspapers that provided news coverage about Mexican politics and advertisements from Mexican business establishments.²⁶

As Chinese and Japanese migrants established their own businesses (including laundries, restaurants, grocery stores, pool halls, barber shops, boarding houses, farms, and ranches, among others) on both sides of the border, regular border crossings became essential to the success of their enterprises.²⁷ Merchants in Mexico, for example, sought to replenish inventories through large purchases north of the line.²⁸ Meanwhile, Chinese business owners, in an effort to evade the American prohibition against the admission of Chinese laborers, frequently transported their Chinese employees north from Mexico. Finally, the very financing of many border businesses was dependent upon the pooling of resources between relatives and friends in the United States, Canada, Mexico, and Asia.²⁹ Perhaps most important for the purposes of this essay, the social status of Chinese and Japanese merchants widened the possibilities for their physical mobility across the nation's borders. While the Chinese

²⁶ Romo notes that over forty Spanish-language newspapers were published in El Paso between 1890 and 1924. David Dorado Romo, *Ringside Seat to a Revolution: An Underground Cultural History of El Paso and Juárez* (El Paso; Cinco Puntos Press, 2005), 18–20.

²⁷ For an account of these mercantile establishments see, Romo, *Ringside Seat to a Revolution*, 198–200. See also, Delgado, *Making the Chinese Mexican*; Walz, “The Issei Community in Maricopa County”; Fong, “Sojourners and Settlers”; Du-Hart, “Immigrants to a Developing Society”; Delgado, “In the Age of Exclusion”; Estes, “Before the War”; Romero, *The Chinese in Mexico*. For an account of Japanese-owned farms in the outskirts of El Paso and San Diego County, see Estes, “Before the War”; Romo, *Ringside Seat to a Revolution*, 201–202. See also Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1917*, 230; and Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1919*, 408 (explaining that in Southern California, American-born children of Japanese nationals typically held title to the land as a result of California's alien land laws.) On Chinese businesses established in Mexico, see Camacho, *Chinese Mexicans*, 23–25; A. E. Burnett, Inspector in Charge, to Supervising Inspector, El Paso, April 8, 1920, file 54820/455, RG 85, National Archives.

²⁸ On the history of Chinese immigrants in Mexico, see Romero, *The Chinese in Mexico*; Delgado, *Making the Chinese Mexican*; and Camacho, *Chinese Mexicans*.

²⁹ Romero, *The Chinese in Mexico*, 30–65, 97–145. On Anglo, Chinese, and Mexican economic and social relations in the Arizona–Sonora borderlands see, Delgado, *Making the Chinese Mexican*, 41–72.

exclusion acts and the Gentlemen's Agreement of 1907 barred the entry of Chinese and Japanese laborers, both laws contained exceptions for the entry of merchants.³⁰

Leisure, as well as labor, led primarily Americans and Mexicans to cross and re-cross the border each day. The entertainment industry drew Americans south of the line, particularly with the start of Prohibition in 1920; as historian David Romo writes of the port of entry at El Paso:

It was no longer arms smugglers, spies, soldiers of fortune, journalists and revolutionaries crossing the lines. Suddenly the ludic zone across the border became packed with American tourists. Between 1918 and 1919, about 14,000 tourists crossed the border into Mexico; a year later the official U.S. Customs tally was 418,700.³¹

While Ciudad Juárez drew thousands of casual visitors, Tijuana surpassed all other border towns, north or south of the line, as a tourist attraction.³² Indeed, given the volume of traffic flowing from north to south, Tijuana identified itself less with Mexico than with California.³³ Seeking to take advantage of the tourist trade in Tijuana, Americans, Mexicans, Armenians, Syrians, Japanese, Spaniards, Italians, and Chinese all launched

³⁰ Merchants were exempted from the exclusionary provisions applied to Japanese (the Gentleman's Agreement of 1907) and Chinese (the Chinese Exclusion Act of 1882) immigrants. The McCreary Amendment of 1893, however, placed strict evidentiary requirements upon Chinese merchants re-entering the United States. On Japanese exclusion, see Roger Daniels, *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion* (Berkeley: University of California Press, 1962). On Chinese exclusion and the McCreary Amendment, see Salyer, *Laws Harsh as Tigers*. Delgado notes that Chinese Mexican merchants could use their citizenship status as well as their merchant status to gain entry into the United States. See Delgado, *Making the Chinese Mexicans*, 26–32; and Camacho, *Chinese Mexicans*, 10–11.

³¹ Romo, *Ringside Seat to a Revolution*, 145.

³² The growth of the tourist industry in Tijuana was due, in part, to the dry and mountainous landscape, which rendered it inhospitable to the development of the mining and agriculture industries. Robert R. Alvarez, *Familia: Migration and Adaptation in Baja and Alta California, 1800–1975* (Berkeley: University of California Press, 1987), 32. See also, Vanderwood, *Satan's Playground*.

³³ Vanderwood, *Juan Soldado*, 76–81.

successful businesses.³⁴ And as an acknowledgement of the increasingly multinational character of the borderlands, one Tijuana school opened its doors to the children of these tourists and traders.³⁵

Taken together, these cross-border demographic, economic, and social ties led local residents to construe the border as an “imaginary line.”³⁶ Yet, on the eve of World War I, these very ties generated concerns about border security among federal officials in the Southwest and Washington, D.C. In particular, the cross-border raids of Mexican revolutionaries exposed the weaknesses of federal authority and the strength of bi-national loyalties to the rebellion. In American border towns, revolutionary forces found a safe haven to retreat from advancing Mexican federal troops, moral support for their political cause, and even a supply of arms and basic necessities.³⁷ While these cross-border raids had been a feature of the Revolution from its inception, by 1913 a violent regime change intensified political rivalries and military hostilities within Mexico and along its northern frontier.³⁸ By 1916, the increase in border raiding drew the fixed attention of Washington officials as they sought to bring order to the region.³⁹ In pursuit of revolutionary leader Pancho Villa and his forces, President Wilson sent General John Pershing and ten thousand troops into Mexico in retaliation for the *Villistas* attacks on American citizens.⁴⁰ Yet, Pershing’s punitive

³⁴ *Ibid.*, 105.

³⁵ *Ibid.*, 113.

³⁶ Calexico Chamber of Commerce, “Regulations at Crossing of International Boundary at the Port of Calexico, California,” n.d., RG 85, file 54410/331G, RG 85, National Archives.

³⁷ García, *Desert Immigrants*, 7. For a discussion of the raiding activities of Mexican revolutionaries on mines and oil fields in Mexico and the United States, see Hall and Coerver, *Revolution on the Border*.

³⁸ In 1913, Victoriano Huerta, chief of staff to President Francisco Madero assumed office in a military coup and ordered Madero’s assassination. His military dictatorship galvanized revolutionary forces against him and he fled the country a year later. Huerta’s resignation, however, did not bring peace to Mexico as revolutionary forces splintered into rival factions, battling each other for control of the state well after revolutionary leader Venustiano Carranza assumed the presidency in 1917. St. John, “Line in the Sand: The Desert Border between the United States and Mexico, 1848–1934” (Ph.D. diss., Stanford University, 2005), 200.

³⁹ St. John, “Line in the Sand,” 200, 206, 216.

⁴⁰ Acting in retaliation against Wilson’s withdrawal of support for a Villa-led government in Mexico, Pancho Villa and his troops killed sixteen Americans traveling on

expedition failed to establish peace along the border and, instead, brought the nation to the brink of war with Mexico.

At the same time, national anxieties about border security were only exacerbated by World War I. Under pressure from German submarine warfare in the Atlantic, federal officials expressed concerns about enemy incursions through the nation's seaports and land borders.⁴¹ The Zimmerman Telegram lent credence to fears about a possible German invasion from Mexico.⁴² In addition, federal officials expressed concerns that Mexican revolutionaries, acting to avenge Villa's defeat, would assist Germany in this effort. Finally, the persistence of the overlapping geographical, social, and economic networks between border towns rendered them "logical haven[s]" for enemy aliens as well as revolutionary forces.⁴³ According to Romo, the Emporium Bar in El Paso served as a meeting place for Pancho Villa and a German spy who allegedly sought leasing rights to submarine bases in Baja California.⁴⁴

At the local level, the apprehension surrounding Villa's raids and the war increased public antagonism toward Mexican immigrants and, in turn, led to a tightening of border inspection procedures. In an atmosphere of paranoia, El Paso city officials alleged that the thousands of refugees fleeing the Revolution would trigger a public health crisis, specifically a

a train in northern Mexico in January 1916. Several months later, they crossed the border into New Mexico and killed another seventeen Americans. Johnson, *Revolution in Texas*, 138–142. On the complex relationship between the *Villistas* and the borderlands, see St. John, "Line in the Sand," 211–217; Romo, *Ringside Seat to a Revolution*.

⁴¹ Lawrence John Briggs, "For the Welfare of Wage Earners: Immigration Policy and the Labor Department, 1913–1921" (Ph.D. diss., Syracuse University, 1995), 164; St. John, "Line in the Sand," 231; Ralph J. Totten, Consul General at Large, El Paso, Texas, "Report on Conditions on the Mexican Border," January 20, 1918, file 54152/1I, RG 85, National Archives.

⁴² Capitalizing on anti-American sentiments in the aftermath of Pershing's expedition, the German foreign minister, Arthur Zimmerman, proposed an alliance that, in the event of a German victory, promised the restoration of Texas and much of the Southwest to Mexico. Along with Germany's declaration of unrestricted submarine warfare, the telegram fueled anti-German sentiment, garnered popular support for the war, and led President Wilson to abandon neutrality for war.

⁴³ García, *Desert Immigrants*, 7.

⁴⁴ Romo, *Ringside Seat to a Revolution*, 7.

typhus epidemic.⁴⁵ As a solution, they initially proposed a quarantine of all new arrivals.⁴⁶ But, in lieu of the quarantine, city officials ultimately conducted health inspections of all the homes in Chihuahuita (the largest Mexican neighborhood in El Paso) while El Paso Mayor Tom Lea proposed to destroy them altogether.⁴⁷ By 1917, local representatives of the United States Public Health Service adopted more austere measures, subjecting 127,173 Mexican entrants to a delousing and bathing procedure followed by a rigorous physical and mental examination.⁴⁸

Like their local counterparts, federal officials demonstrated a more enforcement-minded orientation toward the border during World War I, launching cavalry patrols and air surveillance teams in search of revolutionaries and German spies.⁴⁹ Congress also enacted statutory measures, specifically the Immigration Act of 1917 and the Passport Act of 1918, to secure the line against alien enemies and unwanted immigrants.⁵⁰ In this wartime context, southwestern Bureau of Immigration officials changed their lax orientation toward immigration law enforcement and, for the first time, took seriously their responsibility to enforce the new laws *vis-à-vis* Mexican nationals. In so doing, they attempted to impose a new web of regulations upon a population long accustomed to crossing the border without any restrictions.

In 1917, Congress passed the Immigration Act of 1917, an omnibus bill that consolidated immigration legislation from the prior three decades.⁵¹

⁴⁵ For a recent account of the refugee crisis, see Julian Lim, “Immigration, Asylum, and Citizenship: A More Holistic Approach,” *Legal Studies Research Paper Series, Paper 12-08-03* (St. Louis: University of Washington, School of Law, 2012).

⁴⁶ Romo, *Ringside Seat to a Revolution*, 233.

⁴⁷ During this inspection, city officials found two cases of typhus, and one incidence each of measles, rheumatism, tuberculosis, and chicken pox. Those found ill were forced to take vinegar and kerosene baths, shave their heads, and burn all of their clothing. Romo, *Ringside Seat to a Revolution*, 231, 234, 235.

⁴⁸ Romo, *Ringside Seat to a Revolution*, 243.

⁴⁹ Metz, *Border*, 233.

⁵⁰ *Immigration Act of February 5, 1917*, 39 *Statutes-at-Large* 874 (1917). *Entry and Departures Control Act*, 40 *Statutes at Large* 559 (1918) (hereinafter referred to as the *Passport Act of 1918* or the *Act of May 22, 1918*).

⁵¹ As an omnibus bill, the Immigration Act of 1917 became the foundation of this nation’s immigration law for the next thirty-five years. While the Immigration Acts of 1921 and 1924 added pivotal features to this nation’s immigration law, the Immigration

Its passage marked an apex in Progressive Era efforts to restrict immigration from southern and eastern Europe and Asia. It accomplished the latter by excluding immigrants from a geographic area labeled the “Asiatic Barred Zone” that included all of Asia except for Japan and the Philippines. In order to limit admission from Europe, the Act created a literacy test for all individuals seeking admission into the United States.⁵² Despite President Woodrow Wilson’s veto of the new immigration act (Wilson was unwilling to reverse a campaign promise not to restrict European immigration⁵³), Congress overrode his veto and passed the bill on February 5, 1917.

While the Immigration Act of 1917 was not conceived as a wartime measure, policymakers later relied on its provisions to implement a domestic defense policy within the nation and at the borders. Indeed, once the country entered the war (one month after the passage of the Immigration Act of 1917), President Wilson’s concerns about the entry of radicals “dominate[d] the politics of immigration policy.”⁵⁴ As a result, federal officials relied upon the looser deportation standards created by the new act to expel suspected alien enemies and subversives throughout the country.⁵⁵ In the Southwest, the Bureau of Immigration began to reverse its longstanding practice of letting Mexican nationals freely cross the border, attempting to control and restrict their movement under the authority of the new immigration law. For the first time in its history, they enforced the head tax in conjunction with the new literacy test provisions of the Immigration Act of 1917 *vis-à-vis* Mexican immigrants.⁵⁶

Act of 1917 continued to serve as the basic outline or organizational structure. Fitzgerald, *The Face of the Nation*, 129, 132.

⁵² For a history of the literacy test see, John Higham, *Strangers in the Land, Patterns of American Nativism, 1860–1925* (New York, Atheneum, 1963).

⁵³ Higham, *Strangers in the Land*, 190–93. Robert A. Divine, *American Immigration Policy, 1942–1952* (New York: Da Capo Press, 1972), 6.

⁵⁴ Briggs, “For the Welfare of Wage Earners,” 164.

⁵⁵ William Preston, *Aliens and Dissenters: Federal Suppression of Radicals, 1903–1933* (Urbana: University of Illinois Press, 1994); Briggs, “For the Welfare of Wage Earners,” 164; Divine, *American Immigration Policy*, 8.

⁵⁶ Under the Immigration Act of 1917, Congress decided not to waive the head tax (increased to \$8.00) and the new literacy test for Mexican immigrants as it had in the Immigration Acts of 1903 and 1907. Cardoso, *Mexican Emigration*, 46.

In order to restrict the entry and departure of suspected alien enemies, federal officials initially relied on the immigration statutes. They found, however, that the immigration laws failed to provide the regulatory authority necessary to restrict and supervise this category of foreign nationals. An assistant to the attorney general observed:

When we got into the war we were met, of course, immediately with the necessity of supervising exit from the country and entrance into the country of undesirable persons, and the only law on the subject that came anywhere near reaching them was the immigration law, which was not designed to fit a situation in which spies were moving to and from the country, because the tests prescribed by the immigration statutes for admittance to the country were, of course, simple and designed to meet certain requirements of intelligence, character, previous history, etc.⁵⁷

In response to this lack of authority, Congress passed the Passport Act to prevent the entry of alien enemies. The Act specifically required aliens and U.S. citizens to present passports for inspection at the nation's ports of entry for the duration of the war.⁵⁸ This Act constituted another new layer of restrictions that would have a serious impact on the movement of populations across the U.S.–Mexico border.⁵⁹

The administration of the passport law was divided among several federal agencies including Justice, Labor, Commerce, and State. While the State Department was responsible for the issuance of passports and visas, the Bureau of Immigration was responsible for the actual enforcement of the passport law. Thus, prior to conducting their usual immigration inspection, immigration officers would act as passport agents, inspecting

⁵⁷ U.S. Congress, House, Committee on Foreign Affairs, *Control of Travel From and Into the United States*, 65th Cong., 2nd sess., 13 February 1918, 4–5.

⁵⁸ *Entry and Departures Control Act*, 40 Statutes at Large, 559 (1918). Executive Order 2932, August 18, 1918 (implementing Act of May 22, 1918). Violators of the Passport Act were subject to criminal penalties, including a maximum fine of \$10,000 and a prison sentence of twenty years.

⁵⁹ For a history of the passport, see John C. Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (New York: Cambridge University Press, 2000); Craig Robertson, *The Passport in America: The History of a Document* (New York: Oxford University Press, 2010).

passports and visas, collecting visa fees, and taking declarations of aliens and U.S. citizens entering and departing the country. The new responsibilities increased the workload of an agency lacking the resources to fulfill its own mandate to enforce the nation's immigration laws.⁶⁰ And this, in turn, would compound the problems faced by the Bureau of Immigration in expanding the presence of the federal government in a community long accustomed to its absence.

Initially, the new immigration restrictions had a significant impact on immigration, specifically those individuals seeking entry for permanent admission, across the U.S.–Mexico border. The literacy test plus the head tax created serious obstacles for Mexican immigrants, particularly agricultural workers who, for the most part, were poor and illiterate.⁶¹ For the first few months that the new law was in operation, Mexican immigration declined sharply from the same period the previous year. Historian Lawrence Cardoso reports that only 31,000 Mexicans emigrated to the U.S. in 1917 whereas 56,000 had entered the year before.⁶² By 1918, Cardoso notes, 1,771 Mexicans decided against emigrating to the U.S. due to the literacy test, and the Bureau rejected the applications of 5,745 for failure to pay the head tax.⁶³

While the new immigration and passport laws closed the border for some, other border residents refused to accept the new restrictions. Some expressed their discontent by crossing and re-crossing the line without an official inspection. As a result, the Bureau reported that the undocumented entry of Mexican nationals — an issue the agency had mostly ignored prior to 1917 — had become one of its greatest concerns; as the supervising inspector for the Mexican Border District wrote in his annual report, “The suppression of attempted illegal entry of countless aliens of the Mexican race, excluded or excludable, under what they deem to be the harsh provisions of the immigration act of 1917, has constituted one of the most difficult problems with which this district has had to contend in the past

⁶⁰ S. Deborah Kang, “The Legal Construction of the Borderlands: The INS, Immigration Law, and Immigrant Rights on the U.S.–Mexico Border, 1917–1954” (Ph.D. diss., University of California, Berkeley, 2005), 31–41.

⁶¹ Cardoso, *Mexican Emigration*, 46.

⁶² *Ibid.*

⁶³ Reisler, *By the Sweat of Their Brow*, 24.

year.”⁶⁴ At the same time, thousands of local residents, as both the State Department and Bureau of Immigration reported, protested repeatedly and vehemently about the ways in which the Immigration Act of 1917 and the Passport Act of 1918 disrupted the transnational character of their daily lives.

Locals complained about the new laws in a variety of ways: writing letters to state and federal politicians; sending telegrams, letters, and petitions to local and federal Bureau of Immigration and State Department officials; publishing editorials in opposition to the new regulations; and arguing with immigration inspectors at the gates. In the Southwest, those industries reliant on Mexican labor were the most vocal and politically powerful opponents of the restrictions imposed by the immigration and passport acts.⁶⁵ Southwestern farmers, for example, repeatedly called for exemptions to the new laws, knowing that they would bar the entry of Mexican workers.⁶⁶ In addition to southwestern industries, ordinary individuals — including those traveling from Mexico to shop, work, patronize entertainment venues, or socialize with friends and family — all protested, either in writing or in person.⁶⁷ Among the protesters were American citizens who lived in Mexico, but worked in the United States; and Asian nationals, Asian Mexicans, and Asian Americans, domiciled in Mexico, who sought a relaxation of the immigration and passport laws for business reasons.⁶⁸ Despite the authority possessed by Bureau

⁶⁴ Report of Supervising Inspector, Mexican Border District in Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1918*, 317–319.

⁶⁵ On the supporters and opponents of immigration restriction in the Southwest, see David Montejano, *Anglos and Mexicans in the Making of Texas, 1836–1986* (Austin: University of Texas Press, 1987), 182–186.

⁶⁶ Totten, “Report on Conditions,” 17.

⁶⁷ See, for example, Blocker, American Consul, Eagle Pass to Secretary of State, December 6, 1917, file 54152/1E, RG 85, National Archives. Unsigned Memorandum, January 2, 1918, file 54152/1F, RG 85, National Archives. See also, Vicki Ruiz, *From Out of the Shadows: Mexican Women in Twentieth-Century America* (New York: Oxford University Press, 2008), 12.

⁶⁸ Alvey A. Adey, Second Assistant Secretary of State, to Anthony Caminetti, Commissioner General, April 11, 1918, file 54152/1J, RG 85, National Archives (on the American border crossers); Alvey A. Adey, Second Assistant Secretary of State to Anthony Caminetti, Commissioner General, January 24, 1918, file 54152/1G, RG 85, National Archives (regarding Japanese merchants living on Mexican side of border

officials, many border residents, as one inspector reported, did not hesitate to criticize the new laws and even verbally abuse immigrant inspectors at the gates.⁶⁹

The Bureau's detractors included not only locals who sought crossing privileges from Mexico to the United States but also those domiciled in the United States with business and personal interests in Mexico. In San Diego, American backers of a Tijuana racetrack were vehement opponents of the passport laws, arguing that these regulations would deter patrons from traveling south of the border and, instead, draw them north to competing entertainment venues in Los Angeles.⁷⁰ American tourists and border residents rallied to Tijuana's cause with their feet, defying Prohibitionists' warnings about the dangers of Mexican leisure and liquor, and overwhelming immigration inspectors at the gates with their demands to depart and re-enter the country.⁷¹ Representatives from the Imperial Irrigation District protested that the passport law would halt construction of a canal project in Mexico (by delaying the entry of American skilled laborers) and thereby hurt American farmers who

wishing to cross border to purchase goods.); F.W. Berkshire, Supervising Inspector, El Paso, to Chief, Division of Passport Control, September 9, 1918, file 54410/331B, RG 85, National Archives; A. E. Burnett, Inspector in Charge to Supervising Inspector, El Paso, April 8, 1920, file 54820/455, RG 85, National Archives (Chinese, with American support, seeking crossing privileges between Calexico and Mexicali).

⁶⁹ Grover C. Wilmoth, Acting in Charge of District, Mexican Border District to Commissioner General, March 31, 1923, file 55301/217, RG 85, National Archives.

⁷⁰ Telegram to Frank L. Polk, received December 10, 1917, file 54152/1E, RG 85, National Archives.

⁷¹ Prohibitionists opposed any relaxation of passport regulations for those desirous of crossing the border into Mexico, which they called "a moral plague spot menacing soldiers and civilians alike." Charles C. Selegman, President, Los Angeles Ministerial Alliance to Robert Lansing, Secretary of State, November 23, 1917, file 54152/1E, RG 85, National Archives; W. B. Wheeler, General Counsel, Anti-Saloon League of America to Raymond Fosdick, War Department, April 4, 1918, file 54152/1J, RG 85, National Archives; T.A. Storey, Executive Secretary, Interdepartmental Social Hygiene Board to Bureau of Immigration, March 6, 1920, file 54410/331F, RG 85, National Archives. For an account of how Prohibition impacted border closing times in three different border communities, see Robert Buffington, "Prohibition in the Borderlands: National Government—Border Community Relations," *Pacific Historical Review* 63:1 (February, 1994): 19–39.

relied on the water from the canal to irrigate their crops.⁷² Also engaged in bi-national ventures, an Arizona mining company requested exemptions for its Mexican workers who hauled ore mined north of the border to a processing facility south of the border.⁷³ Meanwhile, in Texas, the Bureau received complaints about the passport laws from American ranchers who grazed their stock in Mexico.⁷⁴ Finally, because it affected small and large businesses alike, the passport law elicited protests from an American dentist who saw many patients south of the border as well as a request for an exemption from an American doctor who also needed to care for his patients in Mexico.⁷⁵

In the borderlands, the new immigration and passport laws seemed to inconvenience everyone; as a State Department official explained, the passport law, “cause[d] a considerable amount of irritation on both sides of the Border. The Mexicans, in ignorance, feel that it is a measure directed especially against them, to cause them annoyance and prevent them from purchasing the food and supplies they greatly need. The American merchants are dissatisfied because of the loss of trade.”⁷⁶ In the face of this widespread opposition, Bureau officials began the work of enforcing the Immigration Act of 1917 and the Passport Act of 1918.

In 1918, Commissioner General Anthony Caminetti asked how the agency could create an immigration policy that closed the border to subversives and unwanted immigrants but, at the same time, kept it open for the benefit of local residents who had legitimate reasons for crossing and

⁷² C.K. Clarke, General Manager, Imperial Irrigation District, to Senator Hiram Johnson, November 19, 1917, file 54152/1E, RG 85, National Archives.

⁷³ Grosvenor Calkins, for Duquesne Mining and Reduction Company, to Louis F. Post, Assistant Secretary of Labor, January 17, 1918, file 54152/1G, RG 85, National Archives.

⁷⁴ F. W. Berkshire, Supervising Inspector, El Paso, to Commissioner General, January 1, 1918, file 54152/1F, RG 85, National Archives.

⁷⁵ George J. Harris, Acting Supervising Inspector, El Paso, to Commissioner General, January 10, 1918, file 54152/1G, RG 85, National Archives; Dr. J. A. Wallace to Department of State, Bureau of Citizenship, January 10, 1918, file 54152/1G, RG 85, National Archives.

⁷⁶ Totten, “Report on Conditions,” 17.

re-crossing the border each day.⁷⁷ In response, southwestern immigration officials developed new ways of managing the huge populations that crossed the border. Responding to the demands of local residents, border officials used their administrative discretion to waive or amend the rules set forth in the Immigration Act of 1917 and the Passport Act of 1918. In turn, they fashioned a series of policies, including the wartime agricultural labor program, the border crossing card, and a waiver to the literacy test that facilitated the movement of locals across the international boundary.

These administrative devices were significant because they effectively nullified the restrictions imposed on the U.S.–Mexico border by both Acts. The wartime agricultural labor program rendered inoperative the head tax, contract labor laws, and literacy test on the U.S.–Mexico border.⁷⁸ The border waiver to the literacy test further diluted the exclusionary intent underlying the Immigration Act of 1917. Meanwhile, the Section 13 certificate (and the subsequent exemptions to the Section 13 certificate itself) removed any incentive for individuals to procure passports. Yet, it is important to note that these exceptions to the new regulations did not generate a condition of lawlessness on the U.S.–Mexico border. Instead, as the following section will explain, immigration officials in the Southwest effectively created a set of immigration policies that were tailored to the needs of border residents and sustained the transnational character of the borderlands.

In shaping an immigration policy for the Mexican border, the Bureau of Immigration relied on the language of the Immigration Act of 1917, the Ninth Proviso of the third section of the Act. The Ninth Proviso specifically stated that the “Commissioner General of Immigration with the approval of the secretary of labor shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission.”⁷⁹ In other words, the Ninth Proviso authorized

⁷⁷ Anthony Caminetti, Commissioner General to Supervising Inspector, Mexican Border District, August 31, 1918, file 54410/331A, RG 85, National Archives.

⁷⁸ Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1919*.

⁷⁹ W. W. Husband, Commissioner General, Memorandum for the Second Assistant Secretary, May 17, 1923, RG 85, File 54275/Gen., Pt. I. (citing Act of February 5, 1917, ch. 29, § 3, 39 Stat. 874, 876 (1917))

the secretary of labor to waive the immigration laws for those migrants who would not pass an immigration inspection (and thereby qualify for permanent residence in the United States) but who demonstrated a need to be in the country for short periods of time. Thus, while nativism inspired its drafting and passage, the Immigration Act of 1917 afforded Bureau of Immigration officials the administrative discretion to unravel the restrictionist spirit of the law.

The most famous invocation of the Ninth Proviso occurred during World War I when the secretary of labor created the nation's first Mexican agricultural labor program. Due to enormous pressure from southwestern growers who claimed wartime labor shortages, the secretary of labor temporarily admitted Mexican farm workers, exempting them from a formal immigration inspection and, more specifically, waiving the literacy test, head tax, and contract labor clauses of the Immigration Act of 1917. Under this program, employers in need of agricultural labor applied to the Labor Department stating the number of workers required, the duration of the work period, and the wages and hours offered. They were also to maintain certain standards regarding living, housing, and working conditions, and wages.⁸⁰ In order to ensure that Mexican agricultural laborers returned to Mexico, wages were withheld from their monthly pay and distributed upon their departure from the country.⁸¹ As an additional precaution against the permanent settlement of these Mexican nationals, immigration inspectors also possessed the authority to deport those who quit their jobs or sought work with a non-approved employer.

Despite its efforts to maintain a restrictive immigration policy, the Department of Labor was under constant pressure to admit even more Mexican workers into the country. This was particularly the case during a 1917 draft scare, when thousands of workers hired under the wartime labor program left for Mexico.⁸² Growers capitalized on this scare

⁸⁰ Reisler, *By the Sweat of Their Brow*, 29.

⁸¹ *Ibid.*, 30.

⁸² Under the Selective Service Act of May 18, 1917, foreigners were exempted from the wartime draft. In order to prove their alien status, however, they were required to present proof of foreign citizenship (by means of a birth certificate or the affidavits of two reliable witnesses as to place of birth) to the local draft boards. Uninformed, unable, or unwilling to meet these requirements, thousands of Mexicans repatriated to Mexico. In the Southwest, many of the repatriations were motivated by fear and a deep

to ask the Department of Labor to alter the program in several ways: first, to loosen the provisions regarding the surveillance of workers; second, to allow Mexicans to work in non-agricultural occupations; and third, to extend the period of stay for Mexican laborers.⁸³ Growers also argued for the suspension of the head tax *vis-à-vis* Mexico altogether so as to facilitate the northward migration of farm workers. Finally, they proposed that the federal government take a more active role in providing them with laborers by stationing officials in border towns to direct Mexican immigrants to agricultural employers.

In response, President Wilson extended the stay of Mexican agricultural laborers for the duration of the war. He also permitted Mexican nationals to work in non-agricultural industries such as the railroads and the coal mines. Later they were authorized to work on other mining operations and construction jobs throughout the Southwest. Finally, Wilson approved the posting of additional immigration inspectors along the Mexican border to assist in the admission of Mexican immigrant workers.⁸⁴ At the war's end, Wilson ended the temporary admissions program. But, the protests of southwestern growers led to the extension of the program through June 30, 1919. Two more extensions were granted through January 1921 when the program finally ended and employers were instructed to return their workers to Mexico.⁸⁵

The temporary admissions program proved a boon to southwestern agriculture. It enabled growers to keep wages low despite an overall rise in agricultural wages during the course of the war. A representative from the Arizona Cotton Growers' Association estimated that the wartime labor importation program saved growers \$28 million in labor costs from 1919 through 1921.⁸⁶ Given these benefits, southwestern growers lobbied

distrust of the American government given the recent vigilante action undertaken by Anglo-Americans against Mexicans and Mexican Americans in retaliation for the raids of Mexican revolutionaries. Local and state draft board officials only aggravated this distrust by compelling ethnic Mexicans, regardless of their citizenship status, to register for the draft. Johnson, *Revolution in Texas*, 150–153. Cardoso, *Mexican Emigration to the United States*, 50–51.

⁸³ Reisler, *By the Sweat of Their Brow*, 30.

⁸⁴ *Ibid.*, 33.

⁸⁵ *Ibid.*, 34.

⁸⁶ *Ibid.*, 39.

for the permanent suspension of the immigration laws; on their behalf, Congressman Claude B. Hudspeth of Texas introduced a joint resolution exempting Mexican nationals from the literacy test and contract labor provisions of the Immigration Act of 1917. What growers wanted even more, however, was a return to the pre-1917 Immigration Act “policy of an open Mexican border.”⁸⁷ Assuaging the fears of nativists, supporters of this bill argued that those Mexicans admitted would not become permanent residents; instead, Congressman John Nance Garner of Texas “contended that 80 percent of the Mexicans admitted to the United States would eventually return to Mexico and that never more than 2 percent would leave Texas for other states.”⁸⁸ In the end, however, the House Committee on Immigration and Naturalization tabled Hudspeth’s resolution, adopting the views of the American Federation of Labor that a sufficient labor force was already present in the Southwest. Furthermore, under pressure from Hawaiian growers to admit Chinese immigrants as agricultural laborers, the Committee feared setting a precedent along the U.S.–Mexico border that would open the door to Chinese immigration in Hawaii.

As Bureau officials satisfied the wartime demands of one border constituency, they recognized that they also had to address the vehement demands of ordinary border residents for exemptions to the new literacy test. Indeed, immigration inspectors in the Southwest observed that, for the first year after the passage of the literacy test, the “pressure, protests and complaints” were “well-nigh irresistible.”⁸⁹ Thanks to the Bureau’s longstanding practice of excusing border residents from the head taxes and qualitative restrictions of the immigration laws, border residents had grown accustomed to crossing and re-crossing the international boundary without hindrance. F. W. Berkshire, supervising inspector for the Mexican Border District, was keenly aware that the agency itself had perpetuated this state of affairs — allowing border residents, in his words, to “go and come in the course of their social and business intercourse with the least possible interference and friction.” Thus, upon the passage of the 1917 immigration law, Berkshire expressed uncertainty as to whether the agency

⁸⁷ *Ibid.*, 40.

⁸⁸ *Ibid.*

⁸⁹ George J. Harris to Commissioner General of Immigration, May 24, 1923, RG 85, File 54275/Gen., Pt. I.

ought to maintain what he referred to as its “time honored custom” by excusing border residents from the literacy test.⁹⁰

Between 1917 and 1924, Berkshire and southwestern immigration inspectors addressed this question by again relying upon the discretionary authority afforded by the Ninth Proviso of the third section of the Immigration Act of 1917. As the commissioner general wrote in 1923, “There is no question under the Act and the Regulations as to the propriety of permitting entry of illiterates for purely temporary purposes.”⁹¹ Despite the authority provided by the Immigration Act of 1917, the Bureau did not create a holistic waiver, or a general exemption from the literacy test right away. Instead, southwestern agency officials began in a more limited and even tentative fashion, granting waivers to those illiterate migrants who lived in the United States but who, for personal or business reasons, crossed the border on a regular basis.⁹² Concerns that locals domiciled in Mexico would use any literacy test exemption to evade a formal immigration inspection and settle permanently in the United States led Bureau officials to prohibit the issuance of literacy test waivers to nonresident aliens. In addition, wartime fears about the entry of enemy aliens and longstanding concerns about illegal Chinese immigration also informed the Bureau’s decision to create a limited waiver in 1917.⁹³

Border residents, however, remained highly dissatisfied by this initial modification of the literacy test. Bureau officials reported that thousands of locals continued to lobby immigrant inspectors at the gates for a complete suspension of the test. In response, immigration inspectors temporarily

⁹⁰ F. W. Berkshire, Supervising Inspector, to Commissioner General of Immigration, March 9, 1917, RG 85, File 54275/Gen., Pt. I.

⁹¹ W. W. Husband, Commissioner General, “Memorandum for the Second Assistant Secretary,” May 17, 1923, RG 54275/Gen., Pt. I (discussing 1917 agency debates regarding use of Ninth Proviso to create an exemption to the literacy test)

⁹² On May 7, 1917, Washington, D.C. officials authorized this procedure in the following telegram: “Habitual crossing and recrossing boundary by illiterate aliens residing in United States is permitted by paragraph f, subdivision five, rule four, regarding transit of resident illiterates through contiguous foreign territory but illiterates residing outside the United States cannot be permitted habitual crossing privilege.” George J. Harris to Commissioner General of Immigration, May 24, 1923, file 54275/Gen., Pt. I, RG 85, National Archives.

⁹³ A. E. Burnett, Inspector in Charge, Los Angeles, to Commissioner General of Immigration, May 28, 1923, file 54275/Gen., Pt. I, RG 85, National Archives.

admitted thousands of illiterate Mexican nationals (domiciled south of the border) so that they could purchase a “loaf of bread, a cake of soap, a pound of starch, a quart of kerosene, a pound of sugar, a pound of flour, a pound of lard, etc.”⁹⁴ While some inspectors admitted border residents on an unofficial basis, others conducted full-fledged hearings by a Board of Special Inquiry (BSI) to formalize these literacy test waivers.⁹⁵ Because these hearings required the participation of southwestern immigration inspectors and their supervisors, the collection of character references from local citizens, and a formal review by Bureau officials in Washington, D.C., they consumed much time and many resources.⁹⁶ Given the overwhelming demand for more relaxed border crossing privileges and the burdens of BSI hearings, southwestern immigration officials themselves proposed changes to the exception to the literacy test. In a 1920 report titled, “Recommendations and Suggestions for the Betterment of the Service and for Remedial Legislation,” southwestern agency officials called for the admission of illiterate border residents who routinely crossed the line for business or personal reasons.⁹⁷ In addition, they proposed leniency for illiterate alien residents of the United States who lacked proof of their domicile in the United States.

By 1923, the ongoing protests of border residents led the Bureau to seek ways to broaden the exceptions to the literacy test on the U.S.–Mexico border. As the Bureau observed, “Various chambers of commerce and individual

⁹⁴ George J. Harris, Supervisor, to Commissioner General, May 24, 1923, file 54275/Gen., Pt. II, RG 85, National Archives.

⁹⁵ United States Department of Labor, Bureau of Immigration, *Immigration Laws, Rules of May 1, 1917*, Rule 4, Subdivision 6 (Washington, D.C.: Government Printing Office, 1917), 51. Boards of Special Inquiry provided immigrants with the opportunity to appeal the exclusion decisions of immigration inspectors. While they served as a kind of court of first resort, the Board was not bound by judicial procedures. See Salyer, *Laws Harsh as Tigers*, 141.

⁹⁶ Report of Supervising Inspector, District No. 23 in Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1920*, 446. See also, Bureau of Immigration file regarding the Board of Special Inquiry hearing for Jesus Reyes, a Mexican citizen who failed the reading test but sought temporary admission for business purposes in 1922, file 55238/12, RG 85, National Archives.

⁹⁷ Recommendations and Suggestions for the Betterment of the Service and for Remedial Legislation,” in Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1920*, 450. See also, J. E. Trout, Inspector in Charge, Laredo, Texas to Supervising Inspector, El Paso, February 12, 1919, file 54410/331D, RG 85, National Archives.

concerns along the Mexican Border are taking concerted action in petitioning both the Bureau direct and through Congressmen and Senators for modification of existing regulations that will permit temporary admission of illiterates for trading purposes.”⁹⁸ In defense of this proposal, the Bureau itself argued that any new exemption would not only benefit the economy of the border region but also promote American foreign relations with Mexico, as the Commissioner General wrote:

It is the opinion of the Bureau that in view of the close relations necessarily existing between the neighboring countries of Canada and Mexico and our own country, that some modification of existing practice along the Mexican Border is most desirable that will permit, under proper safeguards, the temporary entry of illiterate aliens for purposes of trade and other sound reasons.⁹⁹

Finally, an official literacy test waiver would allow the Bureau to standardize procedures on the Mexican and Canadian borders. Since the inception of the literacy test in 1917, Bureau of Immigration officials excused Canadian residents¹⁰⁰ seeking temporary entry to visit “sick friends, or relatives, by reason of death, or funerals, or weddings, or business or family affairs, etc.”¹⁰¹ After soliciting specific proposals from its southwestern offices, the Bureau, in 1923, authorized officers stationed on the Mexican and Canadian borders, to admit “illiterate citizens or subjects of Canada and Mexico”

⁹⁸ W. W. Husband, Commissioner General, Memorandum for the Second Assistant Secretary, May 17, 1923, file 54275/Gen., Pt. I, RG 85, National Archives.

⁹⁹ *Ibid.*

¹⁰⁰ As the U.S. commissioner of immigration, Montreal, Canada, wrote, “When the reading test became effective in 1917, it served to debar large numbers of aliens who patronized the above [railway] lines. Many of those excluded on account of the reading test were show to be substantial citizens of Canada, who were only desirous of visiting the United States as bona fide temporary visitors. . . . This situation was gone over with former Secretary W. B. Wilson in person, and while declining to modify the Regulations as then drawn, he nevertheless, gave me authority to admit temporarily, in my own discretion, illiterates whose exclusion could be shown to involve the serious hardships referred to above.” U.S. Commissioner of Immigration, Montreal, Canada to W. W. Husband, Commissioner General of Immigration, April 2, 1923, file 54275/Gen., Pt. I, RG 85, National Archives.

¹⁰¹ W. W. Husband, Commissioner General, Memorandum for the Second Assistant Secretary, May 17, 1923, file 54275/Gen., Pt. I, RG 85, National Archives.

who sought temporary entry for personal or business reasons.¹⁰² In sum, these amendments to the literacy test created what one Bureau official termed a “sectional” approach to immigration policy in the borderlands.¹⁰³

Bureau of Immigration officials not only eased the restrictive provisions of the Immigration Act of 1917 for the benefit of border residents; they, in conjunction with State Department officials, also addressed locals’ concerns regarding the Passport Act of 1918. While these two agencies would engage in bitter disagreements about the implementation of the Passport Act of 1918, they agreed to develop an exemption to the Act itself, specifically a border crossing card.¹⁰⁴ The border crossing card owed its origins to Rule 13 of the Immigration Laws and Rules, which provided that U.S. citizens and aliens who lived in close proximity to either side of the border and who frequently crossed the border for “legitimate pursuits” could receive a pass (a border crossing card), enabling them to cross the line without embarrassment or delay.¹⁰⁵ By 1918, State Department officials incorporated Immigration Rule 13 into their own regulations regarding the administration of the Passport Act.¹⁰⁶ Referred to as Section 13 certificates, they excused immigrants from paying the head tax,¹⁰⁷ and they were issued due to wartime exigencies, primarily for the

¹⁰² W. W. Husband, Commissioner General to U.S. Commissioners of Immigration, Montreal, Canada and Seattle, Washington; Inspectors in Charge, Immigration Service, Buffalo, N.Y., Detroit, Mich., Winnipeg, Can., Spokane, Wash., Los Angeles, California, and San Antonio, Texas; Supervisor, Immigration Service, El Paso, Texas, June 30, 1923, file 54275/Gen., Pt. I, RG 85, National Archives.

¹⁰³ “Recommendations and Suggestions for the Betterment of the Service and for Remedial Legislation,” in Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1920*, 450.

¹⁰⁴ For an account of these interagency disputes see, Kang, “The Legal Construction of the Borderlands,” 44–45.

¹⁰⁵ Confidential Instructions for the Guidance of Officials Connected with the Administration of the Act of May 22, 1918, July 1918, file 54410/331, RG 85, National Archives.

¹⁰⁶ *Ibid.*

¹⁰⁷ Gerard D. Reilly, Acting Solicitor of Labor, Memorandum for the Acting Commissioner of Immigration and Naturalization, April 15, 1937, file 55883/600, RG 85, National Archives. Holders of section 13 certificates were exempted from the head tax because the Bureau realized that it would be unreasonable for them to pay the tax upon each entry.

benefit of Europeans who were unable to obtain passports from their home countries.¹⁰⁸

In the issuance of these cards, the State Department and Bureau of Immigration tried to balance the nation's security needs and the borderlands' economic and social interests.¹⁰⁹ Thus, State Department and Bureau of Immigration officials agreed that Section 13 certificates, particularly in the case of foreign nationals, were not intended to replace passports; as one State Department official wrote, aliens' identification cards, were only "valid for a sufficient period for them to procure passports of the country to which they owe allegiance."¹¹⁰ As a further security precaution, alien and citizen recipients of the Section 13 certificates were required to be residents of the border region where "residence on the border means residence at no greater distance than ten miles from border."¹¹¹ Moreover, these border crossing cards limited the radius of travel: U.S. citizens and aliens were restricted to a ten-mile radius north and south of the border.¹¹² Finally, border crossing cards were not issued to American citizens who made more frequent trips to non-border, or interior, regions of Mexico; these individuals were required to obtain passports.

Despite these wartime safeguards, the agency eventually relaxed the regulations and began issuing cards to those for whom they were not intended. As a Prohibition measure, the agency originally denied identification cards to "pleasure seekers[,] tourists[,] idlers[,] gamblers[,] race horse followers and the like."¹¹³ Yet, in 1919 after much protest from border residents and proprietors of the entertainment industry, the Bureau instituted

¹⁰⁸ These cards were also in use on the Canadian border, see Kang, "Crossing the Line," 181.

¹⁰⁹ Totten, "Report on Conditions," 15.

¹¹⁰ R. W. Flournoy, Acting Chief, Bureau of Citizenship, Department of State to A. W. Parker, Law Clerk, Immigration and Naturalization Service, November 30, 1917, file 54152/1E, RG 85, National Archives.

¹¹¹ A. Warner Parker, Law Officer, Department of State to Supervising Inspector, El Paso, December 6, 1917, file 54152/1E, RG 85, National Archives.

¹¹² J. E. Trout, Inspector in Charge, Laredo to Supervising Inspector, El Paso District, November 23, 1917, file 54152/1E, RG 85, National Archives.

¹¹³ George J. Harris, Acting Supervising Inspector, El Paso, to Commissioner General, November 27, 1917, file 54152/1E, RG 85, National Archives.

a tourist pass system for those wishing to travel south of the border.¹¹⁴ Tourist passes, initially good for a single day but later extended for ten-day use, allowed visits “in the border zone on either side of the Mexican border, whether such persons reside within or without the zone [the ten-mile limit], provided their identity, nationality and bona fides are established to the satisfaction of permit agents [immigration officials].” These permits were limited to American citizens, but immigration officials could, at their discretion, issue these permits to foreign nationals.¹¹⁵

The Bureau and Department of State also made exceptions to the passport law on an *ad hoc* basis, again to cater to the needs of local communities. In Nogales, Sonora, the local American consul issued 4,000 provisional passports to Mexican citizens so that they could cross the line into Nogales, Arizona in order to shop. Under pressure from local businessmen who complained that passport regulations caused a downturn in the local economy, local immigration and State Department officials agreed to repeated extensions of these provisional passports.¹¹⁶ In 1920 (when passport regulations had loosened somewhat, but still required non-border residents from Mexico to present visaed passports), the State Department authorized the issuance of identification cards to visitors from non-border (interior) regions of Mexico attending fairs in El Paso and Dallas.¹¹⁷

The Bureau also conferred border crossing privileges upon Japanese and Chinese merchants living on both sides of the line.¹¹⁸ While the

¹¹⁴ F. W. Berkshire, Supervising Inspector, Mexican Border District, to Chief, Division of Passport Control, State Department, September 22, 1920, file 54410/331H, RG 85, National Archives.

¹¹⁵ F. W. Berkshire to Secretary of State, November 6, 1919, file 54410/331F, RG 85, National Archives.

¹¹⁶ A. J. Milliken, Inspector in Charge, Nogales, Arizona, to Supervising Inspector, El Paso, January 3, 1918, file 54152/1F, RG 85, National Archives.

¹¹⁷ R. M. Cousar, Inspector in Charge, Nogales, Arizona, to Supervising Inspector, Mexican Border District, October 5, 1920, file 54410/331I, RG 85, National Archives.

¹¹⁸ For an account of the disparate procedures applied to Chinese-national, Chinese-American, and Chinese-Mexican merchants residing in the United States and in Mexico see, F. W. Berkshire to Inspector in Charge, May 16, 1922, file 51941/10A, RG 85, National Archives, in *Records of the Immigration and Naturalization Service, Series A: Subject Correspondence Files, Part 2: Mexican Immigration, 1906–1930*, ed. Alan Kraut (Bethesda: University Publications of America), text-fiche, reel 1, frame 947–949.

immigration laws had long permitted these merchants to cross and re-cross between Mexico and the United States to purchase subsistence items or to engage in trade, these laws imposed strict requirements on their entry and departure. To ensure the latter, the agency had to escort each Japanese entrant out of the country. For the Chinese, the regulations were even more stringent and required a tremendous amount of administrative work for the Bureau.¹¹⁹ For example, before approving the entry and departure of a Chinese transit, the Bureau needed to conduct medical and background investigations, verify residency in the U.S. if the entrant claimed to be a U.S. resident, complete in triplicate a description, with photo, of the Chinese transit upon entry, and arrange for an official escort upon departure.¹²⁰ The Passport Act, then, threatened to impose a new set of restrictions upon these merchants and, from the perspective of local residents, impede border trade.

Indeed, both Japanese and Chinese merchants had strong advocates in border communities; thus, for example, the Bisbee Chamber of Commerce issued a complaint to Congressman Henry Ashurst about the inability of J. F. Hung, a Chinese-Mexican merchant, to cross the line to trade. While the Bisbee Chamber of Commerce made no mention of the racial discrimination encountered by Chinese immigrants on both sides of the line, it protested that “the merchants of Bisbee are being discriminated against.”¹²¹ Chambers of commerce in El Paso, Nogales, and Los Angeles, among others, made similar requests on behalf of Chinese merchants.¹²² In response

¹¹⁹ Because it was easier for Bureau officials to conduct extensive background examinations of merchants residing in the United States, Chinese-American and Chinese-national merchants residing in the United States faced more stringent inspections than Chinese-American, Chinese-Mexican, and Chinese-national merchants residing in Mexico. F. W. Berkshire to Inspector in Charge, May 16, 1922, file 51941/10A, RG 85, National Archives, in *Records of the Immigration and Naturalization Service*, text-fiche, reel 1, frame 947–949.

¹²⁰ F. W. Berkshire, Supervising Inspector, El Paso, to Chief, Division of Passport Control, September 9, 1918, file 54410/331B, RG 85, National Archives.

¹²¹ Robert Hamilton, Secretary, Bisbee Chamber of Commerce to Henry Ashurst, June 24, 1925, file 55301/217, RG 85, National Archives, in *Records of the Immigration and Naturalization Service*, text-fiche, reel 1, frame 925.

¹²² Letter and petition from the Nogales Chamber of Commerce to the Secretary of Labor, March 3, 1922, file 51941/10A, RG 85, National Archives, in *Records of the Immigration and Naturalization Service* text-fiche, reel 1, frame 976–983; El Paso Chamber

to these protests, the Bureau of Immigration, by 1924, had authorized the issuance of border crossing cards to Chinese merchants living on either side of the border and who agreed to enter and depart the country from specific ports in California, Arizona, and Texas.¹²³ Moreover, that Chinese merchants, in particular, were permitted to enter and depart from Laredo, Eagle Pass, El Paso, Nogales, Calexico, and Tijuana was the result of intense lobbying efforts by border chambers of commerce.¹²⁴

All of this is not to say that southwestern immigration officials suspended their concerns about the enforcement of the Chinese exclusion laws or their own anti-Asian sentiments. Instead, it is to say that southwestern border officials created class-based exceptions for a small group of Asian, Asian-American, and Asian-Mexican merchants and, in so doing, acknowledged the importance of creating an immigration policy that did not obstruct border trade. As the commissioner general himself explained in the case of a Chinese national who obtained border crossing privileges, “Wong J. Hong did not claim citizenship, but admitted, on the other hand, that he is an alien. So extensive were his business interests in Mexicali and the country lying below that city, and so necessary did it appear for him to enter and depart from the United States at will in connection with his business enterprises that the Department made his case an exception.” To underscore the highly limited nature of this exemption, the commissioner general noted that the case of Wong J. Hong was not publicized so that “it might not be regarded as a precedent by other Chinese.”¹²⁵

As a further reflection of the Bureau’s ongoing concerns about Chinese immigration, the border crossing privileges issued to merchants of Chinese descent (residing in the United States) differed from those granted to

of Commerce to the Secretary of Labor, December 5, 1921, file 51941/10A, RG 85, in *Records of the Immigration and Naturalization Service* text-fiche, reel 1, frame 1024; Los Angeles Chamber of Commerce to the Secretary of Labor, May 12, 1922, file 51941/10-13, RG 85, in *Records of the Immigration and Naturalization Service* text-fiche, reel 2, frame 216–218.

¹²³ Robe Carl White, Second Assistant Secretary, Department of Labor, to Carl Hayden, April 29, 1924, file 51941/10A, RG 85, National Archives, in *Records of the Immigration and Naturalization Service* text-fiche, reel 1, frame 1025–1026.

¹²⁴ See, for example, *supra*, note 123.

¹²⁵ Commissioner General, Memorandum for the Secretary, June 22, 1920, file 54820/727, RG 85, National Archives.

non-Chinese immigrants.¹²⁶ American, European, Mexican, and Japanese nationals obtained border crossing cards under Rule 13 of the Immigration Laws and Rules. While at least one Chinese-American merchant sought to obtain a Section 13 border crossing card,¹²⁷ the Bureau ultimately chose to issue these merchants “citizens’ return certificates” under the more stringent Chinese exclusion laws. Meanwhile, Chinese-national merchants domiciled in the United States received Section 6 certificates (or “exempt return certificates”), which also were stipulated by the Chinese exclusion acts.¹²⁸ Because both certificates were only valid for six months, Chinese merchants seeking additional crossing privileges would have to re-apply and undergo another extensive examination verifying their merchant status, U.S. resident status, and, if applicable, U.S. citizenship. Once in possession of these certificates, Chinese merchants were required to cross and re-cross the border at designated ports so that the Bureau of Immigration could continually verify the merchant status of these men.¹²⁹

While the agency relaxed border crossing regulations for their benefit, border residents continued to complain about the impositions of the law. Furthermore, despite wartime concerns about border security, local residents demanded fewer restrictions and even an open border. Writing on behalf of San Diego’s business community, William Kettner, congressman for the 11th district of California called for “discontinuing war time restrictions against American citizens going into Mexico” since San Diego

¹²⁶ It appears, however, that Chinese-Mexican merchants were able to obtain either a Section 6 or a Section 13 certificate. Some Bureau officials raised questions about the disparity between the border crossing privileges granted to Chinese Mexican and Chinese American merchants. F. W. Berkshire, Supervising Inspector, Mexican Border District to Inspector in Charge, Los Angeles, California, June 1, 1922, file 51941/10-13, RG 85, National Archives, in *Records of the Immigration and Naturalization Service*, text-fiche, reel 2, frame 211–212.

¹²⁷ W. G. Becktell, Attorney, to Commissioner General of Immigration, San Francisco, May 13, 1920, file 54820/727, RG 85, National Archives (attorney for Sam Poy).

¹²⁸ Commissioner General, Memorandum for the Secretary, June 22, 1920, file 54820/727, RG 85, National Archives; Memorandum for the Second Assistant Secretary, April 3, 1924, file 51941/10-13, RG 85, National Archives, in *Records of the Immigration and Naturalization Service* text-fiche, reel 2, frame 27–29.

¹²⁹ See, for example, Harry L. Blee, Immigrant Inspector to Inspector in Charge, Immigration Service, Los Angeles, April 7, 1920, file 54820/455, RG 85, National Archives (correspondence attaching transcript of examination of Lee Thing).

businessmen were “at peace with the people of Lower California.”¹³⁰ According to Kettner, “full ingress and egress” was essential to the San Diego tourist industry, especially since the town was losing business to Los Angeles under the wartime passport and immigration restrictions. Even San Diego labor unions encouraged a relaxation of passport restrictions as a stimulus to the local economy.¹³¹ Similarly B. Rojo, ad interim *chargé d'affaires* for the Mexican embassy, requested a loosening of border crossing regulations between Presidio, Texas and Ojinaga, Mexico for the benefit of Mexican business.¹³² As the Bureau itself realized, any reprieve from the law failed to quell the complaints of border residents and only led to more calls for leniency.

While southwestern immigration officials created new policies for the benefit of border communities, they were not beholden to local interests. They had their own administrative reasons for pursuing alternative policies. Section 13 certificates, the temporary admissions program, and the literacy test waivers were intended to make life easier for immigration inspectors. No longer would the agency have to deal with the daily press of people seeking entry without a passport or seeking the promise of work. No longer would Bureau officials have to hold BSI hearings for illiterate border residents requesting special permission to shop or visit family members across the line. But instead of making things easier, these exemptions only made things worse. Thus, for example, Supervising Inspector Berkshire observed that the relaxation of passport regulations perpetuated the very problem it purported to solve:

Paradoxical as it may seem, every modification in the [passport] regulations made with a view to facilitating travel across the Border merely adds to the difficulties encountered. The reason is very simple. Relax-

¹³⁰ William Kettner, Congressman, 11th District, California, to Commissioner General, October 22, 1919, file 54410/331F, RG 85, National Archives.

¹³¹ H. M. Hubbard, Secretary, Building Trades Council of San Diego, to William B. Wilson, Secretary of Labor, October 29, 1919, file 54410/331F, RG 85, National Archives.

¹³² Juan B. Rojo, *Chargé d’Affaires ad interim*, Mexican Embassy to Frank L. Polk, Acting Secretary of State, July 1, 1919, file 54261/276A, RG 85, National Archives. Fletcher, Under Secretary of State to Secretary of Labor, October 31, 1921, file 54410/331J, RG 85, National Archives.

ation inevitably increases the volume of travelers to be handled and there is a physical limit to the number of travelers who can be handled by a permit agent under the most favorable circumstances.¹³³

Along with the exemptions to the passport laws, the agricultural labor program and the literacy test waivers generated more work for the Bureau of Immigration in the Southwest.

While the Bureau undertook extensive efforts to implement the Immigration Act of 1917, the Passport Act of 1918, and the exemptions to both statutes, it conceded that those efforts could not succeed without more money, manpower, and materiel.¹³⁴ This is not to say, however, that southwestern immigration officials gave up. Instead, they called for an end to their responsibilities under the passport law, which, among all of their administrative duties, they blamed for diverting their attention and resources away from immigration law enforcement.¹³⁵ More important, it was the agency's experience with the border crossing card program, the agricultural labor program, and the literacy test waivers that led it to call for the formation of a roving police unit that became the immigration Border Patrol.¹³⁶

The wartime mandates increased the responsibilities of the immigration officials on the Mexican border. The border crossing card and temporary admissions program placed a huge new population under the administrative supervision of the Bureau of Immigration. Populations, including agricultural laborers, border crossers, and American citizens, among others, that the Bureau once ignored now had to be processed, surveyed, and policed. Under the temporary admissions program, 72,862 Mexican farmworkers were admitted.¹³⁷ Upon the inception of the Passport Act, one State Department official estimated that 100,000 to 200,000

¹³³ F. W. Berkshire to Philip Adams, Chief, Division of Passport Control, State Department, September 8, 1920, file 54410/331H, RG 85, National Archives.

¹³⁴ For an account of the Bureau of Immigration's efforts to enforce the Passport Act, see Kang, "The Legal Construction of the Borderlands," 35–38.

¹³⁵ *Ibid.*, 45.

¹³⁶ Report of Supervising Inspector, Mexican Border District, Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1918*, 320.

¹³⁷ Reisler, *By the Sweat of Their Brow*, 38. The Bureau, however, doubted the accuracy of these figures. Lacking the force to keep track of agricultural admissions, the Bureau relied on the accounting of employers who were believed to be lax in their

border crossers would need to obtain appropriate border crossing identification (be it in the form of passports, identification papers, or alien declarations).¹³⁸ Bureau figures further attest to the heavy workload created by the Passport Act. Between September 15, 1918 and June 30, 1919, District 23 (the Mexican Border District) issued 12,917 border permits to alien residents of the United States; 22,693 border permits to residents of Mexico; 15,413 citizens' identity cards to those residing in the U.S.; 362 citizens' identity cards to those residing in Mexico; and 14,130 one-trip tourist passes. During the same period, the agency reviewed the passports of 6,663 U.S. citizens entering the U.S. and 7,526 U.S. citizens departing the country.¹³⁹

Successful fulfillment of these tremendous responsibilities required an administrative infrastructure that did not exist. In its enforcement of the passport laws, labor importation program, and the immigration laws, the Bureau, time and again, found itself underfunded and understaffed. Furthermore, the exemptions to the Passport Act and the Immigration Act of 1917 had a negative impact on the Bureau's budget. Dependent primarily on head tax revenue and administrative fines, the Section 13 certificates and temporary admissions programs left the Bureau strapped for cash by waiving the head tax. These fiscal shortfalls, along with federal budget cuts and the wartime draft, prevented the Bureau from hiring more inspectors. Thus, at many ports of entry, the agency had no more than two inspectors on duty at a time processing applications, renewals, or cancellations of passport documents, in addition to handling regular immigration work.¹⁴⁰ Some southwestern offices tried to ease their workloads by temporarily hiring Army and Customs personnel; but their lack of familiarity with the

administration of agricultural laborers. Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1920*, 427.

¹³⁸ Totten, "Report on Conditions," 12.

¹³⁹ George J. Harris, Acting Supervising Inspector, Mexican Border District to Secretary of State, August 6, 1919, file 54410/331F, RG 85, National Archives. Letter from George J. Harris, Acting Supervising Inspector to Commissioner General, August 8, 1919, file 54410/331F, RG 85, National Archives.

¹⁴⁰ Berkshire to Supervising Inspector, El Paso, October 18, 1920. E.P. Reynolds, Inspector in Charge, Brownsville to Inspector in Charge, Hidalgo, April 25, 1921, file 54410/331J, RG 85, National Archives.

immigration and passport laws often created confusion for immigrants.¹⁴¹ The general weaknesses of the agency lowered morale within the force and, as a result, some officers took a lax approach to passport enforcement so as to complete their immigration duties.¹⁴² It also led to *ad hoc*, delayed, or inconsistent implementation of the ever-changing passport policies, immigration laws, and the exceptions to both at the border.¹⁴³

The lapses in the agency's approach to border enforcement along with the repeated modifications of the Immigration Act of 1917 and the Passport Act of 1918 rendered the agency the subject of harsh criticism. Some attacked the agency for failing to close the nation's borders to the entry of alien enemies, as one border resident observed:

The immigration officials here make an effort to be as lenient as possible in the interpretation of the laws and the terms of the treaty existing between Mexico and the United States. Liberal instructions are given the field men in this respect. Inspectors and patrol officers are urged to cooperate with the local Mexican emigration authorities. There seems to be a tendency to lean ever backwards in this — as for example, the waiving of literacy requirements, the recognition of identification cards, permits, and the like in the case of temporary entry of visitors and laborers.¹⁴⁴

¹⁴¹ F. W. Berkshire, Supervising Inspector, El Paso, to Commissioner General, August 9, 1918, file 54152/1L, RG 85, National Archives (describing the confused conditions at Calexico where the Bureau of Immigration, Customs and the U.S. military all helped to enforce the passport laws).

¹⁴² A. A. Musgrave, Inspector in Charge, Calexico to F.W. Berkshire, April 12, 1918, file 54152/1J, RG 85, National Archives.

¹⁴³ A. A. Musgrave, Inspector in Charge, Calexico to F.W. Berkshire, December 14, 1917, file 54410/331A, RG 85, National Archives. F.W. Berkshire to Supervising Inspector, El Paso, September 10, 1918, file 54152/1F, RG 85, National Archives. George J. Harris to Commissioner General, January 19, 1920, file 54951/5, RG 85, National Archives. Alvey A. Adee, Second Assistant Secretary, Department of State to Anthony Caminetti, Commissioner General, April 6, 1918, file 54152/1I, RG 85, National Archives. R.M. Cousar, Inspector in Charge, Nogales, Arizona to Supervising Inspector, Mexican Border District, October 5, 1920, file 54410/331I, RG 85, National Archives. F.W. Berkshire to Inspector in Charge, El Paso, September 10, 1918, file 54410/331A, RG 85, National Archives.

¹⁴⁴ Thomas R. Taylor to D. Bendeen, Foreign Trade Secretary, Chamber of Commerce, El Paso, Texas, February 4, 1927, file 150.126/163, RG 59, National Archives.

This approach to immigration and passport law enforcement deeply concerned military officials. A Navy officer crossing the border at Laredo was shocked to find himself summarily waved across the line without an inspection. Writing to his superiors in the War Department, he noted, “it is a dangerous way to run such a service during war times and particularly on a frontier such as that of Mexico, which country harbors within its borders many of our enemies.”¹⁴⁵

The Bureau itself was also fully cognizant of the ways in which its administration of the laws left the border open to unwanted immigrants and potential alien enemies.¹⁴⁶ The temporary agricultural labor program sparked an increase in legal and illegal Mexican immigration that, according to the 1920 Annual Report, placed a “severe tax” on the agency.¹⁴⁷ Similarly, southwestern immigration inspectors reported that both official and unofficial literacy test waivers had been used by immigrants to achieve permanent domicile in the United States; as George J. Harris wrote in 1923, upon the inception of the literacy test in 1917 “thousands of aliens pleaded for and secured admission on the pretext that they were coming merely temporarily to make small purchases or to visit friends or relatives and took advantage of the opportunity to remain permanently.”¹⁴⁸

Immigrants also used their border crossing cards to circumvent the laws. In California, the Bureau discovered that Hirochi Nagasaki, a Japanese national residing on the U.S. side of the border, used his border crossing card to recruit Japanese immigrant laborers in Mexico to work on a 360-acre Calexico ranch that spanned the U.S.–Mexico border. Nagasaki was only one of 100 Japanese agriculturalists to whom the Bureau had issued border

¹⁴⁵ Letter from R. H. Van Deman, Colonel, General Staff, Chief Military Intelligence Section, War Department to Commissioner General, January 8, 1918, enclosing correspondence from E. McCuley, Jr., Commander, U.S. Navy, Assistant Director of Naval Intelligence, December 27, 1917, file 54152/1F, RG 85, National Archives. See also, Walter H. Sholes, American Consul, Nuevo Laredo, Mexico to Secretary of State, February 20, 1918, file 54152/1H, RG 85, National Archives; F. W. Berkshire, Supervising Inspector, Mexican Border District, to Secretary of State, November 6, 1919, file 54410/331F, RG 85, National Archives.

¹⁴⁶ Anthony Caminetti, Commissioner General to the Secretary of Labor, July 9, 1918, file 54261/202B, RG 85, National Archives.

¹⁴⁷ Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1920*, 24.

¹⁴⁸ George J. Harris, Supervisor, to Commissioner General, May 24, 1923, file 54275/Gen., Pt. II, RG 85, National Archives.

crossing cards for the purpose of traveling to Mexico to lease or purchase agricultural lands.¹⁴⁹ Alarmed immigration agents wrote that Nagasaki had initiated a “Japanese invasion” of undocumented workers. To redress the problem, these particular agents did not call for the revocation of border crossing cards. Instead, they called for the creation of a border patrol.¹⁵⁰

It is important to note that multiple calls for a border patrol were made by various immigration inspectors posted along the U.S.–Mexico border. Bureau officials who administered the Passport Laws and the border crossing cards, inspectors who issued literacy test waivers, and inspectors who tried to enforce the provisions of the agricultural labor program all concluded that a roving patrol force was necessary for effective border enforcement.¹⁵¹ And these inspectors independently reached the same conclusion because they all understood the obstacles and problems surrounding immigration law enforcement on the U.S.–Mexico border. Indeed, in calling for a border patrol, southwestern Bureau officials acknowledged that, taken literally, the task of closing the nation’s borders to unwanted immigrants was impossible. As a result, in the minds of these immigration officials, an effective border enforcement policy needed to take place at the border itself and beyond. A mobile patrol force, operating in the nation’s interior, would be able to monitor and apprehend those immigrants who

¹⁴⁹ W. A. Brazie, Inspector in Charge, to Inspector in Charge, Los Angeles, January 27, 1920, file 54750/36A, RG 85, National Archives.

¹⁵⁰ Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1919*, 24. For an account of the Bureau’s enforcement efforts against illegal Japanese immigrants, see Report of Supervising Inspector, District No. 23 in Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1919*, 408–409; Report of Supervising Inspector, District No. 23 in Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1920*, 440.

¹⁵¹ Department of Labor, Bureau of Immigration, Departmental Order, June 12, 1918, file 54261/202B, RG 85, National Archives (reports need for more manpower to track farmworkers once they have been admitted to the United States); George J. Harris, Assistant Supervising Inspector, Mexican Border District to Commissioner General, August 27, 1918, file 54410/331, RG 85, National Archives (proposes a mobile immigration force in response to problems created by passport law enforcement); Report of Supervising Inspector, Mexican Border District, Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1918*, 319 (general call for border patrol); Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1919*, 26 (call for a “patrol service” in response to illegal Chinese and Japanese immigration); Bureau of Immigration, *Annual Report, fiscal year ended June 30, 1921*, 12 (call for a border patrol to assist in enforcement of the Act of May 19, 1921, popularly known as the Quota Act of 1921).

had not only violated the letter of the immigration laws but also benefited from the exemptions to the Immigration Act of 1917 and the Passport Act of 1918 — exemptions created by the Bureau of Immigration itself.

While the Immigration Act of 1917 sharply curbed the numbers of Mexican immigrants seeking admission for permanent residence, it did not diminish the number of border crossers. By the mid-1920s, the regulation of these non-immigrant border crossers, rather than restriction of immigrants, became the central concern of the Bureau of Immigration. In 1928, the commissioner general of immigration underscored this point when he observed that the nation's borders had surpassed Ellis Island as the major ports of entry. On the Mexican and Canadian borders, he continued, "a great change has been taking place . . . steadily are they approaching a place of first importance in the scheme of things from an immigration standpoint. The fiscal year just closed witnessed a movement back and forth across these frontiers made up of citizens and aliens aggregating 53,000,000 entrants. Many of these, of course, were commuters, visitors, excursionists, etc."¹⁵²

In response to these conditions, Bureau of Immigration officials, for the remainder of the twentieth century, exercised their administrative discretion and constructed distinctive immigration policies for the borderlands. By carving out exceptions to the nation-bound premises of federal immigration laws, these policies reflected the agency's own recognition that statutes alone could not halt the circulation of peoples at the border. Between 1917 and 1924, at least three policy innovations — the wartime agricultural labor program, the literacy test waivers, and the border crossing card, were devised to satisfy the immediate needs of border residents and border officials rather than the aspirations of immigration restrictionists.

Yet, these amendments to the immigration and passport laws only generated new quandaries, such as heavier workloads, and aggravated old ones, particularly illegal immigration. The Bureau's own policy innovations became, in Pressman and Wildavsky's words, the "analytical equivalent

¹⁵² U.S. Department of Labor, Bureau of Immigration, *Annual Report of the Commissioner General of Immigration to the Secretary of Labor, fiscal year ended June 30, 1928* (Washington, D.C.: GPO, 1917), 10.

of original sin.”¹⁵³ Put differently, the Bureau of Immigration created the very phenomenon — the so-called problem of illegal immigration — that it was mandated to resolve. By 1924, the Bureau formed the Border Patrol to shore up the weaknesses in its border enforcement strategy; in possession of sweeping powers, this mobile immigration force would have the ability to pursue and apprehend undocumented immigrants at the border, between the ports of entry, and within the nation’s interior. But, because immigration officials would continue to devise policies for border residents, the Border Patrol acted not only to remedy what nativists construed as the ethical and cultural shortcomings of illegal immigrants but also to absolve the administrative sins of the Bureau of Immigration itself.

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¹⁵³ Pressman and Wildavsky, *Implementation*, 180.

TURNING BACK THE CLOCK:

California Constitutionalists, Hearthstone Originalism, and Brown v. Board

FELICIA KORNBLUH*

In 1953, when they were asked by the Supreme Court to reargue *Brown v. Board of Education*, the attorneys of the NAACP Legal Defense and Educational Fund turned to the writings of a blind professor from the Speech Department at UC Berkeley and a deaf librarian from Los Angeles.¹

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¹ I refer to Graham as "deaf" rather than "Deaf" to indicate his physical impairment as well as his lack of participation in a cultural or linguistic community of other hearing-impaired people. Graham did not communicate in American Sign Language and did not attend any schools that catered to deaf students.

Thurgood Marshall and his team utilized the work of historians such as John Hope Franklin and C. Vann Woodward. However, to answer the critical question of the original meaning of the Fourteenth Amendment — the key question the Court had put to them in its request for re-argument — they built most directly upon the scholarship of Jacobus tenBroek and Howard Jay Graham.² These two scholar-activists had been collaborating since the middle 1940s, when both were in Berkeley, on research about the origins of the Reconstruction Amendments. They were the first to argue that the ultimate source of the language in Section One of the Fourteenth Amendment was the antebellum movement for the abolition of slavery. Therefore, they claimed, segregated education violated the Fourteenth Amendment's proscription against states' depriving citizens of "equal protection of the laws."

TenBroek was a scholar, teacher, and advocate who began his career on the far banks of the mainstream but eventually earned a national reputation. He co-authored a now-classic essay in 1949 that predicted and promoted the central role of the Equal Protection Clause in postwar movements for social change. He argued presciently that the Equal Protection Clause was being revived in the postwar years. TenBroek and his collaborator were responsible for the Venn diagrams that illustrate forms of discrimination under the Equal Protection Clause that are constitutionally prohibited because they are "under-" or "over-inclusive." More ambitious, if less influential, was their argument for a doctrine of "substantive equal protection" that would acknowledge the need for affirmative government action to realize equality.³ In 1940, tenBroek founded and began to lead the National Federation of the Blind (NFB), the first national group in U.S. history dedicated to blind people's advocacy on their own behalf. The NFB became the most effective organization by and for disabled people and public assistance recipients between World War II and the coalescence of mass

² Richard Kluger writes that "[t]he two experts probably most deeply versed in the subject [of the Fourteenth Amendment] shared a pair of traits," that they were Californians and disabled. Kluger, *Simple Justice: The History of Brown v. Board of Education, the Epochal Supreme Court Decision that Outlawed Segregation, and of Black America's Century-Long Struggle For Equality Under Law* (New York: Vintage, 1975), 625.

³ Joseph Tussman and Jacobus tenBroek, "The Equal Protection of the Laws," *California Law Review* 37:3 (September, 1949): 341–381. Graham also argued for substantive equal protection.

movements for disability and welfare rights in the 1960s and 1970s. In a relatively short but productive career, tenBroek wrote field-defining essays on disability rights, income-based discrimination, and the right to travel, and was lead author of the first book-length critique of the Supreme Court and Roosevelt Administration *vis-à-vis* Japanese internment.⁴ He chaired the State Social Welfare Board under Governor Edmond (“Pat”) Brown, and taught in the Speech and Political Science Departments at Berkeley for almost thirty years.⁵ His (zealous) former students included California Supreme Court Justice Joseph Grodin and activist lawyer Michael Tigar, and his colleagues and friends included Chief Justice Roger Traynor.⁶

⁴ Jacobus tenBroek, *The Constitution and the Right of Free Movement* (pamphlet, National Travelers’ Aid Association, 1955); tenBroek, “California’s Dual System of Family Law: Its Origins, Development, and Present Status,” Part I, *Stanford Law Review* 16 (March, 1964): 257–357, Part II, *Stanford Law Review* 17 (July, 1964): 900–981; and Part III, *Stanford Law Review* 17 (April, 1965): 614–682; tenBroek, “The Right to Live In the World: The Disabled in the Law of Torts,” *California Law Review* 54:2 (May, 1966): 841–919; tenBroek, Edward Barnhart, and Floyd Matson, *Prejudice, War, and the Constitution* (Berkeley and Los Angeles: University of California Press, 1954). On public assistance and disability, see also, tenBroek and Matson, *Hope Deferred: Public Welfare and the Blind* (University of California Press, 1959), and see discussions in Felicia Kornbluh, *The Battle for Welfare Rights: Poverty and Politics in Modern America* (Philadelphia: University of Pennsylvania Press, 2007), 30; Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973* (New Haven: Yale University Press, 1993), 20–21, 36; and Matson, *Blind Justice: Jacobus tenBroek and the Vision of Equality* (Washington, D.C.: Library of Congress/Friends of Libraries for the Blind, 2005), 129–148 (on Japanese American project), 171–179 (on theorizing poverty and social welfare).

⁵ Adrienne Asch, “Jacobus Tenbroek [sic], Uc [sic] Berkeley’s Pioneer in Civil Rights Theory and Action,” remarks at the symposium, *Intersections of Civil Rights and Social Movements; Putting Disability in its Place*, held at UC Berkeley, November 3, 2000 and made available via the Regional Oral History Office, Bancroft Library (Bancroft), Berkeley, CA, 2004, <http://content.cdlib.org/view?docId=hb5r29n7w0;NAAN=13030&doc.view=frames&chunk.id=div00019&toc.id=0&brand=calisphere> [accessed November 26, 2012]; Unsigned tenBroek obituary, *San Francisco Chronicle*, March 28, 1968, and other materials, special issue of *The Braille Monitor*, voice of the National Federation of the Blind, Inkprint edition, Berkeley, July, 1968 devoted to memorializing Jacobus tenBroek, Bancroft. See also Matson, *Blind Justice*, 195, 210.

⁶ Joseph Grodin, personal communication with the author, January 30, 2012; Michael Tigar, “Jacobus ten Broek. In Memoriam,” *California Law Review* 56:3 (May, 1968): 573–574; Jacobus tenBroek to Howard Jay Graham, July 22, 1947; Antislavery Origins of the Fourteenth Amendment, 1946–1964; Books, Writings, 1931–1967; the Jacobus tenBroek personal papers; Jacobus tenBroek Library, National Federation of the Blind,

TenBroek's collaborator for a decade was Howard Jay Graham.⁷ Graham never held a position in a university. Nonetheless, he served as an in-house constitutional historian for the NAACP during the summer of 1953 and a consultant in the fall of 1953, and wrote a substantial portion of the final brief to the Court in *Brown*. In the second volume of his biography of Thurgood Marshall, Mark Tushnet demonstrates that Graham's contribution to the NAACP's effort to prepare for the re-argument of *Brown* was more consequential than C. Vann Woodward's.⁸ In a reversal of the traditional understanding of physically disabled adults as the "vulnerable," Judge Robert Carter, in an interview with *Brown v. Board* chronicler Richard Kluger, remembered Graham as one upon whom able-bodied attorneys leaned: Without Howard Jay Graham as an advisor on constitutional history during the preparation of their brief for the reargument of *Brown*, Carter recalled, "'we would have felt very vulnerable.'"⁹ Graham laid the groundwork for his NAACP work with influential essays he published between the late 1930s and early 1950s. These undercut the post-Civil War doctrine of corporate personhood; attacked what he called the "conspiracy

Jernigan Institute, Baltimore, MD: "Had a chat with Traynor the other night . . . was provoked by his tie-up of you and Stephen Field to tell an interesting story about the latter. When he was Dean of the Law School, Sproul's administrative ass't called him up one day to ask about hanging a picture of Field in Boalt. Traynor replied immediately that he 'wouldn't hang a picture of that old son-of-a-bitch in a farmer's back house.' He then hung up the phone and began to think about the difference between Roger J. Traynor, Professor, talking to a law student in the basement of Boalt Hall and Roger J. Traynor, Dean, talking to the University administration. Five minutes later he called up the President's office to say that he would be delighted to hang a picture of Mr. Justice Field. He characterized Field as one of the worst judges ever to occupy the supreme bench, intellectually crooked, a man who gave the best reasons for the worst decisions. He said I could repeat the story to you but obviously wouldn't want it spread any further."

⁷ In addition to my own work, Matson explores their collaboration in *Blind Justice*, 119–127.

⁸ Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961* (New York and Oxford: Oxford University Press, 1994), 197, describes three research papers that "became the center of the NAACP brief," by Howard Jay Graham, John Hope Franklin and constitutional historian Alfred Kelly of Wayne State, and attorney William Coleman (and collaborators).

⁹ Richard Carter, quoted in Kluger, *Simple Justice*, 625. Feminist legal theorist Martha Fineman has made the idea of vulnerability the center of her approach to gender, disability, and difference. See Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism*, 20:1 (2008): 1–23.

theory” of a pro-capitalist, anti-civil rights Constitution posited by Charles and Mary Beard; and claimed that passionate citizens outside of the courts fashioned an “extra-judicial” version of substantive due process in the middle nineteenth century.¹⁰ Graham defended the New Deal while renovating the historical reputations of abolitionists and Radical Republicans, and attempted to fashion an interpretation of the constitutional text that made it useful to social-change efforts in post-World War II America.¹¹

TenBroek and Graham were virtually alone in researching the legislative and grassroots origins of the Fourteenth Amendment in the years between 1944 and 1950.¹² Early in their collaboration, they concluded that the legislative history of the Amendment could support diverse interpretations of its meaning — including interpretations that troubled their effort to further the cause of African-American civil rights in the middle twentieth century.¹³ In response to this difficulty, tenBroek and Graham emphasized the significance of the constitutional thought of the

¹⁰ Howard Jay Graham, “The ‘Conspiracy Theory’ of the Fourteenth Amendment,” Part I, *Yale Law Journal* 47:3 (January, 1938): 371–403; Part II, *Yale Law Journal* 48:2 (December, 1938): 171–194; Editorial Note prior to reprint of the “conspiracy theory” articles, *Everyman’s Constitution* (Madison: State Historical Society of Wisconsin, 1968), 23–27; “Four Letters of Mr. Justice Field,” *Yale Law Journal* 47:7 (May, 1938): 1100–1108; “Justice Field and the Fourteenth Amendment,” *Yale Law Journal* 52:4 (September, 1943): 851–889; and “Procedure to Substance: Extra-Judicial Rise of Due Process, 1830–1860,” *California Law Review* 40:4 (Winter, 1952–1953): 483–500. Only a week after publication of his first “conspiracy theory” essay, Justice Black cited it in his dissent in the case *Connecticut General Life Insurance Co. v. Johnson* [303 U.S. 77, 87] (1938), as support for his questioning of the idea of the corporate person that enjoyed the protections of Section One of the Fourteenth Amendment. Graham begins his book with reference to the constitutional rights of “artificial persons.” See *Everyman’s Constitution*, 3.

¹¹ For the New Deal context of his early publishing, see Graham, *Everyman’s Constitution*, 25.

¹² Within the historical profession, they were working against the still-dominant Dunning school, on the right, and the Beardian or Progressive school, on the left. However, in their appreciation of the historical significance of the abolitionist movement, they followed on the heels of Dwight Lowell Dumond’s *Antislavery Origins of the Civil War in the United States* (Ann Arbor: University of Michigan Press, 1939; reprint, with foreword by Arthur Schlesinger, Jr., 1959).

¹³ For their frustration with what they found disappointing or “embarrassing” views of the Republicans who helped pass the Thirteenth and Fourteenth Amendments, see Howard Jay Graham to tenBroek, October 1 1945; October 28, 1945; and n.d. [filed in-between letters dated October 28 and November 25]; *Antislavery Origins of the Fourteenth Amendment*,

movement for the abolition of slavery from the early nineteenth century forward, and de-emphasized some of the ideas of the Republicans who formed the Congressional majority after the Civil War.¹⁴ They argued that the abolitionists were the true authors of the Reconstruction Amendments, and that abolitionist oratory and journalism gave precise meanings to the sometimes-opaque phrases particularly of Section One of the Fourteenth Amendment.¹⁵ They extrapolated from this research to articulate a socio-legal, “legal-history-from-below,” approach to constitutional history.¹⁶ They concluded that what Graham termed the “hearthstone opinions” of activists outside the courts and legislatures and what tenBroek called the work of “dogmatic, even fanatical, reformers” created some of the most significant changes in constitutional meaning in U.S. history.¹⁷ In their

1946–1964; Books, Writings, 1931–1967; the Jacobus tenBroek personal papers; Jacobus tenBroek Library, National Federation of the Blind, Jernigan Institute, Baltimore, MD.

¹⁴ Dumond, rev. ed., 1959, 67–82, preceded tenBroek and Graham in offering an interpretation of anti-slavery and pro-slavery constitutional thought. (NAACP and U.S. Government Briefs for the Reargument included a few additional citations on anti-slavery thought and more generally on Reconstruction.)

¹⁵ I see here something of a California or Berkeley socio-legal constitutional tradition — a tradition that, like the work of Willard Hurst and the Wisconsin School, was Realist in its inspiration. TenBroek and Graham were less interested than was Hurst in turning away from appellate case law and toward the interpenetration of law into daily lives, and more interested in exploring the historical roots of elite legal change. Interestingly, Hurst and Graham reviewed one another’s work positively. See Willard Hurst, Review, “Truth and Fiction about the Fourteenth Amendment” by Louis B. Boudin; “The ‘Conspiracy Theory’ of the Fourteenth Amendment” by Howard Jay Graham; “Equality and the Law” by Louis A. Warsoff, *Harvard Law Review*, 52:5 (March, 1939): 851–860; Hurst, Review of *Everyman’s Constitution*, *Journal of American History* 56:1 (June, 1969): 146–148; and Graham, Review of *Law and the Conditions of Freedom in the Nineteenth-Century United States* by James W. Hurst and *The Law of the Commonwealth and Chief Justice Shaw* by Leonard W. Levy, *California Law Review*, 45:5 (December, 1957): 792–796. Graham also reviewed John Phillip Reid’s book, *Chief Justice: The Judicial World of Charles Doe*, *Journal of American History* 54:2 (September, 1967): 426–427.

¹⁶ William Forbath, Hendrik Hartog, and Martha Minow, “Forward: Legal History from Below,” *Wisconsin Law Review* (July/August, 1985) 759–766; for a debate and a refinement, see Felicia Kornbluh and Karen Tani, “Below, Above, Amidst: The Legal History of Poverty,” *A Companion to American Legal History*, ed. Alfred Brophy and Sally E. Hadden (Blackwell Publishing, 2013), 329–348.

¹⁷ Howard Jay Graham, SCHOOL SEGREGATION CASES — APPENDIX TO APPELLANTS’ BRIEFS: “The purpose and Meaning of Sections One and Five of the Fourteenth Amendment: The Historical Evidence Re-examined,” NAACP papers, Group

understanding of legal history, what activists such as the abolitionists called illegal and unconstitutional became so; after years of bitter struggle and warfare, the legal and constitutional agenda of these “fanatical” reformers was written into the Constitution.

The NAACP brief for the reargument of *Brown* echoed tenBroek’s and Graham’s scholarship, and had Howard Jay Graham as a primary author. The brief made an historical, originalist, and socio-legal argument about the Fourteenth Amendment that has only rarely been revisited. I think that it deserves reconsideration in light of years of second-guessing — from the left as well as the right — of the so-called “living constitutionalism” of the May, 1954, opinion in *Brown* and its reliance upon data from the “doll studies” of Kenneth and Mamie Clark, among other sources. Graham’s and tenBroek’s appreciation of the role of abolitionist activists in the making of constitutional meaning, combined with their particular originalist historical method, deserves consideration as well in the general context of the renaissance of originalist jurisprudence in the past thirty

II, Box B 143, Folder titled “Schools – Kansas – Topeka – *Brown v. Board of Education* (and other cases) – 2nd Reargument – Legal papers – 1954,” LOC. Graham wrote, p. 1: “The modern elaboration of due process and equal protection is familiar to everyone. Yet the really decisive shifts in these fields occurred before the Civil War. The synthesis was made, moreover, not by lawyers or judges, but by laymen, and only recently has the significance of this fact begun to be fully appreciated.” Also see Graham’s essay, “Extra-Judicial Rise of Due Process,” which emphasized the activist origins of a theory of substantive due process decades before the late nineteenth century, and the essay he produced closest to his experience working for the NAACP, “The Fourteenth Amendment and School Segregation,” *Buffalo Law Review* 3:1 (Winter, 1953): 1–24, which included his appreciation of “hearthstone,” or grassroots, constitutional interpretation. See also Jacobus tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (Berkeley and Los Angeles: University of California Press, 1951), 94–95: “The three much-discussed clauses of section I of the Fourteenth Amendment were the product of and perhaps took their meaning, application, and significance from a popular and primarily lay movement, which was moral, ethical, religious, revivalist rather than legal in character. The movement was comprised of people who knew little and cared less about the erudition and ancient usages of the law, who came to the reading of the Constitution as dogmatic, even fanatical reformers . . . It was as a culmination of this movement and usage that the clauses of section I of the Fourteenth Amendment were made a part of the Constitution; and their accepted meaning was the meaning which these reformers gave to them on the hustings, in revival meetings, in pamphlets, and in the thousand other outlets to their ardor.”

years.¹⁸ Interestingly, Randy Barnett, the leading libertarian originalist legal scholar, recently rediscovered tenBroek's and Graham's scholarship on Section One of the Fourteenth Amendment. However, Barnett reiterated some of the constitutional arguments of leading abolitionists *vis-à-vis* the eighteenth-century Constitution without proceeding, as tenBroek and Graham did, to consider the ways in which nineteenth-century radical politics transformed constitutional meanings and gave the Reconstruction Amendments their liberatory edge.¹⁹

The originalism of the two disabled, California-based, scholars differed in important ways from Randy Barnett's and from that of present-day conservatives such as Antonin Scalia.²⁰ It differs as well from the "framework

¹⁸ The *stunde null* of modern constitutional originalism may be Alexander Bickel's 1955 essay on the use of historical evidence in *Brown*, based upon the research he conducted for Justice Frankfurter in the months after the Court posed its questions for reargument to the parties. Alexander Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review* 69:1 (November, 1955): 1–65.

See also, among other reflections, Erwin Chemerinsky's recent thoughts on the SCOTUS Blog on the significance of Bickel's work in the development of originalism. Chemerinsky argues that the problem derived from Bickel's scholarship, of the legitimacy of "counter-majoritarian" appellate court action, and the answer that originalism appears to provide to this supposed difficulty, are both dead ends for legal thought. Erwin Chemerinsky, "It's Alexander Bickel's Fault," Online Alexander Bickel Symposium, SCOTUS Blog, August 16, 2012 [accessed October 22, 2012]: "Modern constitutional theory began with Alexander Bickel's *The Least Dangerous Branch* and its declaration . . . that there is a 'counter-majoritarian difficulty' in having an unelected judiciary with the power to invalidate the acts of popularly elected officials. The focus of constitutional theory ever since has been on trying to solve the counter-majoritarian difficulty identified by Bickel and on reconciling judicial review with democracy. Unfortunately, this is a misguided and impossible quest, but one that has had profound consequences for constitutional law ever since."

¹⁹ Randy Barnett, "Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment," Georgetown Public Law Research Paper No. 10-06, February, 2010, later published in *Journal of Legal Analysis*, 3 (2011). Barnett has been credited as the author of the constitutional challenge to the Affordable Care Act; despite the Court's choice to uphold the law, Justice Roberts's finding that its mandate exceeded what it was permissible under the Commerce Clause may have owed a debt to Barnett. See Sheryl Gay Stolberg and Charlie Savage, "Vindication for Challenger of Health Care Law," *New York Times*, March 26, 2012 [accessed at <http://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html> October 29, 2012].

²⁰ Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004); Antonin Scalia, *A Matter of Interpretation: Federal*

originalism” that the liberal constitutional theorist Jack Balkin has offered as an alternative to the jurisprudence of the Warren Court. However, like Balkin’s provocative effort to blend late-twentieth- and twenty-first-century rights jurisprudence with originalism, the constitutional theory of tenBroek, Graham, and the NAACP’s reargument in *Brown* was an attempt to claim that the true meaning of the Constitution was an equalitarian one. I do not offer the originalism of the *Brown* reargument as an alternative for today.²¹ However, I think that studying the fate of that particular brand of “living originalism” (to borrow Balkin’s phrase) can help us understand the legal world before *Brown*, and to comprehend some of the reasons why and ways how the Warren Court came to craft its approach to jurisprudence.²²

The history of tenBroek’s and Graham’s role in *Brown v. Board* points toward different understandings of the roots of modern constitutional change than the standard ones. In a parallel to their interpretation of the nineteenth century, tenBroek’s and Graham’s work and lives indicate that twentieth-century constitutionalism, too, came from unlikely and largely unauthorized sources. Beyond their own biographies as West Coast intellectuals whose bodily experiences powerfully shaped their careers, tenBroek’s and Graham’s scholarship was also informed by the national and local contexts in which it was formed. For these two students at Berkeley in the 1930s, New Deal constitutional politics were obviously influential. TenBroek’s early study of what he called “extrinsic [that is, historical] aids” to constitutional construction, and Graham’s impassioned critique of the Beards, were complementary efforts to tear down the edifice of (pro-corporate, anti-labor, and anti-civil rights) post-*Lochner* jurisprudence — a body of jurisprudence that, both scholars would have argued, betrayed the Reconstruction Constitution.²³ For both men, the turn toward historical data as a resource in constitutional interpretation was a Realist intellectual

Courts and the Law, ed. Amy Gutmann, and with responses by Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin (Princeton: Princeton University Press, 1997).

²¹ But see Jamal Greene, “Fourteenth Amendment Originalism,” *Maryland Law Review* 71 (2012): 978–1014.

²² Jack Balkin, *Living Originalism* (Cambridge: Harvard/Belknap Press, 2011).

²³ Jacobus tenBroek, “Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction,” *California Law Review* 26:3 (March, 1938): 287–308; tenBroek, “Use by the United States Supreme Court of Extrinsic Aids

move comparable to Willard Hurst's turn toward history as a window upon the role of law in American life. Graham and tenBroek both paid close attention to African-American civil rights campaigns, but for tenBroek, at least, the campaigns of Japanese and Japanese-American advocates in California were at least as influential as African-American ones.²⁴ This is evident in the range of cases he and co-author Joseph Tussman cited in their essay on equal protection, on which tenBroek was working at the same time that he was collaborating with Graham, and in the cases and other materials tenBroek taught his students in the Berkeley Speech Department (which he turned into a pre-law department) in the late 1940s and 1950s.²⁵ TenBroek, and perhaps Graham as well, were also shaped as intellectuals who appreciated the role of outsider groups in creating legal change by the disability rights movements of the 1930s and 1940s, including the statewide and national groups tenBroek co-founded, the California Council of the Blind and the National Federation of the Blind.²⁶

in Constitutional Construction," *California Law Review* 26:4 (May, 1938): 437–454; and Graham, "Conspiracy Theory," Part I and Part II.

²⁴ For general background on the multiple but distinct threads of civil rights activism in postwar California, see Mark Brilliant, *The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California, 1941–1978* (New York and Oxford: Oxford University Press, 2010).

²⁵ Tussman and tenBroek, "Equal Protection of the Laws." In an early edition of the course book for Speech 1A and 1B, which served as the introductory courses in law at Berkeley during tenBroek's years in the Speech Department, tenBroek and Richard Wilson included the Supreme Court opinions in *Missouri ex rel. Gaines v. Canada* and *Smith v. Allwright*, but few other cases regarding African-American civil rights. The book also included materials from the internment cases, from *Yamashita v. Styer* (prosecution of the Japanese commander in the Philippines), and *Duncan v. Kahanamoku* (challenge to martial law in Hawaii). Jacobus tenBroek and Richard Wilson, *Materials for Speech 1A-1B, University of California Syllabus Series — Syllabus RX — Materials for Speech 1-A and 1-B* (Berkeley and Los Angeles: University of California Press, September, 1947), Bancroft. Note that the course book must have been amended after September, 1947, since the *Gaines* case was not decided by the Supreme Court until 1948.

²⁶ For discussions, see Kornbluh, "Disability, Antiprofessionalism, and Civil Rights: The National Federation of the Blind and the 'Right to Organize' in the 1950s," *Journal of American History* 97:4 (March, 2011): 1023–1047. We may find the roots of their approach to constitutional history as well in the internationalist and social democratic "human rights" politics of the era after the war; the efforts of women to defend their rights to work within and outside of the courts; the legal improvisations of the rising homophile movement of the 1940s; and in the belated revulsion within U.S. public

A LEGAL DILEMMA

Graham and tenBroek had begun to collaborate actively in the early 1940s. This was shortly after tenBroek had completed two years at Harvard Law School and another two at the University of Chicago Law School, earning one doctorate in law at Berkeley and beginning another at Harvard, and attempting to obtain a full-time teaching position. He had also during these years founded the National Federation of the Blind (in 1940, at the age of twenty-nine). Finally, in 1942, he received an offer of a full-time position in the Department of Speech at his alma mater. He began teaching in the fall of 1943.²⁷ Graham had by this time spent twelve fruitful but perhaps also frustrating years in Berkeley, had completed an M.A. in political science and training in librarianship. Despite his widely acknowledged expertise, Graham held neither a Ph.D. nor a law degree.²⁸ He started his career at the Los Angeles County Law Library in 1939. He had faced the predictable barriers both to education and to a scholarly career on account of his disability and on account of, first, the Depression and then wartime declines in university enrollments.²⁹

opinion at the treatment of European Jewry by the Nazis and the assertion of Jewish civil rights after World War II.

²⁷ TenBroek spent two years on a one-year fellowship at Harvard Law School and two in a one-year position at the University of Chicago Law School. On his final settlement with Berkeley, see Letter from Jacobus tenBroek, Chicago, Illinois, to Charles Aikin, Berkeley, CA, March 3, 1942; Letter from Gerald Marsh, Berkeley, CA, to Jacobus tenBroek, March 20, 1942; tenBroek to Marsh, April 13, 1942; and tenBroek to Aikin, April 30, 1942, all quoted in Lou Ann Blake, "Jacobus tenBroek: Letters to Berkeley," *Braille Monitor* 51:3 (March, 2008), no page, <http://www.nfb.org/images/nfb/Publications/bm/bm08/bm0803/bm080312.htm> [accessed January 11, 2012]. For tenBroek's efforts to find a job generally, see Blake, "Jacobus tenBroek: Letters to Berkeley."

²⁸ In his foreword to Graham's book, Brandeis University constitutional historian Leonard Levy called Graham "surely the greatest authority on the history of the [Fourteenth] amendment," its "Maitland," and perhaps the greatest living authority on the history of the Constitution in the United States. Levy, "Foreword," to Graham, *Everyman's Constitution*, vii.

²⁹ Graham, *Everyman's Constitution*, xiii: Graham acknowledges his gratitude to the Berkeley School of Librarianship, "for further professional preparation, often under mutual difficulties — bridged in this instance, as always, by my wife Mary's faithful assistance." For sensitivity to the role of the war in constraining academic careers, I rely upon assorted letters excerpted in Blake, "Jacobus tenBroek: Letters to Berkeley."

The two scholars co-wrote a series of reviews of state constitutional law for the *American Political Science Review* (in 1943–44, 1944–45, and 1945–46).³⁰ They started work on the project they initially called “The American Judiciary and the American Dilemma” in the early fall of 1945, a year after publication of Myrdal’s *An American Dilemma*.³¹ By 1946, they were writing to one another several times a week, sharing citations, interpretations of data, and drafts of writing. Their correspondence was particularly rich since Graham was a self-described “lip-reader,” and there was at this point in history no assistive technology that would allow him to speak on the telephone.³² TenBroek was blind and could not read the letters Graham sent. However, his wife, Hazel tenBroek, who was sighted, worked nearly full time reading aloud to him.³³

As they attempted to contribute to the cause of equality by means of constitutional history, tenBroek and Graham researched the immediate, post-Civil War, political context that produced the Reconstruction Amendments, and most particularly the Fourteenth Amendment. In service of this end, they took the relatively innovative strategy of largely bypassing

³⁰ “State Constitutional Law in 1943–44,” *American Political Science Review* 38 (August, 1944): 670–692; “State Constitutional Law in 1944–45,” *American Political Science Review* 39 (August, 1945): 685–719; and “State Constitutional Law in 1945–46,” *American Political Science Review* 40 (August, 1946): 703–728.

³¹ Graham had great respect for Myrdal’s study. In the editorial notes following republication of his original *Yale Law Journal* piece on the “conspiracy theory,” Graham writes: “Not merely the law review literature, but even the *Journal of Negro History* reflects the national paucity of constitutional research and discussion at this period [late 1930s]. Such was the price and impact of the 1877–1897 constitutional and sectional ‘settlement.’ All honor therefore to the work of the NAACP, and to the Carnegie Corporation . . . for launching, in 1937, the foundation study which culminated in *An American Dilemma*.” *Everyman’s Constitution*, 67, fn. 11.

³² Graham, in *Everyman’s Constitution*, “Preface,” xii, describes himself as “a librarian and lipreader — a member of both groups that understand best how corporate and sociological modern research and communication are.”

³³ Occasionally Graham would acknowledge that the person who was actually reading his letters was Hazel tenBroek, but generally he would not. Howard Jay Graham to Jacobus (“Chick”) tenBroek, October 28, 1945; Antislavery Origins of the Fourteenth Amendment, 1946–1964; Books, Writings, 1931–1967; the Jacobus tenBroek personal papers; Jacobus tenBroek Library, National Federation of the Blind, Jernigan Institute, Baltimore, MD: “Hazel, Never mind this I’ve repeated the important parts of it elsewhere”

judicial interpretations of the Amendments and focusing instead on congressional materials.³⁴ Their initial assumption appears to have been that the intentions of the congressional authors of the Fourteenth Amendment, and of the members of Congress who approved it, were broadly equalitarian; by reading their words, one could develop a convincing case to the effect that Jim Crow segregation was inconsistent with their intentions and that appellate jurisprudence on this and similar questions had been incorrect for half a century and needed to be thrown over.

TenBroek and Graham discovered fairly quickly that parsing the “original intent” of the “framers” of the Fourteenth Amendment was an extremely complex matter. As they gathered information about the congressional sponsors of the Reconstruction-era rethinking of the Constitution, they found that not everything these legislators said or did was consistent with their own twentieth-century civil rights politics. The collaborators began to overcome their impasse at the very end of 1945 or beginning of 1946, when they switched their emphasis (and widened the distance between their method and conventional forms of argumentation in constitutional law) from post-Civil War congressional debate to the roots of the Reconstruction Amendments in the ideology of the movement for the abolition of slavery. As tenBroek wrote later, with a degree of understatement that sounds almost ironic, “the discovery of the antislavery origins of the Civil War amendments dissipates much of the confusion resulting from the congressional and ratification debates.”³⁵

To a degree that may seem contradictory to a contemporary reader, tenBroek and Graham’s approach to the Constitution was simultaneously originalist, historicist, and non-elite. It was originalist in that it centered on the quest for the true meaning of the document; it was historicist in that it sought that meaning in the rich documentation of the past; and it was non-elite, in that it encompassed not only the interpretations of existing constitutional texts by radical activists but also made them, as the sources of the ideas that found their way into Section One of the Fourteenth Amendment, the primary authors of constitutional change in U.S.

³⁴ See tenBroek, “Extrinsic Aids” essays.

³⁵ tenBroek, *Antislavery Origins*, 4.

history.³⁶ Graham, writing in 1953, found the relationship between abolitionism and the Reconstruction Amendments to be “perhaps the classic example of moral and ethical revision of the law and of creative popular jurisprudence and constitution making — at least in the nineteenth century. ‘Hearthstone opinions’ in this process,” he continued, “obviously were far more vital and determinative than judicial opinions. Constitutional Law here was growing at the base rather than at the top.”³⁷

PROVOKING THE ARGUMENT FROM HISTORY

The NAACP argued *Brown v. Board* before the Supreme Court for the first time in December, 1952.³⁸ Thurgood Marshall and the other attorneys submitted to the Court a thirteen-page-long brief accompanied by an appendix signed by leading researchers, including social psychologists Kenneth and Mamie Clark, Robert Merton of the Columbia Sociology Department, psychologist Gordon Allport, and the psychiatrist, Dr. Viola Bernard. The NAACP brief included a quotation from the Kansas court whose decision it appealed, a portion of which the Warren Court ultimately included in its own opinion. The quotation concerned the negative effects of segregation upon “colored children.”³⁹ “‘Segregation,’” the brief quoted, “‘has a tendency to retard the educational and mental development of negro children and . . . instills in [the African-American child] a feeling of inferiority resulting in a personal insecurity, confusion and frustration that condemns him to an ineffective role as a citizen and member of society.’”⁴⁰ In passages that did not ultimately find their way into the Supreme Court opinion,

³⁶ For such an approach to legal meaning-making, see Forbath, Hartog, and Minow, “Legal History from Below.”

³⁷ Graham, *Everyman’s Constitution*, chapter 6 (originally *Buffalo Law Review*, 1953), 284–85.

³⁸ I rely for background upon Tushnet, *Making Civil Rights Law*, 196–231, and Kluger, *Simple Justice*, 582–699.

³⁹ Brief for Appellants, in the Supreme Court of the United States, October Term, 1952, No. 8 – Oliver Brown, Mrs. Richard Lawton, Mrs. Sadie Emmuel, et al., Appellants, vs. Board of Education of Topeka, Shawnee County, Kansas, et al., Appeal from the United States District Court for the District of Kansas, NAACP papers, Series II, Box B138, Folder 10: “Schools – Kansas – Topeka – Brown v. Board of Education – Legal papers – 1951–1953,” Library of Congress (LOC), Washington, D.C., 8.

⁴⁰ *Ibid.*, 9.

the scholars argued that *white* children in a segregated society were likely to develop characteristics that intellectuals of the Frankfurt School had identified with the Authoritarian Personality, hating “the weak while they obsequiously and unquestioningly conform to the demands of the strong.” The social and medical scientists argued that African-American children attending segregated schools “tend to be hypersensitive and anxious about their relations with the larger society. They tend to see hostility and rejection even in those areas where these might not actually exist.”⁴¹

In response to these arguments regarding the “intangible” effects of segregation, the Supreme Court deadlocked.⁴² Justice Douglas, writing in 1954, remembered that after the initial oral argument in *Brown*, there were four in favor of striking down segregation statutes, three in favor of upholding the *Plessy* doctrine, and Frankfurter and Jackson in-between, eager to avoid facing “the question if it was possible to avoid it.”⁴³ The stalemate was settled by a consensus decision to request reargument. Despite his partial endorsement, in an informal memorandum, of the idea that constitutional meanings change with the times, Frankfurter helped settle the stalemate by drafting questions for the reargument that centered on research into the original meanings of the Reconstruction Amendments.⁴⁴

⁴¹ *Ibid.*, 5.

⁴² I have come to understand the importance of the “intangible” from Tushnet, *The NAACP’s Legal Strategy Against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina Press, 1986). However, the idea of intangibles shifted from the higher education cases discussed by Tushnet, which treated matters such as a law school’s reputation and the intellectual value of dialogue with other talented students as the relevant “intangibles,” to the psychological and sociological intangibles that came to the foreground in the consideration of elementary- and secondary-school segregation.

⁴³ William O. Douglas, “Memorandum for the File in re Segregation Cases,” May 17, 1954, William O. Douglas papers, Box 1149, file titled “Segregation Cases O[ctober] T[erm] 1953 – Segregation Cases No. 1, 2, 4, 8, 10,” Manuscript Division, LOC.

⁴⁴ Felix Frankfurter, informal memorandum to the other justices, with handwritten notation in upper right corner: “Written during the Summer 1952 and [reworked?] on September 26, 1952 by F.F.” Earl Warren papers, Box 571, “SUPREME COURT FILE – OPINIONS – CHIEF JUSTICE – O.T. 1953, File titled “SEGREGATION – STATE CASES,” LOC. Frankfurter circulated the draft questions with a prefatory note, in which he expressed the belief that they properly reflected the ambivalence of the Court — and in which he also revealed the ubiquity of psychological thinking in the Court in the middle 1950s by writing about pro-segregation thought in psychological terms: “I know not how others feel, but for me the crucial factor in the problem presented by these cases

The first two questions, revised slightly with input from the other justices, were:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
 - a. that future Congresses might, in the exercise of their power under [section] 5 of the Amendment, abolish such segregation, or
 - b. that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?⁴⁵

is psychological — the adjustment of men's minds and actions to the unfamiliar and the unpleasant. Time, in truth, is the ameliorative factor in the process of adjustment. It is therefore, in my mind, all to the good that the minds of those who are opposed to a change should accustom themselves to the idea of it long before they are confronted with it." Felix Frankfurter, Note accompanying Memorandum for Conference on the Segregation Cases, June, 1953, Felix Frankfurter papers, Harvard Law School, microfilm edition, held at the LOC, Series II, Reel #4, Position 00243.

⁴⁵ These queries may, as Mark Tushnet has suggested, have represented a genuine effort on Frankfurter's part to settle his mind by means of some dispositive historical evidence. Or perhaps, as Frankfurter himself later suggested, it was a play for time that he thought would allow for greater consensus both on and off the Court (of course, the delay did in fact lead to the unexpected resolution of the issue when Chief Justice Vinson died and Earl Warren was appointed to his place). Douglas copy, Felix Frankfurter, "Memorandum for the Conference, RE: The Segregation Cases," June 4, 1953, William O. Douglas papers, Box 1149, folder titled "SEGREGATION CASES O.T. 1953 – Segregation Cases No. 1, 2, 4, 8, 10," LOC; Original and subsequent drafts of the questions for reargument, Frankfurter Papers, Harvard Law School, microfilm edition, held at the LOC, Series II, Reel #4, Positions 00219-00242; Frankfurter, "Memorandum for the Conference . . ." June 4, 1953, copy, papers of Earl Warren, Box 571, "SUPREME COURT FILE – OPINIONS – CHIEF JUSTICE – O.T. 1953 – SEGREGATION – STATE CASES,"

These questions set in motion a flurry of historical research concerning the nineteenth-century meanings of the Reconstruction Amendments. The NAACP legal team pursued the most far-reaching and labor-intensive effort, engaging professional historians such as John Hope Franklin and C. Vann Woodward, devoting countless hours of research time by in-house and affiliated counsel, gathering data from allies throughout the United States, and drawing upon such help as was available from scholars of constitutional law, including especially Howard Jay Graham, then employed as a bibliographer at the Los Angeles County Law Library, and Alfred Kelly of Wayne State University. In the fall of 1953, the NAACP submitted a brief of over two hundred pages covering the questions the Court had posed, with an unsigned appendix by Graham that summarized his argument about the abolitionist roots of the Reconstruction Amendments.⁴⁶ Graham's appendix played a role in the brief for reargument that paralleled the

LOC; and final Court Order, including questions, quoted in NAACP Legal Defense and Educational Fund, Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, in the Supreme Court of the United States, October Term, 1953, No. 1 Oliver Brown, et al., Appellants, vs. Board of Education of Topeka, et al., Appellees, No. 2 Harry Briggs, Jr., et al., Appellants, vs. R.W. Elliott, et al., Appellees, No. 4 Dorothy E. Davis, et al., Appellants, vs. County School Board of Prince Edwards County, Appellees, No. 10 Francis B. Gebhart, et al., Petitioners, vs. Ethel Louise Belton, et al., Respondents. Appeals from the United States District Court for the District of Kansas, the Eastern District of South Carolina and the Eastern District of Virginia, and on Petition for a Writ of Certiorari to the Supreme Court of Delaware, respectively, 13.

⁴⁶ [Howard Jay Graham] "SUPPLEMENT: An Analysis of the Political, Social, and Legal Theories Underlying the Fourteenth Amendment," NAACP Legal Defense and Educational Fund, Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, in the Supreme Court of the United States, October Term, 1953, No. 1 Oliver Brown, et al., Appellants, vs. Board of Education of Topeka, et al., Appellees, No. 2 Harry Briggs, Jr., et al., Appellants, vs. R.W. Elliott, et al., Appellees, No. 4 Dorothy E. Davis, et al., Appellants, vs. County School Board of Prince Edwards County, Appellees, No. 10 Francis B. Gebhart, et al., Petitioners, vs. Ethel Louise Belton, et al., Respondents. Appeals from the United States District Court for the District of Kansas, the Eastern District of South Carolina and the Eastern District of Virginia, and on Petition for a Writ of Certiorari to the Supreme Court of Delaware, respectively, 199–235. Compare with Howard Jay Graham, "SCHOOL SEGREGATION CASES – APPENDIX TO APPELLANTS' BRIEFS The purpose and Meaning of Sections One and Five of the Fourteenth Amendment: The Historical Evidence Reexamined," n.d., NAACP papers, Group II, Box B 143, "Schools – Kansas – Topeka – Brown v. Board of Education (and other cases) – 2nd Reargument – Legal papers – 1954," LOC.

role of the statement signed by social and medical scientists in the original *Brown* brief. The authority of constitutional history — as practiced by an amateur scholar with an outsiderly, socio-legal orientation — here took the place of the authority of social psychology. (In the final *Brown* opinion of May, 1954, the authority would of course switch back from history to social and medical science.)

Lawyers within the U.S. Department of Justice, too, studied the record of the past and produced a gloss on the history and historiography of constitutional Reconstruction. The Justice Department authors (chiefly, the former Frankfurter clerk, Philip Elman) relied heavily upon Graham's and tenBroek's scholarship.⁴⁷ The legal advocates of the southern and border states engaged in their own historical investigations, to prove that the Reconstruction Congress did not contemplate racial integration in the public schools or a legislature that was empowered to take such sweeping action.⁴⁸ And the Supreme Court itself, specifically the chambers of Justice Felix Frankfurter, became a laboratory for the study of the constitutional past. Frankfurter assigned his clerk, Vincent McKusick, to gather historical evidence related to the segregation cases.⁴⁹ By September of 1952, Frankfurter had passed the assignment to McKusick's successor, Alexander Bickel. Bickel spent untold hours reading the *Congressional Globe* and other primary sources, as well as exploring the secondary material. As he was leaving the Court, he drafted a memorandum of over fifty pages on

⁴⁷ See discussion of Justice Department Brief in Kluger, *Simple Justice*, 650–652, and below.

⁴⁸ See discussion in Kluger, *Simple Justice*, 646–650.

⁴⁹ Letter from Vincent [McKusick], to Alexander Bickel, Esq., Washington, D.C., September 2, 1952, Felix Frankfurter papers, Harvard Law School, microfilm edition, LOC, Series II, Reel #4, at position 0329. "Dear Al: . . . [T]he chief thing that comes to my mind [that Frankfurter wanted] is his desire that you look into the 'sociological state of the art' in regard to segregation and its consequences. He had in mind that you should investigate whether in 1897 or whatever the date of the *Plessy v. Ferguson* case was, the literature showed that people realized the psychological and other subtle handicaps imposed by segregation. He also wanted you to make the same investigation in regard to the time of the *Gaines* case . . . As I remember Harlan's opinion . . . at least when the opinion is read in the light of our present knowledge, that he has some inkling of these intangible factors. Of course, Harlan's allusion to these factors does not mean that in 1897 they could be documented scientifically with the state of knowledge of that time."

the legislative history of the Fourteenth Amendment. Frankfurter invested countless effort in editing Bickel's work and summarizing it for his colleagues. He presented his main findings to the other justices while they were deliberating over the reargument, but Warren's opinion made little use of this evidence.⁵⁰ The dissertation or disquisition Bickel produced under Frankfurter's tutelage became grist for the younger man's scholarly career, but it was virtually useless in the Court's jurisprudence.⁵¹

ABOLITIONIST CONSTITUTIONALISM IN THE TWENTIETH-CENTURY COURT

The brief for the reargument of *Brown* by the NAACP utilized Graham's and tenBroek's conclusions about the abolitionist roots of constitutional thought. The NAACP lawyers encountered the same problems in answering the questions Frankfurter posed in 1953 that tenBroek and Graham had encountered when they began to research the legislative history of the Fourteenth Amendment in the 1940s: It was not at all clear that members of Congress or state legislatures who approved the Amendment believed that it would integrate public schools. The "Framers" of the Reconstruction Constitution were not all champions of thorough-going integration; some simply never considered educational integration, and others were appalled at the idea of frequent social contact or intermarriage between whites and blacks. In addition to arguing, then, that the Congressional majority during Reconstruction intended the Fourteenth Amendment to create sweeping changes in African Americans' status in the direction of complete equality, Marshall and his team drew upon tenBroek's and Graham's writing to argue that the mandate for the abolition of Jim Crow lay in the far-reaching equalitarian passions of the movement for the abolition of slavery — in the work of moralists, activists, propagandists, and politicians who began decades before the Civil War to give meaning to the phrases that were ultimately included in the Amendments.

⁵⁰ See details below.

⁵¹ Bickel, "Original Understanding"; *The Least Dangerous Branch* (New York: Bobbs-Merrill, 1962); and *Politics and the Warren Court* (New York: Harper and Row, 1965).

Part Two of the brief was the center of the NAACP's argument, and of the query the Court had posed. It contained the most new information, legal-historical data that had not been available to the Court when it deliberated over *Brown* the first time and that was directly germane to the question before it. In its first twenty-six pages, tenBroek's *Antislavery Origins of the Fourteenth Amendment* was the only piece of contemporary scholarship cited.⁵² Following Graham and tenBroek, the brief argued that "[t]he framers of the Fourteenth Amendment were men who came to the 39th Congress with a well-defined background of Abolitionist doctrine."⁵³ They were, it was claimed, enlightenment humanists inspired by the Declaration of Independence. The brief continued: "The first Section of the Fourteenth Amendment is the legal capstone of the revolutionary drive of the Abolitionists to reach the goal of true equality. It was in this spirit that they wrote the Fourteenth Amendment and it is in light of this revolutionary idealism that the questions propounded by this Court can best be answered."⁵⁴ In a section titled "The Framers of the Fourteenth Amendment," the NAACP argued, again following tenBroek's and Graham's research, that the Joint Committee of Fifteen that drafted the Fourteenth Amendment "was altogether under the domination of a group of Radical Republicans who were products of the great Abolitionist tradition."⁵⁵ In conclusion, according to Part Two of the brief, "[t]he Fourteenth Amendment," as drafted and approved, "was intended to write into the organic law of the United States the principle of absolute and complete equality in broad constitutional language."⁵⁶

The Justice Department's Supplemental Brief, too, drew upon tenBroek's and Graham's scholarship and the framework of their argument.⁵⁷

⁵² NAACP Brief for Reargument (1953), 67–93.

⁵³ Brief for Reargument, 68. The footnote here was to tenBroek, *Antislavery Origins*, 185–186.

⁵⁴ Brief for Reargument, 69. The passage also reads: "In their drive toward this goal, it may be that they thrust aside some then accepted notions of law and, indeed, that they attempted to give to the Declaration of Independence a substance which might have surprised its draftsmen. No matter, the crucial point is that their revolutionary drive was successful and that it was climaxed in the Amendment here under discussion."

⁵⁵ *Ibid.*, 93.

⁵⁶ *Ibid.*, 103. Note that this is a section heading.

⁵⁷ Herbert Brownell, Jr., Attorney General, J. Lee Rankin, Assistant Attorney General, and Philip Elman, Special Assistant to the Attorney General, "Supplemental Brief for the United States on Reargument," NAACP papers, Series II, Box B143, Folder 1,

The second section of the brief, immediately following the introduction, covered the “historical origins and background of the Fourteenth Amendment,” and included two subsections, the first of which was “[t]he anti-slavery origins of the reconstruction amendments.”⁵⁸ Rather than utilizing legislative history of the Fourteenth Amendment, narrowly understood, to grasp its framers’ original intentions, the Government echoed Graham and tenBroek in claiming that “the conception of the principles incorporated in the Constitution by the Reconstruction Amendments, and the line of their development and growth, are to be found in the long and bitter political and ideological conflict over slavery that preceded the Civil War. The abolitionists,” the brief claimed, citing tenBroek, Graham, and a small number of other scholars, “propounded a philosophy of equality expressed most frequently in terms derived from the Declaration of Independence, an equality which implied a duty of government to apply laws impartially to protect the ‘natural and fundamental’ rights of all persons, white and black alike.”⁵⁹

In the end, the Supreme Court made little use of the multiple mini-monographs on legislative, doctrinal, and social-movement history that were written to answer Frankfurter’s queries. Despite the historical research it received, or perhaps because of it, the Court created what is referred to today as the jurisprudence of the living Constitution. The internal debate over *Brown v. Board* also planted a seed that grew over decades, by means of the scholarship of former Frankfurter clerk Alexander Bickel, into what we call originalism. It virtually erased from memory the abolitionist, activist, socio-historical, and “hearthstone” approach to constitutional interpretation practiced by tenBroek and Graham — driving this fugitive mode of interpretation underground, from which it reemerged late in the

pp. X–XI, listed citations to Graham’s essays, “The Early Antislavery Backgrounds of the Fourteenth Amendment,” *Wisconsin Law Review* (May, 1950), 479–507, and “Extra-Judicial Rise of Due Process,” and multiple citations to tenBroek, *Antislavery Origins of the Fourteenth Amendment*. By comparison with the work of professional historians who were involved in the case, it cited C. Vann Woodward’s book, *Reunion and Reaction*, once, and John Hope Franklin not at all.

⁵⁸ Justice Department Supplemental Brief, I.

⁵⁹ *Ibid.*, 9–10. This statement was followed, pp. 10–11, by an extended quotation from tenBroek, *Antislavery Origins of the Fourteenth Amendment*.

twentieth century as an occasional academic practice but never as a mainstream judicial one.

It is easy to understand why the justices' deliberations were different after the reargument than they had been after the initial argument. Chief Justice Vinson died in September, 1953, and Warren replaced him. These events not only gave the Court a new personality at its helm but also changed the vote on segregation from 4–3–2 (as Douglas had it) to 5–2–2, a clear majority in favor of overturning *Plessy*.⁶⁰ It is also easy to imagine that the justices were disappointed by the historical evidence they received from the NAACP, the Justice Department, and the segregating states. I do not think that the argument Earl Warren ultimately chose to emphasize in the *Brown* opinion was *per se* stronger or more true than the one from abolitionist constitutionalism that he rejected. The Supreme Court ultimately based its judgment in *Brown* upon supposedly scientific data suggesting that African Americans emerging from Jim Crow were damaged, even disabled — data that raised immediate questions about whether integration would endanger the educational experiences of white students or the overall quality of schools. The apparent consensus among researchers about the negative effects of segregation on African-American children, which undergirded the scientific appendix to the first *Brown* brief, appears to have been a chimera; Daryl Scott has argued persuasively that the empirical record was thin, and that some of the limited evidence available indicated that children who left the segregated south for integrated northern school systems in which they were outnumbered had *worse* self-images and educational outcomes than the children in all-black schools.⁶¹ However, psychologists and sociologists appeared overwhelmingly to support the claims made in the scientific appendix.⁶² In place of large numbers

⁶⁰ Kluger, *Simple Justice*, 694–695, reports that Justice Jackson was seriously considering writing a concurrence, perhaps with Frankfurter's signature as well. Jackson had a heart attack and was hospitalized before he had the opportunity to draft anything.

⁶¹ Daryl Scott, *Contempt and Pity: Social Policy and the Image of the Damaged Black Psyche* (Chapel Hill: University of North Carolina Press, 1996), 123–124, and, generally, 93–136. Some of Scott's writing is heavy-handed; I do not find all of his claims or suggestions, such as the idea that Kenneth Clark "manipulat[ed images of damaged African Americans] to gain white sympathy" (96) persuasive.

⁶² Statement of Counsel, Appendix to Appellants' Briefs, "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement," in the Su-

of empirical studies supporting their arguments, the authors of that appendix introduced a poll of social scientists, who had not necessarily investigated the issues in question empirically but virtually all shared the NAACP's "opinion . . . concerning the probable effects of enforced segregation under conditions of equal facilities."⁶³ By contrast, in 1953, there was no consensus among professional historians, political scientists, or law professors about abolition, Reconstruction, or the Reconstruction Amendments. Nor was there a large body of scholars with elite credentials in these fields who could sign a brief in response to Frankfurter's historical queries — nor an overwhelming majority in those fields that would agree in a poll that the Constitution, as amended after the Civil War, demanded educational integration.

The historical arguments were rejected by their original champion, Justice Frankfurter, once it was clear that the Court would vote in favor of the NAACP plaintiffs. Frankfurter and Bickel were not interested in pursuing tenBroek's or Graham's "hearthstone" approach to constitutional history, and appear to have misunderstood the Californians' arguments somewhat. Moreover, Frankfurter bypassed the findings of the more conventional legislative history of the Fourteenth Amendment that Bickel wrote (at Frankfurter's insistence) because they went the wrong way; as tenBroek and Graham, and the NAACP LDEF, and the Justice Department lawyers, had realized earlier, Reconstruction-era Republicans did not necessarily support the social or educational mixing of blacks and whites.

Frankfurter had Bickel pursue a conventional but exhaustive legislative history, reading virtually everything printed in the *Congressional Globe* related to passage of the Fourteenth Amendment. However, Bickel did not consider primary documents from before the Civil War, or go beyond official sources. "Valid legislative history," he wrote, "is the study of what a legislative body was on notice of before it voted. Period."⁶⁴ However, Bickel

preme Court of the United States, October Term, 1952 – *Brown, et al., v. Board of Education*, NAACP papers, Box B138, Folder 10, LOC, no page: "The following statement was drafted and signed by some of the foremost authorities in sociology, anthropology, psychology and psychiatry who have worked in the area of American race relations. It represents a consensus of social scientists with respect to the issue presented in these appeals."

⁶³ "Social Science Statement," 10–11.

⁶⁴ Letter from Alexander Bickel to Felix Frankfurter, August 22, 1953, Frankfurter papers, Harvard Law School, Microfilm Edition, Held at the LOC, Series II, Reel #4, at position 00212.

and Frankfurter considered tenBroek and Graham's argument insofar as it impinged directly on the legislative history of the Amendment. "Abolition thought went far," Bickel's draft memorandum, as edited by Frankfurter, read, "but it does not conform to the facts to say that it actuated the majority which submitted the Fourteenth Amendment or that it was embodied in the measure."⁶⁵

There was a mismatch between Bickel's and Frankfurter's research method, a narrowly historical quest to divine the framers' original intentions, and their conclusions. Bickel argued privately to Frankfurter that it was "impossible to conclude that the 39th Congress intended that segregation be abolished; impossible also to conclude that they foresaw it might be, under the language they were adopting."⁶⁶ However, he ultimately claimed that the Fourteenth Amendment permitted jurists in the twentieth century to extend its reach in the service of racial equality well beyond what was explicitly endorsed by Congress or the state legislatures that ratified the Amendment.⁶⁷ He wrote: "[T]he legislative history leaves this Court free to remember that it is a *Constitution* it is construing. I think also that a charitable view of the sloppy draftsmen of the Fourteenth Amendment would ascribe to them the knowledge that it was a *Constitution* they were

⁶⁵ Alexander Bickel, "Legislative History of the Fourteenth Amendment," n.d., with edits by Felix Frankfurter, Frankfurter papers, Harvard Law School, Microfilm Edition, Held at the LOC, Series II, Reel #3, at positions 00979–00980. Bickel cited tenBroek's *Anti-Slavery Origins of the Fourteenth Amendment*. Bickel made much the same point in Bickel to Frankfurter, August 22, 1953, at position 212: Bickel to FF: "There was of course the uncompromising abolitionist tradition behind a number of men in the Congress: Sumner, and Stevens, too, and others. Abolitionist thought went far, but it does not conform to the facts to say that it was consciously embodied in the Fourteenth Amendment by the 39th Congress. Cf. tenBroek, *The Antislavery Origins of the Fourteenth Amendment*. Stevens didn't think it had been. And if anything is clear, it is clear (it was bitterly clear to Sumner) that the Amendment did not extend suffrage."

⁶⁶ Bickel to Frankfurter, August 22, 1953, at position 00213.

⁶⁷ *Ibid.*: The Congressional majority "pointed . . . in Section 1 of the Fourteenth Amendment to the general manner in which problems similar to those with which it was dealing should in future be solved. This I believe is the most that can be said, and it is supported it seems to me by the authority of this Court which has extended the solution of the Fourteenth Amendment to problems — notably jury service — which were as little in focus in 1866 as segregation, and concerning which an even better case can be made out to show that the 39th Congress affirmatively indicated that they were without the scope."

writing.”⁶⁸ Frankfurter summarized Bickel’s main finding in a note to his Brethren that circulated in December, 1953: Bickel’s work, he wrote, “indicates that the legislative history of the Amendment is, in a word, inconclusive, in the sense that the 39th Congress as an enacting body neither manifested that the Amendment outlawed segregation in the public schools or authorized legislation to that end, nor that it manifested the opposite.”⁶⁹ Having thus reached an originalist dead end, Frankfurter and Bickel made the leap into a living constitutionalism, arguing that the original meaning left wide scope for changes in the Amendment’s interpretation and application to new problems.

Earl Warren arrived at a ‘living’ interpretation of the Constitution with a lot less hand-wringing and historical research effort than Frankfurter and Bickel expended. His overwhelming interests were in maximizing the unanimity of the Court and in not inflaming southern segregationist opinion. It was his judgment call that relying upon a narrative of change in the available scientific evidence from 1896 to 1954 was a better route to those ends than rehearsing the record of the past — whether by means of what would have had to have been a careful reading of the legislative debates over the Fourteenth Amendment or (following the NAACP, Justice Department, tenBroek, and Graham) of a declaration of final victory for the radical abolitionists. Warren concluded before drafting the opinion, and without any apparent angst, that *Brown* could not “be decided on the basis of the intended scope of the Fourteenth Amendment because the evidence is inconclusive.” His turn away from history in this sense was one death knell for the tenBroek–Graham approach. Warren marched even more steadfastly away from that approach when he added: “The opinion

⁶⁸ Bickel to Frankfurter, at position 00214.

⁶⁹ [Douglas’s Copy of] F.F. [Felix Frankfurter], “Memorandum for the Conference,” December 3, 1953, Papers of William O. Douglas, Box 1149, File titled “SEGREGATION CASES O.T. 1953 — Segregation Cases No. 1, 2, 4, 8, 10,” LOC. Frankfurter argued in a separate memorandum on the legislative history that his labors convinced him that it was “reasonably clear what the majority in the 39th Congress did not have specifically in mind.” It was less clear exactly what that majority did have in mind. [Felix Frankfurter], “Prefatory Note to LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT,” n.d., from Earl Warren papers, Box 571, “EARL WARREN — SUPREME COURT FILE — OPINIONS — CHIEF JUSTICE — O.T. 1953,” Folder titled, “SEGREGATION — STATE CASES.”

should be *short*, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory. No section of the country and no segment of our population can justly place full responsibility on others. They must assume a measure of that responsibility themselves.”⁷⁰

Despite these warnings, there was language in the early drafts of the opinion that was destined to be left by the chief justice on the editing room floor. These drafts did not reprise the tenBroek–Graham argument, but they did include verbiage about racial subordination, history, and sharp divisions within the American body public. Warren’s clerk William W. Oliver, for example, signed a draft (perhaps based upon an earlier draft by Warren himself that did not survive in the archives⁷¹) that included this passage: “[T]he Court has been guided . . . by that which all men know in their hearts about segregated schools. Segregated schools exist for one reason — as an expression of the dominant group’s belief in the inferiority of the minority group. No equality of physical facilities can remove that implication.”⁷² The Oliver draft explained the Supreme Court’s choice not to utilize the historical evidence it had gathered by suggesting that the Fourteenth Amendment was poorly crafted (not an idea that would quiet southern segregationist complaints about the Court’s role in their lives), and by reminding readers about “[t]he four years of fratricidal warfare” that had created the conditions for its creation.⁷³ Oliver’s version of the opinion included one passage that Warren decided to keep, in support of the Court’s decision to disregard the historical evidence it had amassed. In a section on the changed role of education in the U.S. in the twentieth versus the nineteenth century, the Oliver draft read: “In approaching this

⁷⁰ Warren Memorandum, Draft II, May 5, 1954. Note that this is a second draft; the first no doubt preceded the Oliver and Pollock drafts, below.

⁷¹ Kluger, *Simple Justice*, 695, says that Earl Pollock himself remembered seeing a draft by Warren in April, 1954.

⁷² [William W. Oliver], DRAFT OPINION, *Brown v. Board*, Supreme Court of the United States, Nos. 1, 2, 4, 8 and 10 – October Term, 1953, Earl Warren papers, Box 571, Folder titled “SEGREGATION – STATE CASES,” LOC, 9. On Oliver, who taught for forty-one years at the University of Indiana Maurer School of Law, see <http://law.indiana.edu/support/special/chairs/oliver.shtml> [accessed November 3, 2012].

⁷³ Oliver Draft, 4. In another politically risky passage, Oliver reminded readers that the Fourteenth Amendment was endorsed only grudgingly by the states of the former Confederacy, which “were opposed to its letter and spirit” (4).

important question [of public primary and secondary education], we cannot turn back the clock to 1868 when the Amendment was adopted, or even to 1895 [sic], when *Plessy v. Ferguson*, supra, was decided.”⁷⁴

An early draft on which the chief justice’s other clerk, Earl E. Pollock, worked was closer to the tone and substance Warren ultimately chose for the *Brown* opinion. Pollock, too, included references to the “fratricidal warfare” and “[i]ntense emotion” that were the backdrop to drafting the Amendment, and of the absence of representatives of the former Confederate states from the Congress that passed it.⁷⁵ However, the Pollock draft bypassed the argument about abolitionist origins, and the Justice Department’s deployment of that argument in its brief. It included the suggestion that the Court “conclude, as did the Government [??], that the legislative history of the Amendment is inconclusive as far as the problem presented in these cases is concerned.”⁷⁶ He also included language that was similar to that in the final opinion regarding the social and psychological consequences of segregation. Pollock’s draft included the quotation from the Kansas court regarding the harms African Americans suffered under conditions of segregation, and the retardation of their education. “To separate them from others of similar age and qualifications solely because of their color,” the draft read, “puts the mark of inferiority not only upon their status in the community but also upon their young hearts and minds in a way that is unlikely ever to be erased.”⁷⁷

⁷⁴ Oliver Draft, 6.

⁷⁵ Note from E[arl] P[ollock] to Mr. Chief Justice, May 3, 1954, and, attached, Draft, May 7, 1954 (with edits in pencil), 3, Earl Warren papers, *ibid*.

⁷⁶ Pollock Draft, 3.

⁷⁷ Pollock Draft, 8 and [Pollock], handwritten draft, n.d., 8, in *ibid*. This language was added originally in the margin of the hand-written draft, perhaps indicating that it was added by Warren. Thinking in disability terms, the language here about students’ “qualifications” seems to suggest that educational segregation on the basis of intellectual ability or disability would be acceptable. This issue would re-emerge in consideration of the implementation decree in *Brown II*, and in the local integration battles that followed. Note that the social-science brief in *Brown I* (first argument) made reference to the issue of segregation on the basis of intellectual ability, and argued that this might be damaging to young people in much the same way that segregation on the basis of race was damaging to them. The metaphor of “hearts and minds” was popularized by the British in the Malayan war of 1948–60. That language, too, seems to resonate in a disability register: it suggests that social circumstances can imprint upon people and change their psychological make-up.

In the final drafting of the *Brown* opinion, Warren and the other justices removed even more the history that gave rise to the Reconstruction Amendments and suggestions that white southerners did anything illegal or wrong. They relied ever more on the “modern authority” of Kenneth and Mamie Clark’s doll studies and the fortress of apparent consensus among elite social scientists. They overturned *Plessy* without really imputing fallibility, or bad motives, to their predecessors on the Court, and without calling into question (as an abolitionist constitutionalism that asserted a true meaning for the Fourteenth Amendment that had been abrogated by appellate courts in the nineteenth century would have) decades of constitutional doctrine.⁷⁸

Most of this change was accomplished by the time Chief Justice Warren completed his edits of the extant drafts on May 4. Warren removed the language about “fratricidal warfare” and the contentious, perhaps hasty, historical process that produced the Fourteenth Amendment. He substituted phrases that were close to the bland language that appears in the final opinion: “The historical evidence brought to the Court on reargument of *Brown*,” he wrote, “and our own investigation convince us that these sources cast little light on the problem with which we are faced. At best, they are inconclusive.”⁷⁹ Warren’s draft did not explore the pre-Civil War period or engage the suggestions that abolitionist politics caused the Civil War and the battles of Reconstruction, and provoked the passage of the Fourteenth Amendment. Focusing only on the postwar period, his draft reflected on the divisions within the 39th Congress and enacted a kind of blue-grey (or at least a moderate-radical) peace that mirrored the peace

⁷⁸ For Graham, and, on at least two occasions for Justice Black (and once for Douglas), such a fundamental rethinking of post-Civil War constitutional doctrine would allow for a rethinking of the modern doctrine of corporate personhood. See Black’s dissent in *Connecticut General Life Insurance Company v. Johnson* [303 U.S. 77] (1938), which cited Graham’s two articles against a “conspiracy theory” of a corporate Constitution as scholarly support for the argument that corporate personhood with Fourteenth Amendment protection was a product of simply erroneous nineteenth-century appellate doctrine. See also Douglas’s dissent (with Black’s concurrence) in *Wheeling Steel Corporation v. Glander* [337 U.S. 562, 576–581] (1949); and Graham, “An Innocent Abroad: The Constitutional Corporate ‘Person,’” reprinted as Chapter 9, *Everyman’s Constitution*, 382; and “The Early Antislavery Backgrounds of the Fourteenth Amendment,” reprinted as Chapter 4, *Everyman’s Constitution*, 158.

⁷⁹ Chief Justice Warren, Mark-up and Draft, May 4, 1954, 4–5.

for which he clearly hoped in the middle twentieth century: “The most avid proponents of the post-Civil War Amendments,” his draft read, “undoubtedly intended them to remove all distinctions among ‘all persons born or naturalized in the United States.’ Its opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect.”⁸⁰ He removed language in prior drafts to the effect that separate educational institutions had never, in fact, been equal. And he incorporated and elevated in importance the phrase from the Oliver draft about time: “In approaching this question, we cannot turn the clock [Warren crossed out the words “of education”] back to 1868 . . . or even to 1896.”⁸¹ Warren at first removed, and then re-added, the language about “hearts and minds,” and preserved the quotation from the Kansas court that claimed segregation had a “‘detrimental effect upon the colored children . . . [and] a tendency to retard the educational and mental development of negro children.’”⁸²

The final drafts completed the work of effacing the bitter historical and political antecedents to the Reconstruction Amendments and their interpretation by the courts. In an unsigned draft of May 7, someone, presumably Warren, removed the last remaining use of the phrase, “Civil War,” from the opinion.⁸³ In the draft that contained edits by the other justices, Justice Black was the only one who amended the opinion slightly in favor of the historical data, changing the passage about the data presented at reargument from “these sources cast little light on the problem with which we are faced” to “these sources cast *some* light *but not enough to resolve* the problem with which we are faced.”⁸⁴ On the side of effacement, Frankfurter and Justice Stanley Reed appear to have concurred in removing a paragraph on

⁸⁰ Ibid., 5–6.

⁸¹ Ibid., 6.

⁸² Ibid., 8–9.

⁸³ [Earl Warren], Draft with edits, May 7, 1954, 3, *ibid.*: “In the first cases in this Court construing the Fourteenth Amendment, decided shortly after ITS ADOPTION [someone has written this in pencil and crossed out the phrase “the Civil War”], the Court interpreted IT [crossed out: ‘the Amendment’] as proscribing all state-imposed discriminations against the Negro race.”

⁸⁴ Mark-up of the Brown Decision with Edits from the Justices, Earl Warren papers, 3, Box 571, EARL WARREN – SUPREME COURT FILE – OPINIONS – CHIEF JUSTICE – O[ctober] T[erm] 1953, Folder titled, “SEGREGATION – STATE CASES,” LOC.

state legislative review of the Fourteenth Amendment.⁸⁵ Justices Harold Burton and Tom Clark altered historical sections that contained hints of accusation toward the south: Burton amended a passage that had the education of African Americans “forbidden by law in most Southern States” to read that education of blacks was “forbidden by law in some States.”⁸⁶ Clark changed the passage that had education for African-American children having “received wide acceptance in the North,” to read that it “had advanced further in the North” than in the South.⁸⁷ None of the justices amended the passage averring that they could not “turn the clock back to 1868 . . . or even to 1896.” Endorsing the argument from social psychology, or, in Daryl Scott’s terms, “black damage” (or, in mine, disability), Frankfurter amended the claim that segregation “puts the mark of inferiority . . . upon their hearts and minds” to read instead that educational segregation “generates a *feeling* of inferiority . . . that *may affect* their hearts and minds.”⁸⁸ All of the justices let stand the reference to the Kansas court that found that segregation harmed “colored children” — but did not acknowledge the social science finding that white students under Jim Crow were susceptible to psychological harm and to becoming ‘ordinary Germans’ under authoritarian political rule.⁸⁹

Frankfurter and Bickel, and Warren and his clerks, bypassed the argument from abolitionist constitutionalism. They considered only the arguments the NAACP and Justice Department — and Bickel himself — made about the post-Civil War legislative history of the Fourteenth Amendment. Unsurprisingly, they arrived at the same conclusions tenBroek and Graham had reached in the late 1940s: the 39th Congress was no place to look for a consensus about integration by race into all sectors of American life. However, once Earl Warren became chief justice, there was no chance that the Supreme Court would rule on the basis of that troubling history to uphold

⁸⁵ Mark-up with Justices’ Edits, 3. The passage read: “The records of congressional and state legislative debates is not adequate for this purpose and in many of the State Legislatures ratification was accomplished with little or no formal discussion.”

⁸⁶ *Ibid.*, 4.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, 8.

⁸⁹ *Ibid.*

Plessy. Historical findings that could have been treated as conclusively opposed to integration were instead interpreted as “inconclusive” — and not just by Warren, but by the future tribune of opposition to counter-majoritarian judicial action, Alexander Bickel, and the standard bearer for judicial deference, Felix Frankfurter. In the final stages of crafting an opinion, Warren and the other justices edited ever more of the historical specificity from it, virtually disappearing the Civil War and suggesting that neither the promise of Reconstruction (1868) nor the depredations of the early Jim Crow era (1896) was relevant. As they left the historical content on the cutting room floor, they relied instead upon the argument from social science (black disability) to support their twentieth-century interpretation of the Fourteenth Amendment.

Why did this occur? Historians concur in thinking that Warren and others wanted the opinion to be non-accusatory and non-inflammatory — to maximize the Court’s unity and because white segregationists would, Warren no doubt believed, read the opinion carefully. But it is difficult to write honestly about the history of slavery, abolition, Reconstruction, and Jim Crow without being accusatory — including being accusatory toward some of the Republicans who formed the Congressional majority that approved the Fourteenth Amendment. Abolitionist constitutionalism was a stronger foundation upon which to build a modern, equalitarian understanding of the Fourteenth Amendment than was the legislative history offered by Bickel. But it recalled to mind more sharply the “fratricidal warfare” that eliminated the evil of slavery. TenBroek and Graham argued essentially that there were two irreconcilable factions in early nineteenth-century America. One of these factions was victorious in the Civil War and the other was defeated. The meaning of the Fourteenth Amendment was the meaning imputed to its terms by the winning side. There was little room in this picture of the past for the kind of blue-grey, moderate-radical temporizing that Warren ultimately wrote into the *Brown* opinion.

I place considerable stock as well in the state of scholarship in the middle 1950s. If the Supreme Court was going to take the risks that accompanied an abolitionist constitutional understanding of the past, then it would have wanted a strong scholarly consensus behind it. No such consensus existed at the time *Brown v. Board* was argued. The situation was different in terms of sociology and social psychology (if not also of the medical

sciences). Scholarly agreement appears to have been as persuasive to the Court as were the specific findings of the “doll studies” and other empirical data.

As an historian, I understand why Earl Warren and the other key actors in this drama did what they did. In 1954, the *Brown* opinion, which avoided so many potential political pitfalls, struck many as a work of genius.⁹⁰ At the same time, however, I am aware that much was lost in the Court’s unwillingness to turn back the clock to the nineteenth-century roots of the nationally defining issues that came before it in *Brown*. Of course, as we know now, the intellectual maneuvering of the opinion did not prevent bitter, “fratricidal” battles over school integration in the 1950s, 1960s, and 1970s. The suggestion that African Americans were intellectually and psychologically damaged came to haunt the Court in *Brown II* in the local implementation battles that followed — and set the stage for the limited forms of integration that ultimately occurred in many parts of the country. The doll studies came under persistent assault as a basis for the judgment. And the Court never said in a clear voice that the abrogation of Reconstruction was a legal or moral wrong.

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⁹⁰ In introductory notes to the reprinted version of an essay based upon his work for the NAACP, Graham noted the lack of overt reference to the historical data in the final opinion. However, he allied himself and his own scholarly method with the “living” one (although he did not use that word) that ran through Warren’s work. See Graham, Editorial Note, Chapter 6, *Everyman’s Constitution*, 269: “The *School Cases* were decided May 17, 1954, with scant reference to the historical rebriefings or to framer intent or original understanding. Rather, political and judicial ethics, social psychology — what the equal protection of the laws means, and must mean, in our time . . . these were the grounds and the essence of Chief Justice Warren’s opinion for a unanimous Court. *Affirmative* constitutional protection in short. *Affirmative equal* protection. Psychoanalysis of draftsmen and ratifiers, and obeisance to a dead past, can provide no Constitution for Everyman in this century. That is the argument here.”

HISTORICAL
DOCUMENTS

PRESERVING LEGAL HISTORY IN STATE TRIAL COURT RECORDS:

Institutional Opportunities and the Stanford Law School Library Collection

RACHAEL G. SAMBERG*

[County court] records show human hopes, strivings, speculations, and frolics: the successes and the failures. Researchers can observe the misdemeanors and the crimes, the full range of wrongs to person and property, and the offenses against the peace and dignity of the state. Pioneers become the human beings that they actually were — good, bad, and in-between. The circumstances — fortunate and unfortunate, in high places and low — under which they actually lived become real.¹

— W. N. Davis, Jr., Chief of Archives, California State Archives (1973)

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¹ W. N. Davis, Jr., *Research Uses of County Court Records, 1850–1879: And Incidental Glimpses of California Life and Society, Part I*, 52 CAL. HIST. Q. 241, 242 (1973).

INTRODUCTION

State trial court records illuminate a prism of life and legal history.² With voyeuristic precision, they chronicle the dissolution of business partnerships or marriages gone sour.³ When aggregated, they offer insights into matters of legal heritage — like the defense of slaves against criminal prosecution,⁴ the demography of adoptions and probate administration,⁵ or the evolution of terminology used to classify crimes.⁶ For all of their research value, however, collections of historical trial court records can be tricky to find.⁷ Limited records management budgets and chockablock storage facilities can leave county clerks few options but to discard files once statutory retention periods expire. This is actually sound records management, but it constrains historical research. Certain files (particularly pre-twentieth century records) may be transferred to official state archives, but these archives — whether by statute or custom — often focus on collecting only appellate-level materials. As a result, researchers seeking particular trial court files, or to develop data sets for empirical research, can face difficulties determining even where to start.⁸

² *Id.* See also, WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830* (1975) (using trial court records to trace common law development).

³ See, e.g., “Complaint,” *Glinka v. Wundsck*, No. 10472 (Alameda Super. Ct. Oct. 18, 1894) (business dispute); “Complaint for Maintenance,” *Heringer v. Heringer*, No. 10431 (Alameda Super. Ct. Oct. 3, 1894) (divorce). Both files are available in the Stanford Law School Library collection, described *infra*.

⁴ See, e.g., Jenni Parrish, *A Guide to American Legal History Methodology With an Example of Research in Progress*, 86 L. LIB. J. 105 (1994).

⁵ See, e.g., Jamil S. Zainaldin, *Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851*, 73 NW. U. L. REV. 1038 (1979) (using court records for tracing adoption social characteristics); Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. BALT. L. REV. 54 (1986) (probate demography).

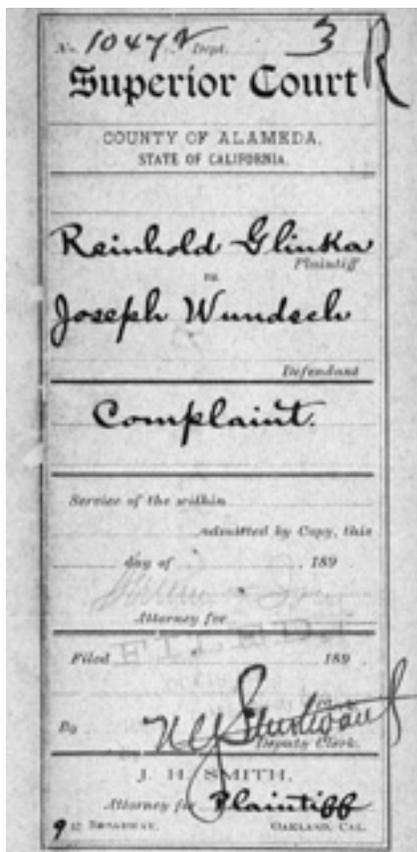
⁶ Davis, *supra* note 1, at 242–43 (explaining the crime of “cheating or swindling,” often applied to the theft of gold dust); Thomas R. Phillips, *Justice in the New State Capital*, 74 TEX. B. J. 195 (2012) (describing a crime for “marking an unmarked hog without the consent of the owner”).

⁷ See generally Rodd E. Cheit, *The Elusive Record: On Researching High-Profile 1980s Sexual Abuse Cases*, 28 JUST. SYS. J. 79 (2007) (addressing difficulty of finding and accessing state trial court documents).

⁸ See, e.g., David H. Flaherty, *The Use of Early American Court Records in Historical Research*, 69 L. LIB. J. 342, 344 (describing search “odyssey”).

Recognizing trial court records' research value and vulnerability, states have increasingly sought to protect them. Archives like those in Vermont and Utah have obtained grants to preserve such files *en masse*.⁹ In 2011, Texas overhauled its preservation laws when a task force reported that scores of county court files — including the trials of John Wesley Hardin and Bonnie and Clyde — were in jeopardy of deterioration or destruction.¹⁰ In 2012, a historian's inability to locate a nineteenth-century murder file led the Missouri secretary of state to establish a “Local Records Preservation Project” for organizing and preserving that state's trial records.¹¹

These preservation efforts suggest increased opportunities to use historical trial court records in scholarship. Yet, what are the mechanics of accessing the records? What conditions and rules shape their availability for research — particularly



⁹ See *Vermont State Archives Awarded Grant to Preserve Court Records*, VSARA'S QUARTERLY NEWSLETTER (August 2011), http://vermont-archives.org/publications/records/Fall2011/Fall2011_news_grant.html; see also *District Court Records*, UTAH DIVISION OF ARCHIVES AND RECORDS SERVICES (May 13, 2008), <http://archives.utah.gov/research/guides/courts-district.html> (last visited Oct. 5, 2012).

¹⁰ Bill Kroger, *A History of Texas in 21 State Court Records*, 74 TEX. BAR J. 190 (2012); Ken Wise, *The Trial of John Wesley Hardin*, 74 TEX. B. J. 202 (2012); James Holmes, *State of Texas v. Frank Hardy and the Bonnie and Clyde Murders*, 74 TEX. B. J. 214 (2012).

¹¹ Stephanie Claytor, *Truman Students Help Preserve County Court Records*, HEARTLAND CONNECTION (Apr. 18, 2012), <http://www.heartlandconnection.com/news/story.aspx?id=743744#UEUBSfIQmw> (last visited Oct. 5, 2012).

beyond the courthouse, as in local universities, museums, or libraries? And by what processes or means have such third-party institutions developed their trial court records collections? This article probes the underexplored mechanics of conducting research with historical state trial court files. First, it examines factors shaping record availability, then discusses interstate variations in applicable preservation rules. Next, it describes the evolution of institutions' right to collect California trial court files. Finally, it provides an overview of the Stanford Law School Library's collection, using a 1905 dispute between oyster barons to reveal the types of research questions inherent within nearly every file.

I. STATE TRIAL COURT RECORDS PRESERVATION ISSUES

For more than a century, court clerks have bemoaned the volume and condition of the files they oversee.¹² Their stories are eerily similar, and go something like this: Old records are piled floor to ceiling under leaky water pipes, or stacked against furnaces; they are left unorganized in musty basements where documents dampen and mold, or in sweltering attics where records grow brittle and crack.¹³ One 1912 Iowa court clerk described his records as having been filed in "pigeon holes," heaped among "boxes, maps, brooms, and sweepings left by the charwoman."¹⁴ As a result, he concluded that, "No investigator could work to advantage with the [court records] in their present condition. It would first require an archaeologist, in the sense of an excavator, to dig them out of the dirt they are in!"¹⁵

Retention standards for paper files certainly have changed in the past hundred years. Yet, even modern-day historians can wade fruitlessly through boxes at the courthouse, unable to obtain confirmation that the sought-after files still exist.¹⁶ Fault lies not with the clerks, but in the size of

¹² Edwin G. Surrency et al., *Legal History and Rare Books*, 59 L. LIB. J. 71, 73 (1966).

¹³ *Id.*; see also Texas Court Records Preservation Task Force, *Report on the Preservation of Historical Texas State Court Records* (hereinafter *Texas Report*), SUPREME COURT OF TEXAS, at 3, 30–31, 51 (Aug. 31, 2011), <http://www.supreme.courts.state.tx.us/crptf/docs/TaskForceReport.pdf> (last visited Oct. 5, 2012).

¹⁴ Surrency et al., *supra* note 12, at 73.

¹⁵ *Id.*

¹⁶ See also *Texas Report*, *supra* note 13, at 30–31.

the court systems, the volume of materials for which clerks are responsible, and the requirements governing what courts must retain — all of which are exacerbated by limited records management budgets and inadequate storage facilities.¹⁷

The records management burdens faced by state trial courts, however, are unique compared with those encountered in other courts in the United States. Federal court records are overseen by the National Archives and Records Administration (“NARA”), which establishes preservation policies for (among other federal entities) the district courts, Circuit Courts of Appeals, and the U.S. Supreme Court.¹⁸ NARA requires the eventual transference of many older files to federal records centers, or to NARA directly.¹⁹ Even state appellate court records can put less of a burden on originating courts: State-run archives, libraries, and universities may accept historical appellate and supreme court records.²⁰ These procedures alleviate some of the storage, care, and administrative burdens placed upon the

¹⁷ See, e.g. JUDICIAL COUNCIL OF CALIFORNIA, REPORT ON JUDICIAL COUNCIL-SPONSORED LEGISLATION: MODERNIZING TRIAL COURT RECORDS MANAGEMENT (AMEND GOV. CODE, §§ 68150 AND 68151) (ACTION REQUIRED) (hereinafter *California 2009 Report*), at 2 (Nov. 13, 2009), available at <http://www.courts.ca.gov/documents/121509item2.pdf> (describing records management strain); JUDICIAL COUNCIL OF CALIFORNIA, TRIAL COURT RECORDS MANUAL (hereinafter *TCRM*), at 2 (Jan. 1, 2011), available at <http://www.courts.ca.gov/documents/tcrm-v1final.pdf> (describing costly and cumbersome management). (Both last visited Oct. 5, 2012.)

¹⁸ See, e.g., *Court Records*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/CourtRecords.aspx> (last visited Oct. 5, 2012).

¹⁹ *Id.* See also, e.g., *Court Records: Records Schedule*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/CourtRecords/RecordsSchedule.aspx>; *Records Control Schedules: Judicial and Legislative*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, <http://www.archives.gov/records-mgmt/racs/schedules/index.html?dir=/judicial-and-legislative>; see also *National Archives Statement on Appraisal of U.S. District Court Records*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, <http://www.archives.gov/press/press-releases/2011/nr11-174.html> (explaining new retention standards for U.S. district court cases). (Each last visited Oct. 5, 2012.)

²⁰ See, e.g., *California Supreme and Appeals Court Records*, CALIFORNIA SECRETARY OF STATE, <http://www.sos.ca.gov/archives/collections/court.htm> (The California State Archives holds appellate and supreme court records, but not trial court files); *Id.* CT. ADMIN. R. 40 (“Appellate Court Records”), available at <http://www.isc.idaho.gov/rules/icar40.txt> (last visited Oct. 5, 2012) (providing for transfer of appellate records to the state law library and University of Idaho School of Law); S.C. CLERK OF CT. MANUAL R. 3.4.3 (archival records may be transferred to the South Carolina Department of

courts, themselves. By comparison, state trial courts have fewer routinized transfer options for old paper files — leaving counties to foot expensive off-site storage bills, or discard records once retention periods expire.²¹

In an effort to remove the onus from trial courts, in 2010 the California Judicial Council sponsored legislation to modernize trial court records management.²² The Legislature amended Government Code Sections 68150 and 68151 to enable and facilitate the electronic creation, maintenance, and preservation of trial court records.²³ The need for these reforms was overwhelming. Literally. A 2007 survey of California trial courts revealed annual storage costs of over \$1.8 million for trial court records — documents that required nearly 2,000,000 linear feet of storage space.²⁴ (Following voter approval of Proposition 220 in 1998, the trial courts of each of California's 58 counties, then consisting of both superior and municipal courts, were consolidated into a unified county superior court.) The new shift toward electronic trial court file creation and management will lessen storage and personnel pressures. It will also help prevent mass destruction of files in the event of natural disasters. Indeed, the near total loss of San Francisco Superior Court records in the wake of the 1906 earthquake is well documented, and its threat has been echoed by modern-day disasters like Hurricane Katrina.²⁵

Yet, while electronic filing and digitization will transform records management, paper trial court records remain important for legal research. Few California counties possess funds to digitize existing files or house them in climate-controlled facilities, leaving many case records

Archives and History); WIS. SUPR. CT. R. 72.04 (allowing transfer of court records to the Wisconsin Historical Society).

²¹ See, e.g., *California 2009 Report*, *supra* note 17, at 2 (describing on- and off-site storage costs).

²² See generally *California 2009 Report*, *supra* note 17. See also CAL. GOV'T. CODE §§ 68150, 68151 (West 2012).

²³ 2010 Cal. Stat. 690.

²⁴ *California 2009 Report*, *supra* note 17, at 2; see also Brian E. Hamilton, *Chapter 167: Taking Court Records Management from the Stone Age to the Digital Age*, 42 MC-GEORGE L. REV. 597 (2010).

²⁵ See, e.g., Richard C. Harrison, *A City Without Records*, 16 AM. LAW. 155 (1908) (describing loss of court records following 1906 earthquake); Hamilton, *id.* at 599 (documenting loss during Hurricane Katrina).

subject to on-site conditions (and pests).²⁶ Even if records are microfilmed or digitized before destruction, easy public access to resulting electronic versions remains a work in progress: No uniform system yet exists for electronically viewing all unsealed court documents (and indeed, many counties still require original filing in paper form).²⁷ Sometimes, paper copies remain the most accessible format.²⁸

II. INTERSTATE VARIATIONS IN PRESERVATION OPPORTUNITIES

The ongoing importance of paper records creates opportunities for cultural and educational institutions to help safeguard legal history. Universities, libraries, and museums may have space to house files that courts would otherwise destroy due to lack of adequate storage. Most states, however, do not permit private institutions to acquire trial court files, and limit records transfer only to state-run archives, libraries, or historical societies.²⁹ In some cases, state legislatures may not have intended this transfer prohibition; rather, they may not have been tuned in to the issue when drafting records provisions long ago, and simply failed to provide for it.

Sorting out which states permit institutional collection begins with understanding the psychedelic patchwork of rules governing trial records

²⁶ *California 2009 Report*, *supra* note 17; *see also Texas Report*, *supra* note 13, at 51 (pest exposure).

²⁷ *California 2009 Report*, *supra* note 17, at 5 (explaining that electronic public access is beyond scope of 2010 amendments); *TCRM*, *supra* note 17, at 2 (explaining future goal of digitizing all case file contents); *see also, e.g., SOLANO CTY. SUPER CT. R. 4.14*, available at <http://www.solano.courts.ca.gov/materials/Rule%204%20--%2007-01-2012.pdf> (prohibiting electronic filing); *cf. SANTA CLARA CTY. SUPER. CT. R. 15*, available at http://www.scsccourt.org/court_divisions/civil/civil_rules/civil_rule15.shtml (permitting electronic filing for civil cases designated as complex). (Both last visited Oct. 5, 2012.)

²⁸ Many historians also prefer original paper copies over digitized records.

²⁹ Telephone conversation with Bill Raftery, Court Research Analyst, National Center for State Courts (Sept. 5, 2012). *See also* Rachael G. Samberg, *Preservation Rules for Trial Court Records: Sample Survey of Ten States* (hereinafter *Ten-State Survey*), CALI (June 13, 2012), http://conference.cali.org/2012/sites/conference.cali.org/2012/files/slides/Preservation%20Rules%20for%20Trial%20Court%20Records_10-State%20Survey.pdf (last visited Oct. 5, 2012). In author's ten-state sample, at least six states did not permit transfer to unaffiliated institutions.

management.³⁰ A given state's preservation rules may be established through multiple sources, including combinations of state statutes,³¹ rules of court,³² the state supreme court,³³ and records retention schedules.³⁴ The retention schedules, themselves, can be set by a number of potential actors — such as state archivists or librarians, the secretary of state, a judicial council, or another statutorily-designated entity.³⁵ The schedules often split hairs by prescribing different conservation periods for various types of documents (e.g. pleadings vs. exhibits) and case matters (e.g. adoption vs. probate, or civil vs. criminal).³⁶

Though perhaps a rare mandate, some statutes require clerks to destroy files once retention periods have expired or the documents have been digitized or microfilmed.³⁷ In most states, destruction is optional, but statutes may obligate clerks to offer the files to state archives or libraries before

³⁰ See generally *Ten-State Survey, id.* (revealing range of authorities for retention and destruction rules).

³¹ See, e.g., OKLA. STAT. tit. 20, §§ 1005, 1005.1 (2012) (Oklahoma statutes setting forth disposal/destruction periods).

³² See, e.g., ID. CT. ADMIN. R. 37, 38 (Idaho court rules establishing retention schedules)

³³ See, e.g., VT. STAT. ANN. tit. 4, § 659 (West 2012) (statute assigning state supreme court the authority to issue administrative orders governing records preservation and destruction); 42 PA. CONS. STAT. § 4321 *et seq.* (2012) (Pennsylvania Supreme Court is responsible for promulgating retention schedules).

³⁴ See *Ten-State Survey, supra* note 29.

³⁵ See generally *id.* As examples of the varied entities that can create records schedules: California's Judicial Council establishes the records schedules, which it set forth in the Trial Court Records Manual. CAL. R. CT. 10.854 (directing the Administrative Office of the Courts to develop trial records management guidelines by creating a TCRM); *TCRM, supra* note 17. South Carolina has instead designated its Department of Archives and History to establish its records schedules. S.C. CODE ANN. §§ 30-1-10, 30-1-80 (2012). Pennsylvania has tasked the state supreme court with schedule-setting authority; the supreme court then delegated part of its authority to the County Records Committee, which in turn issued the County Records Manual. 201 PA. CONS. STAT. § 507 (2012); 201 PA. CODE. § 507(a) (2012).

³⁶ See, e.g., *TCRM, supra* note 17 (denoting separate retention periods based on both document and case type).

³⁷ See, e.g., UTAH JUDICIAL COUNCIL R. OF JUDICIAL ADMIN., at Appendix F (2012), available at http://www.utcourts.gov/resources/rules/ucja/append/f_retent/appf.htm (last visited Oct. 5, 2012) (paper documents “shall be destroyed” after the retention period expires or the file has been copied to microfilm).

destroying them.³⁸ Unfortunately, these statutes sometimes fail to address whether clerks can transfer files to *outside* institutions if the state-run entities decline them.³⁹ Complicating matters, each party involved in records management — whether the court, state archives, state historical society, or the like — may adhere to localized policies affecting the records' ultimate disposition.⁴⁰ This means, for example, that even if a statute requires destruction, the courts may not have actually discarded the files.

With this understanding of where to look for applicable rules and customs, one can begin piecing together which jurisdictions allow third-party collection. Unfortunately, the issue is not addressed in ready-made fifty-state surveys. This author's preliminary effort to compare participation rules suggests that, of the ten states sampled,⁴¹ three — California, Illinois, and Oklahoma — expressly allow non-state-affiliated participation for at least some categories of trial court records.⁴² It is still advisable, though, to contact state archivists and confirm local practices, irrespective of what rules purport to allow.⁴³

³⁸ See, e.g. ID. CT. ADMIN. R. 37, 38 (written notice to Idaho Historical Society prior to destruction of civil and criminal files).

³⁹ See generally *Ten-State Survey*, *supra* note 29.

⁴⁰ See, e.g., e-mail from Scott Reilly, archivist III, Vermont State Archives and Records Administration, to author (June 13, 2012, 11:42 PDT) (on file with author) (explaining that one must look beyond the face of statutes); telephone conversation with Jeffrey M. Kintop, state archivist, Nevada State Library and Archives (Sept. 4, 2012) (discussing local or *ad hoc* records management decisions); see also Cheit, *supra* note 7, at 93 (“local practice may not always follow” formal policies).

⁴¹ The Ten-State Survey reflects the author's attempt to reconcile retention and transfer rules. Analysis remains a work in progress, and results have not been verified by state judiciary representatives. The states sampled include: California, Georgia, Idaho, Illinois, Oklahoma, Pennsylvania, South Carolina, Utah, Vermont, and Wisconsin.

⁴² See CAL. GOV'T. C. § 68150 (West 2012) and CAL. R. CT. 10.856 (West 2012); 50 ILL. COMP. STAT 205/7, 50 ILL. COMP. STAT 205/4 (West 2012); OKLA. ST. tit. 20, § 1005.1 (West 2012). South Carolina's applicable rule on its face also appears to permit transfer of archival records; however, this is possible only upon “written permission of Court Administration and the South Carolina Department of Archives and History.” See S.C. JUDICIAL DEP'T, CLERK OF COURT MANUAL, R. 3.4.3. Because of these additional hurdles, the author did not treat South Carolina as a state that expressly allows transfer.

⁴³ For instance, the author found that Vermont Supreme Court Directive 16, which predates Vermont's statutory changes over the past decade, allows for transfer to any “organizations that may wish to preserve and maintain the records.” VT. JUDICIARY ADMIN. DIRECTIVE No. 16 (Oct. 1987), available at <http://vermontjudiciary.org/LC/Shared%20Documents/Administrative%20Directive%2016.pdf> (“Destruction of Supe-

III. INSTITUTIONAL PARTICIPATION IN PRESERVING CALIFORNIA TRIAL COURT RECORDS

Because the Stanford Law School Library's set of California trial court records was developed pursuant to state statutes, the evolution of California's collection rules is of particular interest. Just how did cultural or educational institutions acquire the right to collect California trial court records? To understand the right's development, it is first necessary to briefly explain what the right is *not* — by distinguishing it from another unique feature of California court records management: the historical records sampling program.

Since 1992, California superior courts have been required to preserve all pre-1911 court records and, if practicable, all from 1910 to 1950.⁴⁴ Of the latter, courts must retain at least 10 percent, plus a 2-percent subjective sampling — as explained both in the applicable rule of court and an associated Trial Court Records Manual (“TCRM”).⁴⁵ Additionally, on a schedule set forth in the TCRM, each year two California counties must permanently retain all paper records from that year.⁴⁶ The program does allow “suitable California archival facilities” (like museums, universities, and libraries) to house the historical samples, but these institutions serve merely as caretakers rather than transferees.⁴⁷ The historical sampling program, therefore, does not explain how institutions can collect files that otherwise would be destroyed.

rior Court Records”) (last visited Oct. 5, 2012). However, the authorizing statute delegating this destruction-setting authority to the supreme court prescribes transfer only to the “secretary of state, Vermont historical society, or the University of Vermont.” VT. STAT. ANN. tit. 4, § 659 (West 2012). In practice, there is no conflict between these two mandates, as transfer is now made solely to the Vermont State Archives and Records Administration. See e-mail from Scott Reilly, *supra* note 40.

⁴⁴ CAL. R. OF CT. 10.855. When the rule was implemented in 1992, it was originally numbered Rule of Court 243.5. See JUDICIAL COUNCIL OF CALIFORNIA, IMPROVEMENTS IN RECORDS MANAGEMENT SYSTEMS IN CALIFORNIA'S TRIAL AND APPELLATE COURTS — REPORT TO THE LEGISLATURE (hereinafter *Improvements in Records Management Report*) (July 1992).

⁴⁵ CAL. R. CT. 10.855; TCRM, *supra* note 17.

⁴⁶ *Id.*

⁴⁷ CAL. R. CT. 10.855 (i).

Instead, the right may be said to have evolved from changes to the California Government Code beginning in 1967. Prior to 1967, only a party to the case could intervene in a file's destruction by responding to the superior court's notice of intended destruction published in county newspapers.⁴⁸ In 1967, the addition of Government Code Section 69503.1 afforded the first non-party intercession right: Clerks were required to notify the California secretary of state sixty days prior to destruction of certain files.⁴⁹ In 1981, the Legislature expanded the range of transfer recipients to include city or county museums. These government-affiliated museums could acquire any non-sealed "civil, criminal or probate superior court case records" which were not pending appeal, and in which no materials had been filed for fifteen years.⁵⁰ Notably, the museum needed to provide written affirmation that it would maintain the records and make them available to the general public.⁵¹ Purging the records after receipt was not allowed.⁵²

The first statutory carve-out for collection by *non-government* or *non-state-affiliated* institutions arose in 1989. Government Code Sections 69503 and 65903.4 were repealed and reenacted to require notification of the following entities prior to record destruction: (1) the secretary of state; (2) any city or county museum in the county; (3) any law school in the state accredited by the State Bar of California; and (4) any university or college located in the State of California.⁵³ These entities could seek a court order granting records accession by submitting a transfer request within sixty days of the

⁴⁸ 1931 Cal. Stat. 1386 (adding Section 189 to the Code of Civil Procedure). Section 189 was the first California statutory right for a party to receive notice of and intervene in destruction of his or her own case file. *Id.*

⁴⁹ 1967 Cal. Stat. 1242. In the 1967 statute, criminal, probate, real property, and adoption matters were excluded from being subject to notice and transfer. *Id.* Note that, by that point, retention and destruction matters had been transferred from the Code of Civil Procedure to the Government Code. *See* 1951 Cal. Stat. 168.

⁵⁰ 1981 Cal. Stat. 4733.

⁵¹ *Id.*

⁵² *Id.*

⁵³ 1989 Cal. Stat. 4174; *see also Public Entities, Officers, and Employees; destruction of court records*, 21 PAC. L. J. 545 (1990) (summarizing new rules). Microforming was required prior to destruction, and parties retained the rights to receive the paper copy of their files. 1989 Cal. Stat. 4174.

clerk's mailed notice of intended destruction.⁵⁴ Unfortunately, just how this list of entities was decided upon remains a bit unclear. Research into this issue is not complete, but it is fair to say that little information has been published about why participation was expanded in this fashion.

Even if short on fanfare, California's legislature continued to expand third-party collection rights. In 1990, it added new entities to the notification list, including: (1) county archives (rather than just county museums) and (2) privately endowed libraries or research institutions that agreed to adhere to recognized archival practices.⁵⁵ Again, transfer of documents was strictly conditioned upon the institution's agreement to make the records publicly available during normal business hours.⁵⁶ In fact, the public access requirement was so strong under these revisions that it was actually a *misdemeanor* for recipient institutions to discard any transferred files without advising the court clerk of such intentions.⁵⁷

This stringency surrounding records collection was relaxed in 1994 with the addition of California Rule of Court 243.6, opening transfer opportunities to any entity upon court approval. Also gone was the imposition of a misdemeanor for non-compliance with transfer restrictions. Instead, the rule required simply that receiving entities "make the records reasonably available to all members of the public" and with reasonable copying fees.⁵⁸

Rule 243.6 came on the heels of Government Code amendments consolidating scattered records management provisions.⁵⁹ These amendments emanated from a 1992 Judicial Council report laying out the first iteration of the historical sampling program.⁶⁰ At the time the report was issued, the Judicial Council was still addressing document destruction (and

⁵⁴ 1989 Cal. Stat. 4174. Institutions could also opt out of notification under Section 69503.4(b). *Id.*

⁵⁵ 1990 Cal. Stat. 1479.

⁵⁶ *Id.* (§ 69503.4(c)(3)).

⁵⁷ *Id.* (§ 69503.4(e)).

⁵⁸ CAL. R. CT. 243.6 (West 1994) (renumbered Rule 6.756 Jan. 1, 2001; renumbered Rule 10.856 Jan. 1, 2007).

⁵⁹ Judicial Council of California, Administrative Office of the Courts, COURT NEWS (Dec. 1992–Jan. 1993), at 10; see also *Improvements in Records Management Report*, *supra* note 44, at 2–3 (describing Judicial Council Advisory Committee's plan to consolidate confusing and scattered records management provisions).

⁶⁰ *Improvements in Records Management Report*, *supra* note 44.

presumably transfer) policies.⁶¹ As such, the 1992 report does not explain the subsequent 1994 expansion of transfer rights to “any” entity with the creation of Rule 243.6. Research into this expansion is ongoing. In the meantime, evidence of Judicial Council intent may lie in their express consideration of “organizations such as California State University, the University of California, and others” to store records under the historical sampling program.⁶² This may suggest the Council was similarly contemplating expanding transfer rights for non-sample documents, too.

Over time, Rule of Court 243.6 has been revised and renumbered.⁶³ Under its current iteration as Rule 10.856, entities that have asked to be maintained on the Judicial Council’s master list, or that notify a superior court of their desire to receive notice, will be advised of proposed records destruction.⁶⁴ The Judicial Council has also created official forms to assist with the notice and transfer process.⁶⁵ In addition, the TCRM describes the Records Management Clearinghouse, created to assist historians and researchers with records management and access questions.⁶⁶ The Clearinghouse is just another example of California’s undertaking to support cultural and educational institutions in preserving legal history within the nation’s busiest court system.

IV. THE STANFORD LAW SCHOOL LIBRARY COLLECTION

Whether under the aforementioned rules, or through courts’ *ad hoc* records management decisions over time, various institutions have acquired excellent (and well indexed) collections of California trial court records. One of the most remarkable is The Huntington Library’s “Los Angeles Area

⁶¹ *Id.*, at IV-18.

⁶² *Id.* at IX-2.

⁶³ CAL. R. CT. 243.6 (West 1994) (renumbered Rule 6.756 Jan. 1, 2001; renumbered Rule 10.856 Jan. 1, 2007).

⁶⁴ CAL. R. CT. 10.856.

⁶⁵ *Id.* See JUDICIAL COUNCIL OF CALIFORNIA, REC-001(N), <http://www.courts.ca.gov/documents/rec001n.pdf> (last visited Oct. 5, 2012) (“Notice of Intent to Destroy . . .”); JUDICIAL COUNCIL OF CALIFORNIA, REC-001(R), <http://www.courts.ca.gov/documents/rec001r.pdf> (last visited Oct. 5, 2012) (“Request for Transfer . . .”).

⁶⁶ TCRM, *supra* note 17, at 45.

Court Records, 1850–1900” — consisting of 2,159 boxes and 295 bound volumes.⁶⁷ The Stanford Law School Library’s California Trial Court Records Collection (“CTCRC”) is a mere fraction of this size, more recent in origin and processing, but rich in history nonetheless.

The CTCRC developed through the collection efforts of Professor Lawrence M. Friedman who, for many years, has responded to superior courts’ notices of intended file destruction. In particular, he has collected San Bernardino County probate and guardianship documents (filed circa 1931–2000), which have been used for research into matters such as that county’s inheritance process as it existed in 1964.⁶⁸ The largest corpus of collected records originates from Alameda County (filed from 1895–1908), and includes a wide variety of civil matters such as contract violations, real property disputes, divorces, and insolvency petitions. These have been used for researching matters such as testamentary behavior in the late nineteenth century.⁶⁹ The most recent additions to the collection include 1935 Tuolumne County criminal records, and 1990s Sonoma County domestic violence files, currently being utilized for empirical research on restraining orders.

The collection totals approximately 100 bankers boxes,⁷⁰ each of which was assigned an internal control number. Files from each box were transferred intact into hanging folders, then placed into nineteen file cabinets reflecting 210 cubic feet of storage space. Roughly, cases are represented in the following quantities and types:

⁶⁷ See Bill Frank & Katrina Denman, *Finding Aid For Los Angeles Area Court Records, 1850–1899*, THE HUNTINGTON LIBRARY (Sept. 19, 2011), available at <http://hdl.huntington.org/cdm/compoundobject/collection/p15150coll1/id/1920/rec/6> (last visited Oct. 5, 2012) (identifying 2,159 boxes, 295 bound volumes); see also Peter L. Reich, *California Legal History Manuscripts in the Huntington Library: An Update*, 5 CAL. LEGAL HIST. 323, 326 (2010) (describing L.A. Area Court Records collection).

⁶⁸ See Lawrence M. Friedman et al., *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 Hous. L. REV. 1445, 1453 n. 35 (2007) (explaining acquisition of twelve boxes of probate records from San Bernardino County Superior Court).

⁶⁹ LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW*, at 141, 210 (2009).

⁷⁰ Not all the files arrived in boxes, and a few were bags of loose papers. Thus, the figure is approximate.

COUNTY	QUANTITY	NATURE OF MATTERS	YEARS FILED
Alameda County	49 boxes	Miscellaneous Civil; Divorce; Adoption	1895–1908
Imperial County	2 boxes	Probate	1967–1999
San Bernardino County	43 boxes	Probate; Guardianship; Conservatorship	1931–1989
Sonoma County	2 boxes	Domestic Violence	1991–2001
Sutter County	1 box	Probate	1953–1983
Tuolumne County	2 boxes	Criminal	1935

The library estimates there to be approximately 4,000 individual case files, but a detailed finding aid is in progress. The finding aid captures each file’s county of origin, case number, party names, year filed, and general nature of suit. Though recording the contents of each file is beyond the finding aid’s scope, the files examined thus far typically include documents such as complaints, summonses, pleadings, affidavits, notices, and judgments — collectively referred to as part of the “judgment rolls.”⁷¹

Each case file presents unique personal stories and legal issues. Some, for instance,⁷² implicate questions of civil procedure and race relations in 1890s’ Oakland. In *Continental Building & Loan Association v. R.L. Aitchison*, filed in Alameda County in 1894, a clerk’s attempt at personal service on a black defendant was sufficient when, among other things, the clerk inquired of all other “persons of color” in the clerk’s acquaintance — believing “that other persons of that race might know” the gentleman’s whereabouts.⁷³ Other files present opportunities for legislative research,

⁷¹ Davis, *supra* note 1, at 242 (explaining “judgment rolls”).

⁷² Additional discussion of particular case files may be found in the author’s presentation given at the 2012 CALI Conference for Law School Computing. See Rachael G. Samberg, *Collecting State Trial Court Files: How Law Schools and Libraries Can Teach and Preserve History (and Use Technology to Do It)*, CALI (Jun. 21, 2012), <http://conference.cali.org/2012/sessions/collecting-state-court-files-how-law-schools-and-libraries-can-preserve-history-and-use-tec> (last visited Oct. 5, 2012).

⁷³ “Affidavit of John M. Newbert,” *Cont’l Bldg. & Loan Ass’n v. Aitchison*, No. 10427 (Alameda Cty. Super. Ct. Oct. 5, 1894).

In the Superior Court
Of the _____ County of Alameda
State of California.

In the Matter of

Rudolf Bartsch
An Insolvent Debtor.

Voluntary Petition by Debtor.

To the Hon. the Superior Court of the _____ County of Alameda
State of California:

The Petition of Rudolf Bartsch

respectfully shows: That your petitioner has for six months next preceding the filing of this petition resided in the said County of Alameda, State of California, and is now residing therein; that he owes debts exceeding in amount the sum of Three Hundred Dollars: that he has, since the 1st day of January 1895, been engaged in the business of Art. Terra Cotta Works, at the said County of Alameda; that your petitioner is unable to pay his debts in full, and is an insolvent debtor within the true intent and meaning of the Act of the Legislature of California, entitled, "The Insolvent Act of Eighteen Hundred and Ninety-Five:" and he is willing to and does hereby surrender all his property and his estate and effects for the benefit of his creditors, in pursuance of the provisions of said Act: and your petitioner declares that he desires to be discharged from all his debts and liabilities, a true and complete list of which is herein set forth, according to law, in the Schedules hereto annexed, according to the best of his knowledge and belief.

Petitioner further states that he has annexed to this his said petition, and makes part thereof, the following Schedule and Inventory, and valuation of all his debts and liabilities, and of all his estate, both real and personal, as required by law, to wit:

such as 1896's *In the Matter of Rudolf Bartsch* — in which a potter's insolvency petition, filed under a newly-revised debtor statute, used certain forms referencing the statute's 1880 predecessor.⁷⁴ One can also observe

⁷⁴ 1895 Cal. Stat. 131 ("An act for the relief of insolvent debtors, for the protection of creditors, and for the punishment of fraudulent debtors"). As part of his petition, Bartsch identified in his estate twelve tons of clay, two pottery turntables, and 409 vases — all subject to an assignee's disposition. See "Voluntary Petition by Debtor, Schedule B 'Real and Personal Estate,'" *In re Rudolf Bartsch*, No. 12425 (Alameda Ct. Super. Ct. Apr. 1, 1896).

1 In the Superior Court of Alameda
 2 County, State of California.
 3
 4 Reinhold Glinka }
 5 }
 6 Joseph Wundsck }
 7 }
 8 The plaintiff complains of the
 9 defendant and alleges:-
 10 1st. That on the 1st day of September
 11 1894, at the City of Oakland, State of
 12 California, the plaintiff entered into
 13 partnership with defendant, in the
 14 business of manufacturing and
 15 selling of all kinds of tin ware
 16 and other goods usually kept
 17 and sold in a tinware store,
 18 which said business was to be conducted
 19 in the said City of Oakland,
 20 under the firm name and style
 21 of "The Oakland Tinware Factory"
 22 for the period of one year from
 23 said date.
 24 2nd. That in pursuance of said
 25 agreement plaintiff and defendant

the pace of civil proceedings, as in *Glinka v. Wundsck*, which recounts the formation of the Oakland Tinware Factory in September 1894, and the dispute between its founders just weeks later.⁷⁵ Glinka filed a complaint in October, and by early November, Wundsck had already filed a demurrer. The court appointed a receiver and the parties settled, but the suit did not

⁷⁵ "Complaint," *Glinka v. Wundsck*, No. 10472 (Alameda Cty. Super. Ct. Oct. 18, 1894).

resolve their ill will. Less than a year later, Glinka sued again, this time for defamation. He accused Wundsch of calling him “a robber, thief and a scoundrel,” and was awarded \$100 in damages.⁷⁶

Examining in detail the surrounding historical context and facts in even just one file — happened upon because of its intriguing party names in the finding aid — reveals the spectrum of questions ripe for research in Stanford’s CTCRC. For this examination, one is transported to the realm of the oyster barons of San Francisco Bay.

A TALE OF TWO OYSTER BARONS:

The Darbee and Immel Oyster and Land Co. v. The Smith Oyster Co., et al.

Following the gold rush, California’s legislature sought to improve the productivity of San Francisco’s burgeoning waterfront by encouraging the importation and cultivation of Atlantic oysters.⁷⁷ By the 1870s, oysters had become a ubiquitous staple food for working-class people of the Bay, and by 1888, sales of oysters in the region soared upwards of \$1.25 million annually.⁷⁸ Oyster farming was facilitated by California statutes like 1874’s “act to encourage the planting and cultivation of oysters”⁷⁹ (the “Oyster Act”). The Oyster Act afforded private parties a license to plant and grow oysters along state-owned shorelines.⁸⁰ Farmers were required simply to stake off and put signage around their beds, and register the boundaries of their farmed land.⁸¹ Cultivation was dangerous work, however. Jack London’s fictional accounts, like *The Cruise of the Dazzler*, provide vivid portraits of oyster “pirates” who, by cloak of night, pillaged oysters from

⁷⁶ See *Sued for Slander*, SAN FRANCISCO CHRONICLE, Oct. 13, 1895, at 23; *Oakland News Notes*, SAN FRANCISCO CHRONICLE, Jan. 16, 1896, at 11.

⁷⁷ Matthew M. Booker, *Oyster Growers and Oyster Pirates in San Francisco Bay*, 75 PACIFIC HISTORICAL REV. 63, 72–73 (2006).

⁷⁸ *Id.* at 76, 79.

⁷⁹ 1874 Cal. Stat. 940.

⁸⁰ See *Darbee & Immel Oyster & Land. Co. v. Pacific Oyster Co.*, 150 Cal. 392 (1907) (describing statute’s creation of a qualified license or leasehold, revocable at the will of the state).

⁸¹ *Id.*

No. 21,634 Dept. 2

In the Superior Court
of the
County of ALAMEDA.
State of California.

THE DARBEE AND IMMEL OYSTER
AND LAND CO., a corporation
Plaintiff
vs.
The SMITH OYSTER CO. a corpor-
ation, et al.,
Defendant

AFFIDAVIT OF L. W. SMITH.

Due service of within
Receipt of copy admitted this 2nd day of
April 1905

Attorney for
Filed Apr 21 1905
John P. Cook Clerk
By Charles Campbell Deputy Clerk
CAMPBELL, METSON & CAMPBELL,
Attorneys for Defendants,
ROOMS 115, 116, 117, 118, 119, 120, 121,
CROCKER BUILDING, SAN FRANCISCO, CAL.

No. 21034 Dept. 1.

SUPERIOR COURT
COUNTY OF ALAMEDA, STATE OF
CALIFORNIA.

THE DARBEE AND IMMEL OYSTER
AND LAND COMPANY, a corporation,
Plaintiff,
vs.
THE SMITH OYSTER COMPANY, a
corporation, et al.,
Defendants.

AFFIDAVIT OF
HANS MATHIESEN.

Filed Apr 26 1905.
John P. Cook
Clerk

Louis Goldstone,
Attorney for Plaintiff,
Crossley Bldg., Suite 487
S. F. Cal.

privately-cultivated beds.⁸² Given these threats to their livelihood, oyster farmers commonly built wharves with “oyster houses” to shelter watchmen and fend off intruders.⁸³

⁸² Booker, *supra* note 77, at 75; see also Charles Crawford, *Oyster Newest Giant of Fishing Industry*, L.A. TIMES, Apr. 7, 1958, at B13 (“Back in the days following the gold rush, in Jack London’s time . . . [t]here were oyster barons, oyster pirates and oyster fortunes [] made and lost . . . First Fish and Game regulations of California had to do with the protection of oyster beds from the famed oyster pirates and forbade trespassing on the oyster farms of San Francisco Bay.”)

⁸³ Booker, *supra* note 77, at 77; see also “Affidavit of L.W. Smith,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,643 (Alameda Cty. Super. Ct. Apr. 21,

1 In the Superior Court of the County of Alameda,
 2 State of California.
 3 -----
 4 The Darbee and Emmel Oyster
 5 and Land Company, a corporation,
 6 Plaintiff,
 7 vs. No. 21,634. Dept. 1.
 8 The Smith Oyster Company, a cor-
 9 poration, L. W. Smith, C. P. Overton,
 10 J. R. Baggett, John Doe, Richard Roe,
 11 William Red, Henry Blue, Thomas
 12 Green and George Yellow,
 13 Defendants.
 14 -----
 15 ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER.
 16 Upon reading and filing the Affidavit of F. C. HASEL,
 17 and upon motion of Louis Goldstone, Esq. Attorney for the
 18 Plaintiff herein; and good and sufficient cause appearing from
 19 the said affidavit and the verified Complaint herein on file,-
 20 It is Hereshy Ordered, - that the Defendants, L. W.
 21 Smith, C. P. Overton, J. R. Baggett, John Doe, and Richard Roe,
 22 and each of them, be and appear before me *S. P. Hall,*
 23 Judge of the Superior Court of the County of Alameda, State of
 24 California, on *Friday* the *21st* day of April, 1905,
 25 at the hour of 10 A. M. of said day, at the Court-room of
 26 Department No. *1* of said Court, in the Court-house, City of
 Oakland, County and State aforesaid,-then and there to show

With such lucrative (and life-threatening) matters on the line, disputes between rival farmers ended up in court. The Smith Oyster Company (“Smith”), for instance, filed several suits against competitors like the Darbee and Immel Oyster and Land Company (“Darbee & Immel”) and the Pacific Oyster Company (“Pacific”).⁸⁴ These suits sought injunctions

1905) (describing the dwelling houses that Smith Oyster Co. claimed to have built on its wharves).

⁸⁴ *The City in Brief: Oyster Companies Clash*, SAN FRANCISCO CHRONICLE, May 4, 1905, at 13.

to protect oyster beds from theft, and Smith employees from “threats of bodily injury.”⁸⁵ It is difficult to discern, however, just who the aggressors were, as allegations were lodged in all directions.⁸⁶

At least one of the challenger’s case files can be found in Stanford’s collection: *Darbee & Immel v. Smith*, Case No. 21,643, filed in 1905 in Alameda Superior Court. Invoking the authority of the Oyster Act, Darbee & Immel sought to restrain Smith from entering and removing oysters from Darbee & Immel’s farms.⁸⁷ The original complaint also requested \$25,000 in damages for “unlawful and forcible” destruction of wharves and stakes. Smith and its employees were accused of, “under armed menace,” sawing and chopping down Darbee & Immel’s signage, stakes, and structures, and physically threatening Darbee & Smith employees.⁸⁸

Smith petitioned for removal based on the amount in controversy being over \$2,000.⁸⁹ Following a temporary and “improvident” grant of removal, and after further hearing at Darbee & Immel’s request, the matter was ordered to remain in superior court — at least for the time being.⁹⁰ On April 7, 1905, the superior court issued a temporary restraining order and

⁸⁵ *Id.*

⁸⁶ Darbee & Immel and Pacific had several other frays in court. These are particularly intriguing, as Darbee and Immel were also on Pacific’s board of directors. In one lawsuit, Pacific stockholders accused Darbee and Immel of self-profiteering by binding Pacific to sell oysters to the Darbee & Immel Company at below market rate. See *Directors Accused by a Stockholder*, S.F. CHRONICLE, Feb. 11, 1904, at 16. In another dispute, Darbee & Immel asked for a partitioning to divide oyster farms between the companies. See *Darbee & Immel Oyster & Land Co. v. Pacific Oyster Co.*, 150 Cal. 392 (1907). The California Supreme Court affirmed the determination that Darbee & Immel had no grounds by which to seek partitioning: The farmed land was not held as an “estate of inheritance,” but rather a mere license under the Oyster Act. *Id.*

⁸⁷ “Summons,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,643 (Alameda Cty. Super. Ct. Feb. 10, 1905).

⁸⁸ “Affidavit of F.C. Immel, on Application for Injunction,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,643, at 4–5 (Alameda Cty. Super. Ct. Apr. 7, 1905).

⁸⁹ See “Petition for Removal of Cause,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,643, at 2 (Alameda Cty. Super. Ct. Feb. 10, 1905) (stating amount in controversy as one ground for removal).

⁹⁰ See “Order Denying Petition to Remove Cause to U.S. Circuit Court,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Feb. 24, 1905).

1 IN THE SUPERIOR COURT OF THE COUNTY OF ALAMEDA, STATE OF
 2 CALIFORNIA,
 3 -----
 4 The Darbee and Immel Oyster and
 Land Company, a corporation,
 5 Plaintiff,
 6 vs. No. 21634, Dept. 1,
 7 The Smith Oyster Company, a cor-
 8 poration, et al.,
 9 Defendants.
 10 -----
 11
 12 AFFIDAVIT OF HANS MATHIESEN.
 13 State of California, }
 14 City and County of San Francisco, } ss.
 15
 16
 17 HANS MATHIESEN being duly sworn, deposes and says:
 18 That ever since the year 1897, this affiant has been
 19 intimately familiar with the tracts of oyster land described
 20 in the plaintiff's complaint in the above entitled action,
 21 and also with other tracts immediately adjoining and in the
 22 neighborhood of the same, and that affiant's father, Peter
 23 Mathiesen, and affiant himself, the former in the early year
 24 1897 and affiant himself in the early part of the year 1898,
 25 filed locations upon portions of said land. That affiant,
 26 of his own knowledge, says that at the time of the filing of
 27 notices of location upon portions of said tracts of land by
 28 one L. W. Smith and for many years prior thereto, the said
 29 portions of said tracts described in plaintiff's complaint which
 were covered by said Smith filings had been, and were contin-
 uously, staked or fenced off and signs maintained and plainly
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they claimed years of prior property rights, and that Darbee & Immel were not continuously occupying the land.⁹² Numerous affiants (including third parties) countered Smith's assertions.⁹³ They averred that Smith's allegations were "actuated by the sole purpose and intent of forcibly jumping and seizing said oyster lands."⁹⁴

Over the year that followed, there was a dizzying series of additional attempts at removals and remands. Copies of federal court orders in the Alameda file suggest that Smith had the case removed again to the circuit court (i.e. the district court) for the Northern District of California.⁹⁵ However, Darbee & Immel were granted remand once more in April 1906.⁹⁶ Smith may not have been too troubled by these circuitous events: Unwilling to accept the superior court's jurisdiction under any circumstances, Smith had filed a concurrent action for quiet title in federal court soon after Darbee & Immel's original complaint.⁹⁷

With the case squarely back in Alameda, Darbee & Immel amended their complaint, upping claimed damages to \$50,000 for Smith's ongoing trespasses.⁹⁸ On September 17, 1906, Smith answered, asserting that the superior court could not grant the requested relief because of the quiet title action pending in district court.⁹⁹ Ultimately, the parties stipulated to

⁹² "Affidavit of L.W. Smith," *supra* note 83.

⁹³ See, e.g., "Affidavit of William Roberts," *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Apr. 24, 1905) (claiming more than ten years of prior occupation than Smith to the land); "Affidavit of Hans Mathiesen," *supra* note 91 (asserting that his father had been previous farmer of certain parts of the disputed tracts since 1887, and that Darbee & Immel began farming other portions before Smith).

⁹⁴ See "Affidavit of William Roberts," *supra* note 93.

⁹⁵ "Order Remanding the Cause to the Superior Court," *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 13718 (N.D. Cal. Apr. 24, 1905).

⁹⁶ See *Ruling in Oyster Case*, S.F. CHRONICLE, Apr. 17, 1906, at 13 (describing remand); "Certified Copy of Order Remanding Cause," No. 13718 (N.D. Cal. Apr. 17, 1906).

⁹⁷ See "Answer of Certain Defendants to Amended Complaint," *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Sept. 17, 1906) (explaining Smith's federal court case).

⁹⁸ "Amended Complaint," *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634, at 8 (Alameda Cty. Super. Ct. Jun. 11, 1906).

⁹⁹ See "Answer of Certain Defendants," *supra* note 97.

dismissal of the Alameda action in December 1906, possibly on account of Smith's federal petition.¹⁰⁰

This was not Darbee & Immel's last hurrah in court. Only weeks later, they were sued by their lawyer, Louis Goldstone, for failure to pay his legal fees.¹⁰¹ Goldstone's office address, stamped on the *Darbee & Immel v. Smith* filings, is also of historical interest: All documents until April 1906 reflect an office suite in the Crossley Building, which was reduced to rubble in the earthquake and resulting fires.¹⁰² With his old building in ruins, Goldstone moved shop farther west and, by June of 1906, operated from an address near Golden Gate Park.¹⁰³

While some procedural blanks in *Darbee & Immel v. Smith* are hard to fill in, the Alameda court records are pearls of history. They offer socio-cultural evidence of working-class life along the waterfront in early twentieth century San Francisco. For legal historians, the documents present thought-provoking questions of land use rights under the Oyster Act and common law; the sufficiency of evidentiary proof among competing affidavits; and, the labyrinthine process of successive removals and remands. Remarkably, such issues are identifiable in even one of the approximately four thousand files in the collection.

CONCLUSION

State legislatures are increasingly striving for better conservation of historical trial court records, whether in electronic or paper form. Private cultural and educational institutions may be uniquely positioned to alleviate

¹⁰⁰ *Id.* Darbee & Immel moved to dismiss the district court action on the grounds that the court lacked jurisdiction to quiet title for land Smith did not actually own. See *Smith Oyster Co. v. Darbee & Immel Oyster & Land Co.*, No. 13753, 149 F. 555 (N.D. Cal. 1906). The district court denied the motion, finding that ownership was not a prerequisite for quieting title in equity. *Id.*

¹⁰¹ *Oyster Companies are Sued*, S.F. CHRONICLE, Jan. 8, 1907, at 16.

¹⁰² See, e.g., "Notice," *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Mar. 11, 1905) (showing Goldstone's address of Crossley Building, San Francisco, Suite 427): Herman Davis, *Ruins of the Crossley Building. [New Montgomery Ave. and Jesse St.]*, CALISPHERE (1906), available at <http://content.cdlib.org/ark:/13030/hb687008tk/> (last visited Oct. 5, 2012).

¹⁰³ See, e.g., "Amended Complaint," *supra* note 98 (reflecting Goldstone's office address of 2207 Fulton St., San Francisco).

some of the historical records management burden on state trial courts. Museums, libraries, and universities may be able to house paper records that would otherwise be earmarked for destruction — thereby making legal history more accessible. Not all jurisdictions, however, permit private organizations to participate in collecting trial court records. Legislatures have an opportunity — as California has done — to streamline records destruction and transfer guidelines, and facilitate third-party opportunities to preserve our legal past. California's rules have enabled universities like Stanford to acquire small but unique trial court records collections that present interesting questions prime for further study.

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CALIFORNIA ASPECTS OF THE RISE AND FALL OF LEGAL LIBERALISM

UC Hastings College of the Law

INTRODUCTION:

Examining Legal Liberalism in California

REUEL SCHILLER*

Modern American liberalism is capacious, embodying a vast panoply of political beliefs and policy prescriptions. At its core, however, are two characteristics: a commitment to mildly redistributive economic policies within a capitalist economic system, and a belief in the value of cultural pluralism. These basic principles have manifested themselves through a variety of laws and legal institutions that developed in the United States since the 1930s. Redistributive principles have been fostered by programs such as Social Security, unemployment insurance, minimum wage laws, and laws supporting the right of workers to form unions. The commitment to cultural pluralism was most famously advanced by the United States Supreme Court in its decisions holding the various manifestations of racial discrimination unconstitutional. These cases were, of course, just the tip of the iceberg. In the years following the Second World War, legislative,

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judicial, and administrative actions promoted the rights of racial, religious and ethnic minorities, political dissenters, and women.

As the twentieth century progressed, these two strands of liberalism met with different fates. Liberalism's defense of cultural pluralism has grown more robust. The law now seeks to protect the rights of other formerly marginalized groups, including gays, lesbians, and the disabled. While debates over issues such as affirmative action and marriage equality indicate that pluralist beliefs are still contested, even the most cursory comparison between the rights afforded women and racial, religious, and ethnic minorities in 1945 and those afforded them at the end of the twentieth century demonstrates that, to use David Hollinger's evocative phrase, we have expanded "the circle of we."¹

Liberalism's attempt to promote economic egalitarianism, on the other hand, was considerably less successful. During the last third of the twentieth century, the various mechanisms that sought to further modest redistribution of wealth have been dismantled: taxation has become less progressive, social programs starved of resources or eliminated, the right of workers to join unions eviscerated, the regulatory state weakened by deregulation. The result has been a dramatic increase in income inequality within the United States.

The articles in this symposium examine the legal aspects of the rise and fall of liberalism. Each article explores a component of legal liberalism in California.² In some cases the story is one of the ascension and triumph of liberal legal principles. In other cases, the story is mixed, as legal liberalism falters in the face of hostile social and political forces, or struggles against its own internal contradictions. Whatever their differences, however, each article demonstrates that California legal history provides a rich source of material about the contours of twentieth-century American liberalism.

The first article, Jeremy Zeitlin's exploration of the demise of Sunday closing laws in California, shows that some of the earliest rumblings of cultural pluralism in the state were felt in the nineteenth century. Zeitlin begins his piece with a description of the California Supreme Court's

¹ David A. Hollinger, "How Wide the Circle of We? American Intellectuals and the Problem of Ethnos Since World War II," 98 *American Historical Review* 317 (1993).

² Laura Kalman coined the phrase "legal liberalism." See Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996).

surprising 1858 decision that held the state's Sunday closing law to be unconstitutional. Within three years the Court backed away from its initial hostility toward the law, upholding a newly-passed law by giving it a secular justification. The explicitly Christian rationale for the law evolved into a religiously neutral defense of the workingman's right to a day of rest. By the end of the century, however, Californians rejected this justification, viewing it as an unfair burden on religious minorities within the state, thereby incrementally increasing the rights of those minorities.

If Zeitlin's piece illustrates the pre-history of legal liberalism in California, Catherine Davidson's contribution to this symposium takes us into prime time: the years following World War II. She also introduces us to one of legal liberalism's most famous practitioners: California Supreme Court Justice Roger Traynor. Davidson chronicles the rise of no-fault divorce in California, locating its origins in the 1953 California Supreme Court case, *DeBurgh v. DeBurgh*. Traynor's opinion in *DeBurgh* abolished the doctrine of recrimination in California divorce law, thereby making it easier for women to leave failed marriages. Davidson places the *DeBurgh* opinion in the context of two of postwar liberalism's most salient features: women's entry into the work force and the rise of egalitarian feminist ideology. She also describes how Traynor made these changes in the law, while nevertheless adhering to the modest judicial role dictated by the principle of *stare decisis*. Traynor's genius, Davidson argues, was his ability to bring the law into harmony with the liberal sentiments of the age without asserting an excess of judicial power.

The next two articles in this symposium describe policy areas in which legal liberalism's successes have been more muted than those illustrated by Zeitlin and Davidson. David Willhoite places an ironic spin on one of legal liberalism's triumphs: the passage of California's Agricultural Labor Relations Act (ALRA). Passed in 1975, the ALRA guaranteed the right of California farm workers to form labor unions and required employers to bargain with such unions. The law, which stemmed from the economic and political organizing of Cesar Chavez's National Farm Workers Association, was one of the most pro-union laws in the country. Yet Willhoite demonstrates that channeling disputes between farm workers and agricultural employers into legal forums (as well as Chavez's increasingly erratic behavior) sapped the movement of the grassroots political activism that had sustained it. What

should have been a legislative milestone of legal liberalism had become, by the 1980s, a dead letter — unenforced and ineffective.

Elaine Kuo's examination of California environmental law reveals an outcome that, if not as dismal as the ALRA's, is at least ambiguous. Kuo demonstrates how the state's attempts to preserve its water resources and control its air pollution interacted with the equally powerful commitment to the automobile and to exploiting the state's water resources to promote development. Legal protection of the environment is another significant manifestation of legal liberalism, but, as Kuo demonstrates, countervailing economic and cultural impulses have blunted this facet of postwar liberal ideology. The irony of California's environmental legal history is the simultaneous urge to both preserve the state's resources and to exploit them.

The final piece in this symposium, Jennie Stephens-Romero's article on pregnancy discrimination and family medical leave laws, recounts another of legal liberalism's successes: the passage of state and federal laws that prohibited discrimination against pregnant women and that required employers to grant family medical leave to their employees. Stephens-Romero recounts the complicated interaction of state and federal law and politics that resulted in the passage of these laws. In doing so, she highlights divisions within postwar feminism. Egalitarian feminists believed that any law recognizing differences between men and women would undermine women's equality. Other women's rights advocates thought it was crucial for the law to recognize the specific needs of women, even if it meant giving them benefits, such as pregnancy leave, that men could not have. Stephens-Romero's article thus illustrates divisions within liberalism, focusing on its internal complexity and the effect this complexity had on the development of the law.

Taken together, these five articles demonstrate a range of approaches to studying legal liberalism. First, scholars can identify and describe the legal manifestations of liberalism, and explain how they came into being. Second, they can examine how social forces interacted with legal liberalism, imposing constraints on it and preventing the law from fulfilling liberalism's political desires. Finally, scholars can look at the conflicts within legal liberalism, exploring how different aspects of liberal ideology interacted with one another, shaping and limiting the law and legal institutions

that furthered liberal policy goals. As these articles reveal, the complex legal order of postwar California provides an excellent medium for studying the laws and legal institutions that have shaped contemporary society both in this state and nationally.

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EDITOR'S NOTE

Among the goals of the California Supreme Court Historical Society and its journal are to encourage the study of California legal history and give exposure to new research in the field. Publication of the following "Student Symposium" furthers both of these goals.

Professor Reuel Schiller, whose course offerings at UC Hastings include a seminar on American Legal History, devoted his spring 2012 course to "The Rise and Fall of Legal Liberalism." Professor Schiller — who is also a member of the journal's Editorial Board — graciously agreed to propose to his seminar students that they consider writing on California aspects of legal liberalism with the possibility that the most promising papers might be accepted by the journal. From those provided by Professor Schiller, I have selected the five that appear on the following pages as our first presentation of a Student Symposium in the field of legal history in California.¹

— SELMA MOIDEL SMITH

¹ The papers provided by Professor Schiller also included the one that appears here by Jeremy Zeitlin, which was written for Professor Joseph Grodin (another member of the journal's Editorial Board).

WHAT'S SUNDAY ALL ABOUT?

The Rise and Fall of California's Sunday Closing Law

JEREMY ZEITLIN*

One Sunday in April 1858, Morris Newman decided to keep his tailor shop, located at 100 J Street in Sacramento, open for business.¹ Soon after, Newman was arrested, tried, and convicted for violating the California law known as “An Act for the better observance of the Sabbath.”² Newman’s actions had been plainly illegal under this statute. By selling his wares on a Sunday, Newman had violated the law’s requirement “that no person shall, on the Christian Sabbath, or Sunday, keep open any store, warehouse, mechanic-shop, work-shop, banking-house, manufacturing establishment” or sell “any goods, wares, or merchandise on that day”³ As a result of this conviction the trial court imposed a fine of twenty-five

* Jeremy Zeitlin received his J.D. in May 2012 from UC Hastings College of the Law. He expresses his gratitude to Professor Joseph Grodin for both introducing him to the study of California legal history and for his guidance throughout this project. He would also like to thank Vincent Moyer and Professor Reuel Schiller for their generous help. As always the author sends his special love to his family.

¹ *Ex Parte Newman*, 9 Cal. 502, 504 (1858); WILLIAM M. KRAMER, *JEWISH-ACTIVIST LAWYERS OF PIONEER CALIFORNIA* 5 (1990).

² *Newman*, 9 Cal. at 503.

³ *Id.* at 519 (Field, J., dissenting).

dollars on Newman. When he failed to pay, the judge ordered Newman imprisoned for thirty-five days.⁴

Newman's desire to break California's Sunday closing law stemmed from his religious affiliation. As an observant Jew, Newman followed his faith's tradition and celebrated the Sabbath on Saturday.⁵ Because Newman's religion required him to refrain from work on Saturday, he chose to flaunt the Sunday closing law and keep his shop open on the day of rest demanded by the state.⁶

Newman emphasized this law's burden on his religious exercise when he subsequently challenged the constitutionality of the act before the California Supreme Court. In the case of *Ex Parte Newman*, he contended that the Sunday closing law conflicted with California Constitution article I, section 4's guarantee that individual rights to "the free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever allowed in the state."⁷

Ex Parte Newman was the first volley in the almost quarter-century-long debate over the state's Sunday closing law. This contest played out in both the legal and political realms of nineteenth-century California. Opponents of the law believed that the state was granting an impermissible benefit to a particular religious outlook when it declared all must rest on the traditional Christian Sabbath. Those in favor of the Sunday closing did not focus on the law's effect on religious exercise. These Californians considered the law to be a legitimate extension of the state's police power. In the nineteenth-century understanding of this doctrine, the police power conferred to the states included broad constitutional authority to regulate the people's health, welfare, and morals in order to promote the public good.⁸ Because the act's only actual prohibition was on the time period

⁴ *Id.* at 504.

⁵ KRAMER, *supra* note 1, at 5.

⁶ *Newman*, 9 Cal. at 504.

⁷ CAL CONST. art. I, § 4 (amended 1879). Newman also argued that a law totally banning business activity on any day of the week, even if devoid of religious effect, violated California Constitution article I, section 1's protection of property rights. *Newman*, 9 Cal. at 503.

⁸ See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 572-77 (1868).

Californians could work, supporters of the law characterized it as a simple labor regulation born from the state's traditionally broad police powers.

Ex Parte Newman rejected this police power rationale for the Sunday closing and instead held that the act violated article I, section 4's guarantee of individual religious rights.⁹ *Ex Parte Newman's* precedential value was, however, quite minimal.¹⁰ Three years later the California Supreme Court reversed course and found that the Sunday closing did not unconstitutionally interfere with religious rights. The Court now held that the law was "purely a civil regulation, and spends its whole force upon matters of civil economy."¹¹ Over the next two decades the California Supreme Court pushed questions of religious preference to the sideline as it repeatedly affirmed that the Sunday closing law was rooted in the state's police power.¹² By 1882 the judiciary's comfort with this interpretation was so complete that the California Supreme Court did not feel it necessary to discuss the law's effect on individual religious exercise when it again upheld the statute.¹³

Although California's judges had come to a consensus concerning this law, popular opinion of the ban on Sunday work was decidedly mixed. Indeed, the people of California never wholly adopted the Court's opinion of the Sunday closing law. While civil issues of labor regulation, public morals and temperance did seep into the people's understanding of the law, many Californians continued to view the prohibition on Sunday work as primarily concerning spiritual matters.

In the nineteenth century, the opinion of California's judges and of its people diverged. In decision after decision, the California Supreme Court sustained the Sunday closing law as a reflection of the state's police power to legislate for the general welfare. A conflicting view of the Sunday closing law held sway among the people. Throughout the second half of the

⁹ *Newman*, 9 Cal. at 506.

¹⁰ *Ex Parte Newman* appears to be the only instance in which a state supreme court struck down a Sunday closing law. Alan Raucher, *Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview*, 36 JOURNAL OF CHURCH AND STATE 13, 16 (1994).

¹¹ *Ex Parte Andrews*, 18 Cal. 678, 685 (1861).

¹² *Ex Parte Burke*, 59 Cal. 6, 19 (1881); *Ex Parte Koser*, 60 Cal. 177, 189 (1882).

¹³ *Koser*, 60 Cal. at 189.

nineteenth century the people of California clung to a belief that their state's Sunday closing law was inextricably tied to religion.

In the United States, laws banning Sunday work date back to the colonial era.¹⁴ In 1610 the Virginia Colony enacted a law commanding attendance at religious services on Sunday.¹⁵ Forty years later, the Plymouth Colony followed suit and passed a law forbidding its citizens to participate in servile work, unnecessary travels, and selling alcoholic beverages on Sunday.¹⁶ By the time of the Revolutionary War essentially all the colonies had a Sunday closing law.¹⁷ This trend continued after independence when the new states both adopted their own constitutions guaranteeing some form of religious freedom, and also passed statutes banning Sunday work.¹⁸

Throughout the states there were many challenges to the constitutionality of local Sunday closing laws.¹⁹ Each one of these failed.²⁰ Prior to

¹⁴ DAVID N. LABAND & DEBORAH HENDRY HEINBUCH, *BLUE LAWS: THE HISTORY, ECONOMICS, AND POLITICS OF SUNDAY-CLOSING LAWS* 29 (1987). The Sunday closing laws, like many aspects of Anglo-American culture, has biblical roots. "Remember the Sabbath day, to keep it holy. Six days shalt thou labor, and do all thy work: but the seventh day is the Sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: for in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore, the Lord blessed the Sabbath day, and hallowed it." Exodus 20: 8–11.

¹⁵ *Id.* at 29 (Virginia modeled this law after an English act passed by the twenty-ninth Parliament of Charles II).

¹⁶ *McGowan v. State of Md.*, 366 U.S. 420, 433 (1961).

¹⁷ LABAND, *supra* at note 34, 30–37.

¹⁸ Andrew King, *Sunday Law in the Nineteenth Century*, 64 ALB. L. REV. 675, 685 (2000). During the early republic era, the states repealed statutes providing for mandatory church attendance. Virginia acted first in 1776. Connecticut, however, had a statute requiring Sunday church attendance as late as 1838. Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 HARV. L. REV. 729, 746 (1960).

¹⁹ At this time, the substantive rights within the United States Constitution's Bill of Rights did not bind the actions of the state governments. *Barron v. Baltimore*, 32 U.S. 243, 247 (1833). Not until the 1947 case, *Everson v. Bd. of Education*, were the protections of religion within the First Amendment of the United States Constitution incorporated against the states. 330 U.S. 1, 16 (1947).

²⁰ Early nineteenth-century decisions defended Sunday closing laws as a legitimate means to encourage religious practice. In 1811, for example, New York's highest court stated that bans on Sunday work served to "consecrate the first day of the week, as

the California Supreme Court's decision in *Ex Parte Newman*, every state court that reviewed a Sunday closing law held that its prohibitions complied with constitutional protections of individual religious rights. In 1858, when the California Legislature took its turn and declared Sunday to be the state's official day of rest, contemporary constitutional jurisprudence provided a strong foundation for this law.

California enacted its Sunday closing law eight years after the state entered the union. In the preceding Gold Rush years the California electorate apparently lacked much interest in reserving Sunday as a day of rest. Rather, in these nascent days of statehood, "more business was done on Sunday than any other day of the week."²¹

For the more responsible of California's early white inhabitants, Sunday was the day to obtain provisions, wash and prepare for the next week in the mines. Others disposed of Sunday in a less productive manner. These Californians found the first day of the week to be an ideal time for watching a horse race or dog fight, drinking in the local saloon or "risking part or all the week's earnings against the luck and skill and percentage of the professional dealer of faro or monte."²² During the first decade of

holy time." *People v. Ruggles*, 8 New York (Johnson's) 290, 297 (1811). Similarly in 1817, the Pennsylvania Supreme Court held that the state's Sunday closing law did not violate constitutional protections of religion because, "the rights of conscience" were never "intended to shelter those persons, who, out of mere caprice, would directly oppose those laws, for the pleasure of showing their contempt and abhorrence of the religious opinions of the great mass of the citizens." *Commonwealth v. Wolf*, 3 Serg. & Rawle 48, 51 (1817). As the nineteenth century wore on, state supreme courts ceased to accept open endorsement of religious practice as an acceptable constitutional justification for the law. In 1843, North Carolina's renowned Chief Justice Edmund Ruffin declared that working on Sunday could not qualify as a common law nuisance because, "it is not so in the sense that an act contrary to the precepts of our Savior or of Christian morals, is, necessarily, indictable," as acts "against God and religion were left to the correction of conscience, or the religious authorities of the State." *State v. Williams*, 26 N.C. 400, 407 (1843). By 1848 the Pennsylvania Supreme Court had chosen to uphold a Sunday closing law as legislation that fulfilled non-religious needs for the "absolutely necessary" day of rest "at stated intervals, so that the mass of which the community is composed, may enjoy a respite from labour at the same time." *Specht v. Commonwealth*, 8 Pa. 312, 322 (1848).

²¹ *The Sunday Law: Address by Judge Nye Before the Home Protection Society*, THE MORNING CALL, Jan. 15, 1882.

²² Arnold Roth, *Sunday "Blue Laws" and the California State Supreme Court*, 55 SOUTHERN CALIFORNIA QUARTERLY 43, 43 (1973).

California's statehood many of its residents enthusiastically patronized businesses on Sunday, and took advantage of both the practical and licentious products for sale.

By 1858 California had changed. Most notably, diverse economic activity displaced bonanza mining as the primary way of making a living in the state. Soon, permanent communities, replete with women, children, and an array of businesses, replaced the mining camp as the center of California's communal life. As more established American social and business practices took hold in the state, support for enacting a venerable Sunday closing law surged.²³

In 1855 California's legislature took a preliminary step toward meeting the "propelling force that has been moving California forward in its march on moral advancement" and declared that participating in noisy activities on Sunday was a nuisance violation.²⁴ This effort culminated in 1858 when the Legislature passed a law banning all Sunday business.²⁵

Many Californians would have been happy to voluntarily shut their shops on Sunday.²⁶ For the vast Christian majority of California, Sunday was the natural day of rest, and thus a law forbidding business during that time was of no great consequence. The specter of competition from their own less pious and Jewish counterparts left some in the majority hesitant to close up on their own accord. During the Assembly's debate over the law, an opponent of the proposed act pointed out that it "would act more for the protection of certain merchants of Santa Cruz and Santa Clara, who found their trade interfered with, because the Jew merchants saw fit to open their shops on a Sunday."²⁷

During this same legislative debate, all in the Assembly seemed to be aware that the Sunday closing law burdened those whose religion did not require resting on Sunday. In one such discussion Assembly Speaker William W. Stow declared that he had "no sympathy with the Jews," who were "a class

²³ *Id.* at 42 (In 1853 the Legislature received a number of petitions from Californians urging the passing of Sunday closing laws).

²⁴ *Roth*, at 44.

²⁵ *Newman*, 9 Cal. at 503.

²⁶ *Roth*, at 43.

²⁷ 13 OCCIDENT AND AM. JEWISH ADVOCATE 124 (1855) (excerpted in JEWISH VOICES OF THE CALIFORNIA GOLD RUSH: A DOCUMENTARY HISTORY, 1849–1880, 408 (Eva Fran Kahn ed., 2002)).

of people who only came here to make money, and leave as soon as they had effected their object.” In regard to the Sunday closing law, the Jewish preference for the Saturday Sabbath was irrelevant to Stowe as the Jews “ought to respect the laws and opinions of the majority.”²⁸

In 1858, popular support for a Sunday closing law reached its apex. That spring the Legislature passed “An Act for the better observance of the Sabbath,” so making it a crime for any Californian to “keep open any store, warehouse, mechanic-shop, work-shop, banking-house, manufacturing establishment” or sell “any goods, wares, or merchandise” on Sunday.²⁹ Sunday was now the state-mandated day of rest in California.

Almost immediately after the Sunday closing law passed, the California Supreme Court was given an opportunity to review this statute’s constitutionality. In *Ex Parte Newman* the Jewish shopkeeper convicted under the Sunday closing law contended that this act clashed with the California Constitution article I, section 4 guarantee of the individual right to practice religion free of government discrimination or preference.³⁰ From this case two conflicting perspectives on the constitutionality of the Sunday closing law emerged.

Justice David Terry’s majority decision took exception with California’s Sunday closing law from the start. Even the name of the very statute drew his ire. With a scorching tone, Terry disputed that any law entitled ‘An Act for the better observance of the Sabbath’” whose “prohibitions in the body of the act are confined to the ‘Christian Sabbath’” could be an acceptable exercise of the state’s normal police powers.³¹ Instead, Terry held that by requiring the closing of business on the Christian day of rest, the state preferred “the observance of a day held sacred by the followers of one faith, and entirely disregarded by all the other denominations within the State.”³²

²⁸ *Id.* Stow also argued the religious roots of Sunday closing laws. “The Bible lay at the foundation of our institutions, and its ordinances ought to be covered and adhered to in legislating for the state.”

²⁹ *Id.* at 519 (Field, J. dissenting).

³⁰ *Newman*, 9 Cal. at 503.

³¹ *Newman*, 9 Cal. at 504–5.

³² *Id.* at 505.

Ex Parte Newman held that article I, section 4's guarantee of "free exercise and enjoyment of religious profession and worship, without discrimination or preference" provided an absolute right for individual Californians to practice their religion free from interference from the state.³³ "When our liberties were acquired, . . . we deemed that we had attained not only toleration, but religious liberty in its largest sense — a complete separation between Church and State, and a perfect equality without distinction between all religious sects."³⁴ In Terry's opinion, the Sunday closing law violated this constitutional protection because it granted sanction to the Christian day of rest while denying this same benefit to Californians whose religions mandated a different time for the Sabbath.

Justice Field's dissent in *Ex Parte Newman* took a contrary view of the Sunday closing law. Field held that the statute was merely an exercise of the state's police power to regulate the health, safety and morals of the community. Consequently, Newman could not claim to be the victim of state-sanctioned religious discrimination. "The petitioner is an Israelite, engaged in the sale of clothing, and his complaint is, not that his religious profession or worship is interfered with, but that he is not permitted to dispose of his goods on Sunday." In Field's opinion, the law did not impinge on Newman's religious rights because this act only made it so "his secular business is closed on a day on which he does not think proper to rest."³⁵ The Sunday closing law's mandate of a universal day of rest on Sunday was thus, "only a rule of civil conduct . . . limiting its command to secular

³³ *Id.* at 508. Terry's promotion of individual rights over the Legislature's expression of the collective will did not confine itself to the realm of religion. *Ex Parte Newman* also held that even if devoid of religious elements, a Sunday closing law would still violate California Constitution article I, section 1's protections of individual property rights. For Terry, an individual's decision to "seek cessation from toil" was a matter of personal choice — not communal consensus as "the amount of rest which would be required by one-half of society may be widely disproportionate to that required by the other." The Sunday closing law annulled a person's ability to choose to engage in economic activity on a particular day of the week, leading Terry to find that the act "infringes upon the liberty of the citizen, by restraining his right to acquire property." This argument would again rear its head during the *Lochner* era of American law. Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 HASTINGS CONST. L.Q. 141, 153 (2004).

³⁴ *Newman*, 9 Cal. at 506.

³⁵ *Id.* at 519. (Field, J., dissenting).

pursuits,” and “as to the forms in which that profession or worship shall be exhibited, the law is silent.”³⁶ Because this act neither required nor prohibited any particular religious practice, Field found that the statute did not conflict with article I, section 4’s protection of individual religious rights.³⁷

In 1861 the California Legislature passed another Sunday closing law.³⁸ The newly resurrected law, known as “An Act for the Observance of the Sabbath,” mirrored the earlier iteration of this statute. This new version did, however, provide for a few exceptions allowing boarding houses, stables, and retail drugstores to stay open on Sunday. The law still mandated that most stores, saloons, and banks shut down on Sunday.³⁹

Soon after this act came into being, another San Francisco challenge made its way to the California Supreme Court. With the Court only three years earlier declaring the Sunday closing law to be unconstitutional, it would seem that this defendant could depend on the rule of *stare decisis* to liberate him from the clutches of the law. He would be sorely disappointed.

At this time the *Ex Parte Newman* Court, which had ventured out on uncharted legal grounds when it struck down the Sunday closing law in 1858, no longer existed. By 1861 Justices David Terry and Peter Burnett, the two members of the California Supreme Court who had found the Sunday closing law to be unconstitutional, had left the bench.⁴⁰ With two new members and Justice Field now serving as its leader, the newly constituted bench was eager to amend the ways of its predecessor.

This case, *Ex Parte Andrews*, marked a complete reversal of *Ex Parte Newman*. The Court’s unanimous decision held that the Sunday closing law was a legitimate extension of the state’s police power and accordingly

³⁶ *Id.* at 520.

³⁷ *Id.*

³⁸ *Ex Parte Andrews*, 18 Cal. 678, 678 (1861).

³⁹ *Id.*

⁴⁰ Justice Terry’s exit from the court was dramatic. In 1859 Terry became embroiled in a dispute with California’s United States Senator David Broderick and Terry challenged him to a duel. Although Terry had a few months left in his term on the Court, he resigned his seat and made himself busy with preparation to restore his honor. When Terry and Broderick met, the judge’s aim was superior to that of the senator’s. The shot Terry landed mortally wounded Broderick. PAUL KENS, *JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE* 86 (1997).

complied with all constitutional protections of religion. The decision expressed disdain for both the legal reasoning within, and even the mere presence of, *Ex Parte Newman*. Indeed, *Ex Parte Andrews* did not even mention the contrary precedent of *Ex Parte Newman* by name, instead only stating that “[t]hese sections were commented upon by the several Judges of this Court at the April term, 1858, when the law of that year upon this general subject was under review.”⁴¹ The California Supreme Court had broken away from its sister courts when it struck down the Sunday closing law in *Ex Parte Newman*. In *Ex Parte Andrews*, the state’s highest court returned California law to the fold.⁴²

The Court now held that California Constitution article I, section 4’s protections of religion did not conflict with California’s Sunday closing law because these protections only prohibited legislation “that invidiously discriminates in favor of or against any religious system.” The Sunday closing law fell within this constitutionally acceptable space because it “requires no man to profess or support any school or system of religious faith, or even to have any religion at all”⁴³ Accordingly, *Ex Parte Andrews* held the statute to be a proper manifestation of the state’s police power. “The operation of the act is secular, just as much as the business on which the act bears is secular; it enjoins nothing that is not secular, and it commands nothing that is religious”⁴⁴

In order to separate California law from Justice Terry’s legal principles, this curt, six-page decision ended by stating that the Court “did not deem it necessary to pursue the discussion” anymore as “the opinion of Mr. Justice Field in *Ex Parte Newman* . . . discusses the main question involved, and more fully expresses our views.”⁴⁵ The decision was clear. In *Ex Parte Andrews*, the California Supreme Court deemed the Sunday closing law to be a constitutionally permissible exercise of the state’s police power to

⁴¹ *Andrews*, 18 Cal. at 681.

⁴² *Id.* *Ex Parte Andrews* began its defense of California’s Sunday closing laws by reiterating the broad acceptance of Sunday closing laws in America. For the *Ex Parte Andrews* court, the constitutionality of Sunday closing laws was such a settled legal issue that “[p]robably such strong concurrence of opinion on one leading question affecting the general community, cannot be found in the history of American jurisprudence.”

⁴³ *Id.* at 684.

⁴⁴ *Id.* at 685.

⁴⁵ *Id.*

regulate the health, welfare, and morals of the community. It would continue doing so.⁴⁶

In the wake of *Ex Parte Andrews*, future challenges to the state's Sunday closing law also failed before California's highest court.⁴⁷ In an 1881 case, the California Supreme Court quickly disposed of a defendant's challenge claiming that the Sunday closing law violated his constitutionally protected religious rights.⁴⁸ This decision expanded on the precedent set forth in *Ex Parte Andrews* and declared that the Sunday closing law "was purely a secular, sanitary, or police regulation . . . in no manner influenced by sectarian or puritanical ideas."⁴⁹ Contrary to its earlier fickleness, the California Supreme Court did not again waver in its opinion of the Sunday closing. As the nineteenth century entered its last decades, settled California law dictated that the state's police power justified the ban on Sunday work.

One year later, in 1882, yet another defendant attempted to argue that California's Sunday closing law was unconstitutional. Here, the majority of

⁴⁶ *Ex Parte Andrews* also held that California Constitution article I, section 1's protection of individual property rights did not conflict with the Sunday closing law. This court held that the clause "did not deprive the Legislature of the power of prescribing the mode of acquisition, or of regulating the conduct and relations of the members of the society in respect to property rights." *Id.* at 682. A few months after the *Ex Parte Andrews* decision, the California Supreme Court rejected another challenge to the Sunday closing law in a brief one-page decision. *Ex Parte Bird*, 19 Cal. 130, 130 (1861).

⁴⁷ *Ex Parte Burke*, 59 Cal. at 19.

⁴⁸ *Id.* Since the 1861 decision in *Ex Parte Andrews*, the wording of California Constitution article I, section 4 had been slightly changed. During the 1879 constitutional convention the delegates revised the section so that the last phrase now read, "forever guaranteed in this state." CAL CONST. art. I § 4. (1879); David A. Carrillo, *California Constitutional Law: The Religion Clauses*, 45 U.S.F. L. REV. 689, 718–21 (2011) (providing a thorough history of the religion clauses in the California Constitution). *Ex Parte Burke* held that the slight differences in language did not affect the substantial protections afforded by article I, section 4, as the original and revised provision were "precisely same, *totidem verbis*." *Burke*, 59 Cal. at 13.

⁴⁹ *Burke*, 59 Cal. at 13–16. *Burke* also challenged the law under the new constitutional provision in article IV, section 25, which mandated that "the legislature shall pass no local or special laws." Impermissible special laws apply to one individual segment of the population rather than the whole community. *Burke* argued that the Sunday closing law's exceptions for business such as hotels and stables made this statute special legislation. The *Ex Parte Burke* court rejected this argument before reaching the merits of this issue by holding that the new constitutional ban on special legislation was prospective and thus could not reach the Sunday closing law passed in 1861. *Id.* at 8.

the California Supreme Court did not even consider it necessary to waste ink discussing the Sunday closing law's harmony with the state's police power or individual religious rights as "most of the questions arising in this case were passed on in *Ex Parte Andrews*."⁵⁰

On three separate occasions the California Supreme Court had affirmed the constitutionality of the Sunday closing law as a proper exercise of the state's police power. By 1882 judicial opinion concerning the Sunday closing law had settled. No longer could opponents of this statute make any plausible claim in court that the Sunday closing law abridged constitutional guarantees of individual religious practice.

San Francisco Police Chief Patrick Crowley had a frightfully full day ahead of him. On Sunday, March 19, 1882, San Francisco's leaders decided to resume rigorous prosecution of the state's Sunday closing law.⁵¹ San Francisco's efforts to enforce the statewide prohibition on Sunday work were somewhat novel. During its two decades of existence, the Sunday closing law did not always inspire local authorities to action. By 1882 it had become apparent that local authorities varied in their devotion to the Sunday closing law.

To be sure, some communities enforced the Sunday closing law with vigor. A report from Woodland in 1873 indicated that on Sunday "every saloon in town as well as every store (drug stores excepted), being closed . . . the streets presented a quiet and Christian like appearance and

⁵⁰ *Koser*, 60 Cal. 177, 189–90 (1882) In *Ex Parte Koser*, the Supreme Court also rejected the defendant's claim that the Sunday closing law was special legislation. *Koser* actually did have some reason to believe that the Court would strike down the law on this ground because it had recently found a regulation banning the opening of bakeries on Sunday to be an impermissible special law. *Ex Parte Westerfield*, 55 Cal. 550, 551 (1880). Here, the appeal to the constitutional prohibition on special legislation did not sway the California Supreme Court. *Ex Parte Koser* held that these exemptions for certain lines of work and the corollary mandate that saloons, banks, and stores remain closed on Sunday was permissible because these two categories of business were different "in their essential features, as regards society and the health and comfort of those who constitute a community . . ." *Koser*, 60 Cal. at 190.

⁵¹ *The Sunday Law: Result of the First Day's Enforcement*, S.F. CHRONICLE, Mar. 21, 1882.

the churches were well filled.”⁵² Such strict observance to the law continued into the next decade around some parts of the state. In the spring of 1882, for example, the authorities in San Luis Obispo continued to demand “the closing of every business house” and issued a harsh warning that anyone conducting business on the Sabbath would be arrested and prosecuted.⁵³

Other communities paid little heed to the Sunday closing law. Reports from Bakersfield found that “no attempt has been made here to enforce the Sunday law since its constitutionality was affirmed by the Supreme Court.”⁵⁴ At the same time in the Calaveras County town of San Andreas both the people and the authorities demonstrated little appetite for enforcing the law. Dispatches from one Sunday in this town disclosed that all the saloons and restaurants continued to operate on Sundays as the local prosecutor had announced that the practice of continuing business on the first day of the week was “sanctioned by the community” and the law itself to be “regarded as a failure of the Supreme Court.”⁵⁵

Against a degree of public apathy, Chief Crowley had to attempt to enforce the state’s Sunday closing law in San Francisco. This mission, bestowed on Crowley by San Francisco Mayor Maurice Blake, was herculean. In the four decades since the Gold Rush, San Francisco had grown into California’s largest city, sporting a population of approximately 234,000.⁵⁶ San Francisco’s size did not erase its rugged edge.⁵⁷ At this time, 2,000 saloons dotted the city’s streets, providing one place of libation for every 117 men, women, and children within San Francisco.⁵⁸ It was the city’s many saloonkeepers who became one of the main targets of renewed efforts to enforce the Sunday closing law.⁵⁹

⁵² *The Sunday Law: Its Observance in Different Parts of the State*, S.F. CHRONICLE, Jan. 16, 1873.

⁵³ *The Issue of the Day: Saloon Keepers as a Rule, Bid Defiance to the Sunday Law*, THE MORNING CALL, Mar. 20, 1882.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ R. HAL WILLIAMS, *THE DEMOCRATIC PARTY AND CALIFORNIA POLITICS: 1880–1896* 4 (1973).

⁵⁷ Carl Nolte, *100 Years Ago: The Great Election of 1882*, S.F. CHRONICLE.

⁵⁸ *Id.*

⁵⁹ *The Issue of the Day*, *supra* note 53.

Chief Crowley met his responsibilities with zeal. After dividing San Francisco into multiple districts, he assigned parties of ten officers and one commander to gather evidence of any business operating on Sunday. The authorities devoted most of their time to inspecting the city's saloons, cigar shops, and groceries, and avoided citing small places of business such as fruit peddlers, and newsstands.⁶⁰ Even though they could not cover the entire city, their labors were fruitful. In one district, the police collected evidence of 114 places of business open on Sunday even before Crowley's men were able to investigate two thirds of the area.⁶¹

Sorting the mounds of evidence against San Francisco's mischievous businessmen nearly overwhelmed the city's prosecuting attorney.⁶² Crowley's sweep had yielded enough evidence to make out 800 viable arrest warrants. On the following Monday a flurry of activity swept through the local courthouse as the police and judges attempted to issue arrest warrants. One witness to the scene claimed that "[a]s fast as the warrants and complaints were filled out they were laid before the Judges for signing, the officers swearing to them in batches of fifty."⁶³ Even with this expedited process, the court was unable to finish issuing the warrants before nightfall, and as a result no arrests were made until the next day.⁶⁴

This attempt to enforce the Sunday closing law divided Californians. After hundreds of San Francisco businessmen eventually had received arrest warrants, doubts emerged about the feasibility of holding trials for the putative violators of the Sunday closing law. Contemporary predictions were pessimistic. One report surmised that because of "the prominence Sunday law cases have obtained, and the feeling that people have for and against the law" the courts would struggle to field a neutral jury in any Sunday closing prosecution. Due to the deep rifts in people's opinions of the law, this critic anticipated that the authorities would require initial jury pools "of at least one hundred persons" in order to eventually empanel

⁶⁰ *Id.* One contemporary report noted that the grocers of San Francisco's outskirts only complied with the Sunday closing law to the extent that they shut their front doors. *Id.*

⁶¹ *Over Five Hundred Warrants Issued for the Offenders*, THE MORNING CALL, Mar. 21, 1882.

⁶² *The Sunday Law*, *supra* note 51.

⁶³ *Over Five Hundred Warrants*, *supra* note 61.

⁶⁴ *Id.*

twelve “good and true” San Franciscans capable of hearing a Sunday closing case without bias.⁶⁵ As 1882 turned from spring to summer, the people of California had yet to collectively decide whether to support or oppose the state’s constitutionally valid Sunday closing law.

During the spring of 1882, both friends and foes of the Sunday closing law took measures to turn California’s public toward their side. A group known as the Ministerial Union took their ardent support for the Sunday closing law directly to the halls of power.⁶⁶ This group of Protestant leaders implored Mayor Blake of San Francisco to enforce the existing state ban on Sunday business. The Ministerial Union referred to the political clout of its members, assuring San Francisco’s authorities that it represented “a large, calm and determined constituency,” who “resolved to do what they may in every legitimate way to defeat the machinations of rebellion, and prevent such a triumph of conspiracy as would blast the good name of the city”⁶⁷

In San Francisco and the neighboring communities, opponents of the Sunday closing law also drew on their collective power. The League of Freedom, an association of saloonkeepers and other businessmen, supplied the primary organized opposition to the law.⁶⁸ The League employed multiple methods to resist the Sunday closing law. Operating as a mutual protection society, the League collected fees from its members and in exchange advocated against the Sunday closing law, represented its members in court, and made bond payments for those who had violated the law.⁶⁹

The fissures in Californians’ opinions of the Sunday closing law soon rose to the top of state politics. During the spring of 1882, both the Republicans and Democrats staked out positions on the Sunday closing law in advance of the upcoming fall election. The Republicans, who had carried

⁶⁵ *Id.*

⁶⁶ *Id.*; *About Sunday Law: The Questions Discussed by Ministers*, S.F. CHRONICLE, Aug. 19, 1890.

⁶⁷ *The Sunday Law*, *supra* note 51.

⁶⁸ *The Issue of the Day*, *supra* note 53. The League of Freedom’s strategy to bring about public opposition to the law was clever. Instead of calling for immediate abrogation, the League promoted “impartial enforcement of the law” and “the arrest of anyone and all that violated it” so that the “people would rise up *en masse* and call for its repeal.” *Id.*

⁶⁹ *Id.*

the governor's office four years earlier, threw their support behind sustaining the legal prohibition on Sunday work. Representatives from California's churches had advocated fiercely for the law and warned the politicians to "be careful of their platform in this direction" because "[a]ny yielding or temporizing on this and kindred subjects will be resented by the better class of our citizens, who, in all cases, are the power of the land."⁷⁰ Although the Republicans did not embrace the same pious language as the churchmen, they did endorse renewing the Sunday closing law.

In late August the Republicans convened their party convention. There they adopted a plank that recommended "preserving one day in seven as a day of rest from labor" if victorious at the polls.⁷¹ In their announcement to the electorate, the Republicans hewed closely to the police power reasoning utilized by the California Supreme Court. Like California's courts, the Republican Party portrayed the Sunday closing law as a non-religious means to promote the health and welfare of the people. "We are in favor of observing Sunday as a day of rest and recreation, and while we expressly disavow the right or the wish to place any class of citizens [under compulsion] to spend that day in a particular manner, we do favor the maintenance of the present Sunday laws, or similar laws, providing for the suspension of all unnecessary business on that day." Whatever their motivations for preserving the Sunday closing law may have been, Californians in favor of the ban now had a statewide political party to support them.

The Democrats took a contrary view of the Sunday closing law.⁷² Recent turmoil within this political party had left the Democrats ripe to oppose the Sunday closing law. After losing a considerable share of their

⁷⁰ WARREN L. JOHNS, DATELINE SUNDAY, U.S.A.: THE STORY OF THREE AND A HALF CENTURIES OF SUNDAY-LAW BATTLES IN AMERICA 90 (1967).

⁷¹ *Republican Convention*, S.F. EVENING BULLETIN, Aug. 31, 1882.

⁷² Within the Democratic Party, especially among those most influenced by Jacksonianism, opposition to Sunday closing laws had a long history. Jacksonian political thought was always vigilant to promote *laissez faire* policies, and thus saw Sunday closing laws as yet another pernicious instance of state interference with individuals' lives. As early as the late 1820s Democratic politicians, such as the orator Theophilus Fisk, were denouncing Sunday closing laws as the work "of a proud and aspiring priesthood, [possessed of] a determination to establish an Ecclesiastical Hierarchy, and to reduce us to a worse than Egyptian bondage." Theophilus Fisk, *Priestcraft Unmasked* (excerpted in Manuel Cachán, *Justice Stephen Field and "Free Soil, Free Labor Constitutionalism": Reconsidering Revisionism*, 20 LAW & HIST. REV. 541, 556 (2002)).

constituents to the Workingmen's Party in the previous decade, the Democrats were in need of resurgence by 1882.⁷³ One of the men who would bring the Democratic Party back to power was a San Francisco political leader known as Christopher "The Blind Boss" Buckley.⁷⁴

Buckley operated a political machine out of the Alhambra Saloon on the corner of Bush and Kearny Streets in San Francisco, and controlled Democratic politics with "a power bordering on absolute despotism."⁷⁵ Buckley expanded his political power by extending patronage networks into San Francisco's Italian, French, Jewish and German communities. Always in search of new avenues of power, Buckley even formed an alliance with a Chinatown boss known as Little Pete who affectionately referred to Buckley as the "the Blind White Devil."⁷⁶ Buckley, along with mining millionaire George Hearst formed a group representing the "anti-monopolist" wing of the California Democratic Party.⁷⁷ At the Democratic Party Convention in June 1882, the anti-monopolists won the nomination for the former Union general George Stoneman as the party's candidate for governor.⁷⁸ A few months later, Stoneman led the legislative push to end California's Sunday closing law.⁷⁹

⁷³ In the 1870s the Democrats had lost substantial support to Dennis Kearney's populist Workingmen's Party. The Workingmen appealed to mass rage against both the monopoly of the railroad and newly arrived Chinese immigrants. In the election of 1879, the Workingmen displayed themselves as a powerful political force in California. That year's election saw the Workingmen candidate win 28 percent of the gubernatorial vote, just behind the 30 percent claimed by the Democratic candidate and in shouting distance of the victorious Republican's 48 percent share. Although by 1880 internal disputes within the Workingmen's Party had stalled the party's political rise, many of its members joined the Democrats but continued to hold onto many of their ideals. WILLIAMS, *supra* note 56, at 19–20.

⁷⁴ Buckley was a fascinating character. After losing his eyesight during adulthood, Buckley took advantage of his other assets and was able to "marshal men and matters into a formidable phalanx with unnerving precision." His "illimitable and infallible" memory was reportedly so sharp that Buckley could recognize visitors by the grip of their handshakes. Nolte, *supra* note 57.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ WILLIAMS, *supra* note 56, at 21.

⁷⁸ *Id.* at 25–27.

⁷⁹ JOHNS, *supra* note 70, at 92–93.

At this same convention, the Democrats also resolved to officially oppose the Sunday closing law.⁸⁰ Chairing the committee considering the Sunday law was none other than former California Supreme Court Justice David Terry. Despite Terry's avowed opposition to the law, some Democrats feared opposing the law would rob them of the support of religious folk.⁸¹ Terry, however, condemned the law as "a religious holiday," which only represented a "parcel of nonsense put up by the judges."⁸² By a vote of eight-to-one at the convention, the Democrats committed themselves to repealing the Sunday closing law if the electorate so chose to empower them.

The result of the election of 1882 was clear. That November, Stoneman carried 55 percent of the gubernatorial vote while his fellow Democrats claimed the majority of seats in the Assembly and Senate.⁸³ Now ascendant in the politics of California, the Democrats quickly moved to repeal the Sunday closing law. In early 1883, Governor Stoneman called on the Legislature to end the Sunday closing law. Both houses complied, and soon California became the first state in the nation to entirely eliminate legal prohibitions on Sunday business.⁸⁴

At this time the California Supreme Court, following Field's dissent in *Ex Parte Newman*, had taken multiple occasions to affirm that the state's police power provided the lone legal justification for the Sunday closing law. By embracing this constitutional theory, the judiciary had largely excised the question of religious preference from legal debate over the Sunday law. This view did not, however, define the whole of the political sphere. When the people and politicians of California evaluated the Sunday closing law, the issue of the state's permissible interaction with religion again took the forefront.

⁸⁰ *Id.*

⁸¹ *Id.* at 91.

⁸² *Democratic Convention*, S.F. EVENING BULLETIN, Jun. 21, 1882.

⁸³ PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 26 (1997). (Stoneman won 44 of California's 52 counties and 23,500 more votes than the Republican candidate.)

⁸⁴ Alan Raucher, *Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview*, 36 JOURNAL OF CHURCH AND STATE 13, 18 (1994).

Ever since the Legislature first passed a Sunday closing law, public critics of the law complained that this state-sanctioned ban on work impermissibly interfered in their religious affairs. One 1866 article argued that the Sunday closing law conflicted in spirit with the state's existing religious diversity.⁸⁵ For this observer of San Francisco life, his community was "one of the most cosmopolitan cities in the world" where a "great liberality of thought and feeling prevails." Thus, the city welcomed "all religions and creeds and no-creeds, from the strictest form of Calvinism now in existence, to Spiritism, Atheism, and Materialism." Here, a wide variety of individual religious practices met "not only with toleration, but with tolerance, which is a much rarer phenomenon."⁸⁶ Upon this diverse population, bans on Sunday business seemed to be the work of puritanical forces, representing nothing less than "narrowness and bigotry, and petty tyranny, as were ever developed in Connecticut under the *regime* of the Blue Laws."⁸⁷

While this critic did not dispute the beneficial results of dedicating Sunday to rest and prayer, he disapproved of the state's enforcing such behavior. "The evil of all this is not apparent to that class of well-meaning persons who look no further than the *end in view* . . . a class incapable of understanding that the violation of the personal rights of the citizen as a free moral agent, upon the mere ground of compelling him to be virtuous against his inclination, is in its tendency subversive to all liberty."⁸⁸ This rebuke of California's Sunday closing law avoided delving into whether the law actually benefited the people's welfare. Rather, it condemned the law's mere attempt, be it beneficial or not, to interfere with Californians' religious choices.

In another tract against the Sunday closing law, a critic humorously contended that the true preferences of many San Franciscans lay outside of church services on the weekend. This writer argued that participating

⁸⁵ *Blue Law Legislation*, DAILY DRAMATIC CHRONICLE, Nov. 23, 1866.

⁸⁶ *Id.*

⁸⁷ *Id.* (emphasis in original).

⁸⁸ *Id.* (emphasis in original). Utilizing comparisons between Sunday closing and sumptuary laws, this writer warned that a government that maintained a Sunday closing law could, "on the same principle . . . legislate as to what people should eat and wear; make it a penal offense to eat mussels, on the ground they are indigestible; to smoke, because it injures the nerves; to wear corsets, because they produce disease and shorten life." *Id.*

in public recreation was the ideal way to spend a California Sunday. “It does them more good to go to Hayes Park, or the Cliff House, or Bay View, or to take a trip to Oakland, and enjoy themselves according to their tastes and inclinations than to go to church.”⁸⁹ In this tract’s opinion it was wrong for the state to push citizens toward religious observance and it asserted that there should be no Sunday closing law so that “the churchgoers enjoy the liberty of acting according to their own convictions and tastes; but let the theater-goer possess the same liberty.”⁹⁰

The declaration that emerged from the Democratic Convention in the spring of 1882 further demonstrates that much of the opposition to the Sunday closing law stemmed from a fear of state interference in religious affairs. This plank framed the Sunday closing law as wrongfully interfering with individual religious choice:

That the Democratic Party, inheriting the doctrine of Jefferson and Jackson, hereby declares its unqualified enmity to all sumptuary legislation, regarding all such exercise of the law-making power as against the just objects of free government, and that all laws intended to restrain or direct a free and full exercise by any citizen of his own religious and political opinion, so long as he leave others to enjoy their rights unmolested, are antidemocratic and hostile to the principles and traditions of the party, create unnecessary antagonism, cannot be enforced, and are a violation of the spirit of the republican government; and we will oppose the enactment of all such laws and demand the repeal of those now existing.”⁹¹

This plank plainly states that the Sunday closing law impinged on individual religious preferences and employed many of the arguments first stated by Justice Terry in *Ex Parte Newman*. The Democrats warned the public that the law would “restrain or direct a free and full exercise by any citizen of his own religious and political opinion.” The apparent truth that the Sunday closing law did not explicitly impel religious practice or criminalize spiritual belief mattered little. Even though the law permitted religious minorities “to enjoy their rights unmolested,” compelling those

⁸⁹ *The Sunday Law*, S.F. CHRONICLE, Mar. 6, 1867.

⁹⁰ *Id.*

⁹¹ *Democratic Convention*, S.F. EVENING BULLETIN, Aug. 31, 1882.

who lacked a spiritual compunction to rest on Sunday was still in “violation of the spirit of the republican government.” Terry and others of the same opinion had failed to convert the California Supreme Court to their belief that the Sunday closing law violated individual religious rights. In 1882 they brought their same case to the people.

After the Democrats' victory in the election of 1882, the newly elected governor quickly acted to repeal the Sunday closing law. Governor Stoneman's remarks to the Legislature show a preoccupation with the statute's effect on religious practice. Besides acknowledging that it was “unwise to cumber the statute books with an enactment which experience has proven cannot be enforced,” Stoneman proclaimed that the Legislature must repeal the law because “the right to worship free from hindrance or molestation should always be carefully guarded.”⁹² The paths of the people and courts had departed from each other. The judiciary had held the Sunday closing law to be a pure manifestation of the state's police power. The people, believing that the Sunday closing law negatively interfered with their own religious practice, declared the same law to be poor policy.⁹³

Political debates over the Sunday closing law did not only concern religion. Both opponents and proponents of the law marshaled a variety of arguments to promote their view of the law. For example, the League of Freedom's primary complaint focused upon the fact that the Sunday closing law detracted from their ability to profit financially from keeping their saloons open every day of the week. This economic distaste for the law was apparent when the League's leader denounced the prohibition of Sunday work as an “obnoxious and unpopular law” and swore they had “the whole

⁹² *Stoneman's Address*, S.F. EVENING BULLETIN, Jan. 10, 1883.

⁹³ Later attempts to pass Sunday closing laws also aroused the people's concerns over the state's granting religious preference. An 1883 *San Francisco Chronicle* article evaluated a proposed Massachusetts ban on Sunday railroad shipping and found that “[t]o Californians accustomed to nearly the full freedom of Continental cities, it seems strange that objections should be made to the running of railroads on Sundays” and that “to declare as a violation of the Sabbath the running of trains, the delivery of bread, milk, newspapers and other articles indispensable to the modern breakfast, is a relic of barbarianism which will soon find as few defenders as the Massachusetts legislation against witchcraft or the old Blue Laws of California.” *Sabbatarianism*, S.F. CHRONICLE, Dec. 27, 1883.

mercantile community, both wholesalers and retailers, to back them up” in this opposition.⁹⁴ Other critics of the Sunday closing law found this regulation to be undesirable because it was simply impractical. One editorial argued for repeal because it believed the authorities lacked the will to enforce it. “[S]uch laws are more than useless: they are absolutely mischievous and demoralizing in their tendency by engendering a disrespect for law in general. Whatever tends to disassociate the idea of law from an idea of justice in the popular mind is a public evil of the greatest magnitude.”⁹⁵ This opponent expressed little concern that the Sunday closing law could interfere with individual religious rights. It campaigned against continuing the legal restriction on Sunday work purely because this law was unpopular.

Those who supported the Sunday closing law contended that civil concern, falling under the province of the state’s police power, justified the act. During public debate over the law, these Californians provided many reasons why the electorate should back the statute as an act “founded on consideration of the public good . . . health and material prosperity.”⁹⁶ In many ways these arguments fit well into the template of police power legislation that the California Supreme Court had employed when it found the Sunday closing law to be constitutional.

Support for the Sunday closing law melded with larger efforts to promote temperance. The union of these two movements was natural, as saloons were one of the primary targets of the Sunday closing law. Many of those in favor of the Sunday closing law stressed how increasing access to the saloons, by allowing them to stay open on Sunday, imperiled California with the “ravage of the rum curse which is capturing the people every day.”⁹⁷ At a meeting of a pro-Sunday closing group known as the Home Protection Society, a speaker urged support for the law because the state needed to restrict the dangerous greed of the saloonkeeper who claimed the right “to open the gilded gates of hell even on a Sunday.”⁹⁸ While this

⁹⁴ *The Issue of the Day*, *supra* note 53.

⁹⁵ *Unpopular Laws*, S.F. CHRONICLE, Jun. 12, 1876.

⁹⁶ *The Issue of the Day*, *supra* note 53.

⁹⁷ *The Sunday Law: A New Batch of Arrests To-Day: Notes and Discussion*, S.F. CHRONICLE, Mar. 27, 1882.

⁹⁸ *Id.*

speaker's message utilized religious symbolism, his message expressed concern for the people's health rather than their souls.

Even some voices from California's churches specifically called for maintaining the Sunday closing law as a means to counteract the social harms of liquor. One San Francisco religious leader, for example, lamented that the consumption of liquor was the primary public evil in California. Saloons, said the Reverend Dile, "take more money than the Chinese, the Land League, fires, floods and crime and more that is required for orphans, paupers, railroads and war." To his congregation Dile bemoaned the saloonkeeper who continued to flaunt the law and, in a moment of retributive hyperbole, requested: "Oh! would to God we had General Jackson here to hang these rebels who openly avow the purpose to not abide by law of the land, and Ben Butler [a notoriously tough Union general] to close up the saloons at the point of the bayonet."⁹⁹ The link between Sunday closing and temperance was both strong and natural. Even when preaching to their congregations, California's ministers found it persuasive to promote the Sunday closing law as a means to protect society from the harms of liquor. Through appealing to a desire to rid the state of the harms of alcohol, proponents of the closing law offered the public a reason to support the law that did not touch upon religion.

Some California ministers also promoted the Sunday closing law as a means to improve working conditions. Reverend Simmons of St. Paul's Church in San Francisco urged his flock to support the Sunday closing law because "there are thousands of laboring men and women all over the state that have no control of their time having sold that to their employers for that upon which they and their families subsist."¹⁰⁰ Across the city at Grace Church, Reverend Needham similarly reasoned that the people should continue to support the act "not so much from a religious as from a sanitary point of view."¹⁰¹

Despite the use of civil rationales, proponents of the Sunday closing never entirely abandoned religious justifications for the Sunday closing law. A sermon given by Dr. Beckwith at the Third Congregational Church in San Francisco illustrates how some Californians, even as late as 1882, believed

⁹⁹ *The Issue of the Day*, *supra* note 53.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

the Sunday closing law's primary purpose was promoting religion.¹⁰² Beckwith urged the people to support the law because no one "has any right to come between me and my season of restful communion" and, "having inherited the Sabbath from God, we have a right to it just as God made it." This argument did not rely upon the state's broad police power to justify the law. Beckwith believed California should have a Sunday closing law because his religious beliefs dictated so.

Beckwith's religious defense of the Sunday closing law conflicted with the civil rationales offered by the judiciary and other public supporters of the law. Unlike them, Beckwith rejected that a Sunday closing law properly could serve as a regulation on working conditions. "Men do not need one day in seven for carousels and picnics. If the Sabbath is to be put in these uses it would be better for men's health and prosperity for all the seven days to be consumed by honest labor." For Beckwith, a week without a day of rest was preferable to devoting the Sabbath day to secular activities. "This perverted use by some, prevents its full enjoyment by those who treat it as a day of worship and rest." Instead "it would be better to drive toll through every day than to stop one day to give more time to run a wearier and swifter race of sin." Beckwith further avowed that it "would be false to God, to ourselves, to the Sabbath-breakers themselves, if we did not oppose the secularization of one day of rest." By offering religious rationales for the Sunday closing law, this supporter of the act opposed both those citizens who wished to keep Sunday open for business and the California courts that had declared the law to be a constitutional reflection of the state's broad police powers to legislate for the health, welfare, and morals of the people.

The aftermath of the Sunday closing law's repeal further demonstrates how far popular and judicial opinions had diverged. In 1893 a new statute was enacted that guaranteed each California employee one day of rest in seven.¹⁰³ Instead of mandating a statewide closure of businesses on Sunday, this new measure gave each employer the discretion to choose

¹⁰² *Id.* Beckwith also stated that there were civil rationales for sustaining the Sunday closing law. "We need it for our financial prosperity, our public morals, our social security, our intellectual culture, the perpetuity of our free government."

¹⁰³ JOHNS, *supra* note 70, at 176. The Assembly approved of this Act by a vote of 56–4, the Senate by a tally of 29–0.

the day of rest.¹⁰⁴ Californians treated this new legislation quite differently than the old Sunday closing law. One decade earlier the Legislature had enthusiastically repealed the Sunday closing law, despite strong arguments that its purpose was to promote the public welfare by ensuring that Sunday would be a day of rest for all. Now, once the law had been stripped of its association with Sunday, the Legislature did not hesitate to approve it. The same police power justifications that had failed to convince the California Supreme Court to uphold the Sunday closing law in 1858 carried the day once the specter of religious preference ceased to encumber the law.

SUMMARY

In *Ex Parte Newman* the California Supreme Court departed from contemporary constitutional notions of individual religious rights and declared the state's Sunday closing law to be unconstitutional. This novel legal perspective, however, failed to attain any lasting impact on California jurisprudence. Starting with Justice Field's dissent in *Ex Parte Newman*, the California Supreme Court continually held that this statute did not clash with constitutional protections of religious exercise. By 1882, the Sunday closing law enjoyed an unassailable legal foundation within the state's authority to regulate health, welfare, and morals through its police power.

The citizens of California held a contrary opinion of the Sunday closing law. While the need for labor regulation and temperance certainly had a place in the public's understanding of the law, questions of religious preference never abated. Indeed, during the election of 1882 the victorious opponents, and to some degree the defeated supporters of the Sunday closing law, relied on overtly religious arguments to convince the population to join their cause.

The legal justification, based on the state's police power, has endured.¹⁰⁵ By 1882 it had become settled California law that the prohibition on Sunday

¹⁰⁴ *Id.*

¹⁰⁵ Field's doctrine also proved influential when the United States Supreme Court considered a Sunday closing law's constitutionality under the United States Constitution, as one justice declared that "Justice Field's dissent in this case has become a leading pronouncement on the constitutionality of Sunday laws." *McGowan*, 336 U.S. 420, 511 nt. 96 (Frankfurter, J. concurring).

work was “purely a secular, sanitary, or police regulation . . . in no manner influenced by sectarian or puritanical ideas.”¹⁰⁶ Time has, however, proved this statement to be only partially correct. During the second half of the nineteenth century, the judiciary excluded questions of religious preference from their opinion of the Sunday closing law. The people of California did not.

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¹⁰⁶ *Burke*, 59 Cal. at 13.

ALL THE OTHER DAISYS:

Roger Traynor, Recrimination, and the Demise of At-Fault Divorce

CATHERINE DAVIDSON*

*Novel legal problems need not take [a judge] by storm if he makes a little advance, uncloistered inquiry into what people most want out of their lives and how they wish to live with one another. It is from the stuff of their relationships with one another and with the state that the common law develops, ostensibly from the cases that formalize their quarrels, but under the surface and over the years, from the values that formalize their aspirations.*¹ — Roger Traynor

I. INTRODUCTION

In 1949, Mrs. Daisy DeBurgh filed suit for a divorce from her husband, Albert, claiming the grounds of cruelty.² She alleged that her husband was

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¹ Roger Traynor, *Better Days in Court For a New Day's Problems*, 17 VAND. L. REV. 109 (1963–1964).

² See generally *DeBurgh v. DeBurgh*, 39 Cal. 2d 858 (1952).

a philandering drunk; that he was jealous and cheap; and that he had beaten her on several occasions, once so severely she had attempted suicide by way of sleeping pills.³ Albert, for his part, countersued, claiming that Daisy had ruined his reputation by sending vicious letters to his business associates alleging that Albert was a homosexual.⁴ Clearly their marriage was a failure, and yet the trial court refused to grant them a divorce. At that time, California was one of a vast majority of states refusing to grant a divorce where both parties were at fault for the destruction of the marriage relationship. Known as the doctrine of recrimination, it was a complete bar to recovery in divorce actions. However, the DeBurghs appealed to the California Supreme Court and they won their case. That decision, which took the air out of recrimination doctrine and led the way to California's becoming the first state to have a no-fault divorce system, sent shockwaves through American society. This paper will examine the case and its context, and will attempt to answer the questions: why then, why California?

In 1970, California became the first state in the nation to change from a fault system of divorce to a no-fault system.⁵ The California no-fault divorce statute "removed consideration of marital fault from the grounds for divorce, from the award of spousal support, and from the division of property."⁶ Before the switch to a no-fault system, the law simply did not recognize consensual divorce involving an agreement between spouses to end their legal marriage relationship.⁷ Rather, historically, divorce was only granted as a privilege to an "innocent spouse."⁸ In order to obtain a divorce, the plaintiff would have to file a lawsuit against his or her spouse, the defendant, and proceed to allege and then prove "grounds" for the divorce⁹ such as adultery, cruelty, or desertion.¹⁰ That is, the plaintiff would

³ *Id.* at 871.

⁴ *Id.* at 871-72.

⁵ Herma Hill, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 291 (1987).

⁶ *Id.*

⁷ Lawrence Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 653 (1984).

⁸ *Id.*

⁹ *Id.*

¹⁰ Barbara Armstrong, *The California Law of Marriage and Divorce: A Survey*, 19 J. ST. B. OF CAL. 160, 174 (1944).

need to show the defendant was at fault. Further, under the doctrine of recrimination, if the defendant could show that the plaintiff had also been at fault, the divorce would be automatically denied.¹¹

These state divorce systems were generally statutory, and purposefully inefficient, in order to serve as “compromises between two genuine social demands, which were in hopeless conflict. One was a demand that the law lend moral and physical force to the sanctity and stability of marriage. The other was a demand that the law permit people to choose and change their legal relations.”¹² Divorce law has historically been awkward and complex because it has so many different meanings and consequences for both the families involved and for society as a whole. Divorce “has economic meaning and economic consequences”¹³ in that it “consists of the rearrangement of claims to property and other valued goods. But it also has moral and symbolic meaning. It touches on the basics: sex, romance, family, children, love, and hate.”¹⁴

Divorce, and specifically divorce law, is controversial because it is a deeply personal, frequently devastating and almost always unfortunate event that involves the government in citizens’ most private lives. Californians (and Americans in general) had, long before 1970, begun to find ways to circumvent the fault system, encumbered as it was by moral judgments and fraught with procedural hoop-jumping.¹⁵ They had been using every conceivable method to separate themselves from unwanted spouses, even where neither was legally at fault. For example, in California, where one of the more popular grounds was cruelty, the plaintiff would often merely claim the defendant was “‘cold and indifferent,’” the defendant would not even bother to show up in court to contest the suit, and the judge would simply rubber stamp the divorce.¹⁶ In the end, no-fault divorce “statutes were a delayed ratification of a system largely in place; a

¹¹ George D. Basye, *Retreat From Recrimination — DeBurgh v. DeBurgh*, 41 CAL. L. REV. 320, 320 (1953).

¹² Friedman, *supra* note 7, at 653.

¹³ *Id.* at 651.

¹⁴ *Id.*

¹⁵ See Hill, *supra* note 2, at 297–98.

¹⁶ Elayne Carol Berg, *Irreconcilable Differences: California Courts Respond to No-Fault Dissolutions*, 7 LOY. L.A. L. REV. 453, 454 (1974).

system that was expensive, dirty, and distasteful, perhaps, but a system that more or less worked.”¹⁷

California Supreme Court Justice Roger Traynor paved the way for California’s change to no-fault divorce with his 1952 majority opinion in *DeBurgh v. DeBurgh*.¹⁸ In that case, the Court did away with one of the major bulwarks of the at-fault system: the defense of recrimination.¹⁹ In pruning away what he saw as an outdated and often unjust doctrine, Traynor’s decision confronted the reality of a growing divorce rate brought on in large part by changing gender roles following the Second World War. He acted on his own judicial instincts that led him in this case and many others to make what he believed was a thoughtful, well-timed, and necessary modification to the common law in order to meet the challenges of a rapidly changing society. Traynor’s hallmark as a judge was his endeavor to make a reasoned and careful decision to initiate a change, and then to craft his opinion in a way that made his thought process clear to lower courts as well as to the legal community at large.²⁰ While some have accused Traynor of being an activist, he likened himself more to the tortoise than the hare.²¹ Far from autocratically transforming the law from the highest bench in the state, Traynor’s decision in *DeBurgh* only articulated in the common law that which already existed in practice.

II. *DEBURGH V. DEBURGH*

Plaintiff, Daisy DeBurgh, and Defendant, Albert DeBurgh, moved to California together in 1944.²² They were living together in Manhattan Beach and were married on October 27, 1946.²³ They separated on February 13, 1949,²⁴

¹⁷ Friedman, *supra* note 7, at 666.

¹⁸ 39 Cal. 2d 858.

¹⁹ See generally *id.*

²⁰ See, e.g., Roger Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 230 (1962).

²¹ Roger Traynor, *The Well-Tempered Judicial Decision*, 21 ARK. L. REV. 287, 291 (1967).

²² Brief for Appellant at 4, *DeBurgh v. DeBurgh*, 240 P.2d 625 (1952) (Civ. 18581) [hereinafter *Brief for Appellant*].

²³ *Id.*

²⁴ *Id.*

and Daisy filed suit for divorce on February 15, 1949, citing cruelty as the grounds.²⁵ On March 16, 1950, after Daisy had considerable difficulty serving him with process, Albert filed an answer and cross-complaint, also claiming cruelty as the grounds.²⁶ The two-day trial began on September 18, 1950, and on September 19, the court found neither party was entitled to a divorce because each was guilty of cruelty toward the other.²⁷ This was a classic case of recrimination, in that Daisy had accused Albert of cruelty and he had simply responded “you, too.” Because both parties were thus legally at fault, neither could be granted a divorce. Unsatisfied with this result, Daisy appealed to the Second District Court of Appeal,²⁸ and that court affirmed the decision of the trial judge on February 18, 1952.²⁹

To support her claim for cruelty, Daisy alleged five different ways in which her husband had been cruel to her, with specific instances of each.³⁰ Those five general categories included: “1. Physical force and assault. 2. Continuous reference to plaintiff’s former suitor. 3. Continuous reference by defendant to defendant’s former girl friends and ‘conquests.’ 4. Derogatory statements concerning plaintiff’s daughter. 5. Acts indicating a tendency toward homosexuality.”³¹ As to the physical abuse, she testified at trial to seven separate instances in which her husband struck her.³² For example, she testified that the defendant had knocked her down in November, 1946, resulting in bruises, cuts, and a permanent scar.³³ She provided corroboration for this incident from several other witnesses.³⁴ She was likewise able to point to specific instances of the other four categories of defendant’s cruelty, and was able to provide corroborating witnesses for each.³⁵

²⁵ *Id.* at 1.

²⁶ *Id.*

²⁷ *Id.* at 2–3.

²⁸ *Id.* at 3.

²⁹ Appellant’s Petition for Hearing After Decision by District Court of Appeal at 1, *DeBurgh v. DeBurgh*, 39 Cal. 2d 858 (1952) (L.A. 21986) [hereinafter *Appellant’s Petition*].

³⁰ *Brief for Appellant*, *supra* note 22, at 4.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 5–6.

“Defendant’s answer to these cruelties was to minimize, depreciate and deny them.”³⁶ His cross-complaint was based on one alleged act of cruelty that occurred immediately before the separation: that Daisy had sent letters to Albert’s business associates accusing her husband of being a homosexual.³⁷ The trial court denied both parties a divorce on the basis of the recrimination doctrine.³⁸ That is, Daisy could not get a divorce from Albert because she was at fault, and Albert could not get a divorce from Daisy because he, too, was at fault.

In her petition for a hearing by the Supreme Court of California, Daisy argued that provoked acts of cruelty should not be allowed to defeat a cause of action for divorce.³⁹ The trial court had found that Daisy’s letters, while cruel, were provoked by her husband’s many acts of cruelty.⁴⁰ The Supreme Court of California granted her petition, and, in doing away with recrimination, the court went considerably above and beyond what Daisy was asking for. Hers was the perfect case in which to take the larger step of eliminating the defense entirely, in that here was a woman who had been beaten throughout her short-lived marriage to a brutish man. Or at least her story could be packaged that way.

The opinion, indeed, paints Albert DeBurgh as a mean, cheating, lying drunk.⁴¹ In formulating his opinion, Traynor first laid out the facts as found by the trial court and then deftly framed the issue as one solely of recrimination rather than, as Daisy suggested in her brief, provocation.⁴² He pointed out that while Albert may have provoked Daisy’s act of cruelty, she certainly did not provoke his, so the trial court could not have found in Albert’s favor on these grounds, which it did by denying Daisy a divorce.⁴³ Turning then to recrimination, Traynor began by explaining that the trial judge erred by failing to consider that recrimination only applies where the guilt incurred is for something that would “bar” that

³⁶ *Id.* at 6.

³⁷ See *DeBurgh v. DeBurgh*, 240 P.2d 625, 626 (Cal Ct. App. 1952) vacated, 39 Cal. 2d 858 (1952); *Appellant’s Petition*, *supra* note 29 at 6.

³⁸ *Brief for Appellant*, *supra* note 22, at 7.

³⁹ *Appellant’s Petition*, *supra* note 29, at 4.

⁴⁰ *Brief for Appellant*, *supra* note 22 at 7.

⁴¹ *DeBurgh*, 39 Cal. 2d at 861.

⁴² *Id.* at 861–62.

⁴³ *Id.* at 862.

party's suit for divorce.⁴⁴ Traynor went on to explain that, while "it has sometimes been assumed that any cause of divorce constitutes a recriminatory defense," the relevant statutory language — California Civil Code sections 111 and 122 — suggests that not just any cause will do to show recrimination.⁴⁵ Rather, courts "are bound to consider the additional requirement that such a cause of divorce must be 'in bar' of the plaintiff's cause of divorce." Traynor's statutory interpretation argument was that, because the statute provides that "[d]ivorces must be denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce," the Legislature could not have meant to make every cause of divorce an absolute defense.⁴⁶ If the Legislature had wanted to do so, "it could easily have provided that: 'Divorces must be denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff.'" ⁴⁷ Traynor did not list which acts would meet this heightened requirement of being "in bar" to a divorce, but the message is clear: recrimination was no longer to be the wooden, automatic defense that it had been construed to be in prior cases. Rather, the trial judge was to use his own discretion to determine whether certain acts would trigger the defense.⁴⁸

With that in mind, Traynor went on to distinguish one such case: *Conant v. Conant*,⁴⁹ decided in 1858, which, according to Traynor, had erroneously stated that the recrimination defense was "based on the doctrine that one who violates a contract containing mutual and dependent covenants cannot complain of its breach by the other party."⁵⁰ Traynor used this case as a springboard for his overall policy argument that Conant's "deceptive analogy to contract law ignores the basic fact that marriage is a great deal more than a contract. It can be terminated only with the consent of the state."⁵¹ Traynor went on to explain:

⁴⁴ *Id.* at 862–63.

⁴⁵ *Id.* at 863.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 871.

⁴⁹ 10 Cal. 249, 1858 WL 905 (1858).

⁵⁰ 39 Cal. 2d at 863.

⁵¹ *Id.*

In a divorce proceeding the court must consider not merely the rights and wrongs of the parties as in contract litigation, but the public interest in the institution of marriage. The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life.⁵²

Traynor argued that marriage provides important benefits: “It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; [and] it establishes continuity from one generation to another. . . .” He went so far as to declare that marriage, as an institution, “nurtures and develops the individual initiative that distinguishes a free people,” and thus deserved every legal effort for preservation.⁵³ But in the end, he admitted, “when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted.”⁵⁴

Traynor continued on, pointing out the basic illogic of the recrimination doctrine: that “[t]he chief vice of the rule enunciated in the Conant case is its failure to recognize that the considerations of policy that prompt the state to consent to a divorce when one spouse has been guilty of misconduct are often doubly present when both spouses have been guilty.”⁵⁵ In other words, two wrongs do not make a right, and it “is a degradation of marriage and a frustration of its purposes” when the state is allowed to use its power to deny divorce as a punishment for couples whose marriages have failed.

Traynor shored up his argument with several more minor points. He argued that the Conant case included an inaccurate and irrelevant historical discussion of older English cases,⁵⁶ and that the California Legislature purposefully declined to follow the Conant holding in writing the recrimination provisions of the Civil Code.⁵⁷ He also pointed out that the relevant precedent on the issue of recrimination was unclear and thus ripe for review

⁵² *Id.* at 863–64.

⁵³ *Id.*

⁵⁴ *Id.* at 863–64.

⁵⁵ *Id.* at 864.

⁵⁶ *See id.* at 864–66.

⁵⁷ *Id.* at 866.

and clarification.⁵⁸ He then went on to note that the state legislature was already moving toward reforming the doctrine in response to the rising divorce rate. Traynor believed that the national surge in divorce “had compelled a growing recognition of marriage failure as a social problem and correspondingly less preoccupation with technical marital fault,” and that the California Legislature had followed that trend by, for example, adding insanity and prolonged separation as grounds for divorce.⁵⁹ He argued that this showed a recognition on the part of the legislature that “[m]arriage failure, rather than the fault of the parties, is the basis upon which such divorces are granted.”⁶⁰

Traynor finished his analysis with a lengthy reiteration of his public policy argument that courts must recognize that “a marriage in name only is not a marriage in any real sense.”⁶¹ He noted that current legal scholarship supported ending the use of recrimination as a defense,⁶² and he ended the discussion by neatly distinguishing Albert’s precedents.⁶³ The holding is rather complex, but boils down to the following: the relevant Civil Code section, 122, “imposes upon the trial judge the duty to determine whether or not the fault of the plaintiff in a divorce action is to be regarded as ‘in bar’ of the plaintiff’s cause of divorce based upon the fault of the defendant.”⁶⁴

The Court also officially disapproved of any cases that “support a mechanical application of the doctrine of recrimination,”⁶⁵ thereby discarding the common law rule treating recrimination as an automatic bar to divorce wherever the defendant could show fault on the part of the plaintiff. For the *DeBurgh* situation, Traynor argued that “[t]echnical marital fault can play but little part in the face of the unhappy spectacle indicated by this evidence,” and he supported this claim with a long list of some of the individual acts of cruelty alleged by both parties.⁶⁶ Traynor held

⁵⁸ *Id.* at 867.

⁵⁹ *Id.*

⁶⁰ *Id.* at 868.

⁶¹ *Id.*

⁶² *Id.* at 870.

⁶³ *Id.* at 870–71.

⁶⁴ *Id.* at 871.

⁶⁵ *Id.*

⁶⁶ *Id.* at 871–72.

the evidence was “ample to support a finding that the parties’ misconduct should not bar a divorce”⁶⁷ and reversed the Court of Appeal, remanding back to the trial court for a decision as to the divorce.⁶⁸

The decision was complicated by Traynor’s announcement that there could “be no precise formula for determining when a cause of divorce shown against a plaintiff is to be considered a bar to his suit for divorce.” However, he listed four major considerations which the trial court should use to aid that finding: the likelihood of reconciliation; the effect of the marital conflict on the parties; the effect of that conflict on third parties, with special consideration for the welfare of any children; and comparative guilt.⁶⁹ Thus, after *DeBurgh*, recrimination would be in the discretion of the trial court rather than an automatic bar to divorce whenever each party could show some fault in the other. Recrimination was not excised, per se, but its effectiveness was cut to the bone.

III. ALL THE OTHER DAISYS

Traynor was not only addressing one woman’s problems when he handed down his opinion in *DeBurgh*. Daisy was just one of a generation of women who had married quickly in the years before, during, and after the war and realized too late that marriage was not the idyll being portrayed by society as the norm, and indeed the goal, for every woman.⁷⁰ Daisy’s case was simply not at all unusual for the time. Due to rapidly changing gender politics and fluctuation of the feminine role after the war, divorce rates skyrocketed, becoming a huge strain on a legal structure that had been developed in a ‘simpler’ time. One of the major reasons that the postwar period saw such a surge in divorce was because men and women (and husbands and wives) frequently no longer related to each other the same way they had before 1940. Traynor addressed this reality with his opinion in *DeBurgh*: hoping to free men and women from strained marriages that were not all they were promised to be.

⁶⁷ *Id.*

⁶⁸ *Id.* at 874.

⁶⁹ *Id.* at 872–73.

⁷⁰ MARILYN YALOM, A HISTORY OF THE WIFE 350 (2001); Stanley Mosk, *Ingredients of the Divorce Test Tube*, 29 L.A. B. BULL. 163, 179 (1954).

The gender role balance was upset⁷¹ when, during World War II, there was a sudden, massive demand for workers.⁷² With so many men gone off to fight, women workers took their place, resulting in a 50 percent increase in the female labor force.⁷³ Especially significant was the fact that the number of married women working doubled. Interestingly, rather than condemning women who worked as deserters of their homes, the government and the media began to encourage women enthusiastically to enter the badly diminished labor force.⁷⁴ The July 1942 issue of the *Woman's Home Companion*, for example, exhorted, “‘Mrs. John Doe We Need You!’”⁷⁵ Propaganda posters assured women that their husbands wanted them to do their part.⁷⁶ Women were also being treated with more respect at their new jobs, and, as they began to show that they could do good work, their male coworkers frequently began treating them as equals.⁷⁷ Married women, especially, enjoyed a new and dominant place in the workforce.⁷⁸ By the time the war ended in 1945, the proportion of married women who worked had jumped to over 24 percent, up from 15.2 percent in 1940.⁷⁹

This change was reflective of not just a pure necessity for bodies, but also of the changing values and attitudes that developed to justify the existence of a new female workforce. For example, Margaret Hickey, head of the Women's Advisory Committee to the War Manpower Commission, pointed out in 1943 that “‘employers, like other individuals, are finding it necessary to weigh old values, old institutions, in terms of a world at war.’”⁸⁰ Hickey's astute observation reflected the massive changes occurring at the

⁷¹ There is a great deal of historical scholarship devoted to changes in gender politics during the postwar period. See, for example, WILLIAM H. CHAFE, *THE PARADOX OF CHANGE: AMERICAN WOMEN IN THE 20TH CENTURY* (1991); ANNIGRET S. OGDEN, *THE GREAT AMERICAN HOUSEWIFE: FROM HELPMATE TO WAGE EARNER, 1776–1986* (1986); YALOM, *supra* note 70; ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* (1988).

⁷² See CHAFE, *supra* note 71, at 121.

⁷³ *Id.*

⁷⁴ *Id.*; MAY, *supra* note 71, at 59.

⁷⁵ YALOM, *supra* note 70, at 317.

⁷⁶ *Id.*

⁷⁷ CHAFE, *supra* note 71, at 124; see also MAY, *supra* note 71, at 59.

⁷⁸ CHAFE, *supra* note 71, at 130.

⁷⁹ *Id.*

⁸⁰ *Id.*

time relating to the acceptability of hiring married women to work outside the home.⁸¹ That is, the public and private attitudes had changed from a condemnation of women leaving their homes, children and husbands to fend for themselves, to an outright encouragement of those same married women to do their part for the war effort by taking the place of soldiers gone away.⁸²

The transformation did not go unnoticed. Many observers considered women's work experience in the war years to be a social and gender revolution. The Women's Bureau considered it to be "one of the most fundamental social and economic changes" of the time.⁸³ Women were suddenly being recognized as independently valuable to the nation and as first-class citizens capable of earning their own keep without their husbands to depend on financially.⁸⁴ The exigencies of the war had done away with the established ways of doing things.⁸⁵ Women seamlessly took the place of men in many fields, and barriers against married women's employment were broken down.⁸⁶ Millions of American women were discovering for the first time the economic and psychological independence that could be achieved from earning (and spending) the family bread, themselves.⁸⁷

But the change was not without critics. Those who opposed married women working outside the home warned that in order for children's lives to remain stable, their mothers needed to be at home all day.⁸⁸ These conservatives, fearing for the stability of American families, were only willing to tolerate married women's working outside the home "as a temporary necessity," and certainly not as a "permanent reality."⁸⁹ In other words, married women — and women, in general — entering the workforce during the war raised serious concerns about the evolution of male–female relations and a possibly permanent disruption of the existing social order.⁹⁰

⁸¹ *Id.*; see also MAY, *supra* note 71, at 59; and YALOM, *supra* note 70, at 320–22..

⁸² CHAFE, *supra* note 71, at 130; MAY, *supra* note 71, at 59.

⁸³ CHAFE, *supra* note 71, at 133.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* and YALOM, *supra* note 70, at 350; see also MAY, *supra* note 71, at 73–74.

⁸⁸ See CHAFE, *supra* note 71, at 134; see also YALOM, *supra* note 70, at 323–24.

⁸⁹ CHAFE, *supra* note 71, at 134.

⁹⁰ *Id.* at 135; MAY, *supra* note 71, at 71.

Those concerns would become apparent in the postwar years leading up to *DeBurgh*, during which women and society tested the boundaries of the new female sphere.⁹¹

The dimensions of this transformation became clear once the war was over and there was no longer any need for women to be working in the now-defunct munitions factories. Car factories stopped making tanks and started making cars again.⁹² Thus, between government pressure on businesses to hire returning veterans⁹³ and social pressures on women to return home,⁹⁴ the exodus began with alacrity.⁹⁵ And yet, even with women being fired to make room for the returning soldiers,⁹⁶ twice as many California women were employed in 1949 as were in 1940.⁹⁷ Married women were included in this statistic, and in 1952 about ten million wives across the nation held jobs.⁹⁸ This was two million more than at the height of the war and almost three times more than in 1940.⁹⁹ Part of the reason for this was that there were simply more married women in general, with the greatest number of marriages in United States history occurring in 1946.¹⁰⁰

These millions of working, married women were facing a dilemma, though: they were expected to fully shoulder two burdens at once. These women were expected to work outside the home from nine to five and still manage the many duties of a housewife who was home all day long.¹⁰¹ Even though the ideal was still that of the suburban housewife, economic realities did not bode well for the traditional model of the individual male breadwinner.¹⁰² The 1952 issue of the *Journal of Home Economics* made a shocking announcement: that the American economy would be unable either to sustain or expand productivity without the entry of an even larger

⁹¹ CHAFE, *supra* note 71, at 154; YALOM, *supra* note 70, at 348.

⁹² *Id.* at 155.

⁹³ *See id.* at 158–59.

⁹⁴ *Id.* at 156–57; Ogden, *supra* note 71, at 166.

⁹⁵ CHAFE, *supra* note 71, at 158–59.

⁹⁶ *Id.*

⁹⁷ *Id.* at 161.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *See* OGDEN, *supra* note 71, at 166; Quintin Johnstone, *Divorce: the Place of the Legal System in Dealing With Marital-Discord Cases*, 31 OR. L. REV. 297, 298 (1952).

¹⁰¹ CHAFE, *supra* note 71, at 175.

¹⁰² OGDEN, *supra* note 71, at 172.

number of women in the workforce.¹⁰³ Thus, with ideal and reality conflicting, American women received two equally strong but hopelessly opposing messages from society: one was to stay at home and gain fulfillment from caring for husband and children, and the other was, "Get a job."¹⁰⁴ The effect, some argued, was a rise in the national divorce rate from 2.8 percent in 1948 to 10.4 percent in 1951.¹⁰⁵

For example, *Life* magazine editorialized on this issue in 1947 when it published a thirteen-page special on the "American Woman's Dilemma."¹⁰⁶ The editors revealed that contemporary (middle-class) women were suffering from confusion and frustration due to a conflict that they perceived between the tradition and reality of gender norms.¹⁰⁷ That is, in the old days, a woman simply had no choice but whom to marry, while in 1947 she had a far more complicated set of decisions to make.¹⁰⁸ Should she stay at home? Should she work? If it were financially necessary to do both, where would she find the time? And if she somehow managed to balance the conflicting demands on her time and energy, what would her neighbors think of her? Her in-laws? The article characterized this identity crisis as a direct consequence of the war.¹⁰⁹

The social commentary on this issue ranged from feminists, who claimed these women were unhappy because they were trapped inside the home and their traditional roles, to anti-feminists, who argued just the opposite: that women were unhappy when they strayed too far from both.¹¹⁰ Betty Friedan, for example, wrote in her 1963 book, *The Feminine Mystique*, that American women in the 1950s were unhappy because they had been told that they should find all their happiness at home, through fulfillment of the roles of wife and mother.¹¹¹ But regardless of which side one was on, everyone agreed that there was a problem: that many women, especially married women, were deeply unhappy, because they were struggling

¹⁰³ *Id.* at 172–73.

¹⁰⁴ *Id.* at 173.

¹⁰⁵ *Id.* at 171.

¹⁰⁶ CHAFE, *supra* note 71, at 175.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 176.

¹¹¹ *Id.* at 195.

to find their proper place in their homes and in the outside world.¹¹² With the relationship between men and women in such a state of flux, ideologically as well as personally, divorces were bound to occur. The reason divorce rates rose was, according to Betty Friedan, that “for the first time, some women had enough independence to want out of bad marriages.”¹¹³

One of the biggest and most immediate issues that arose between husbands and wives during this era was that women often relished the economic freedom and sense of independence they had attained from working during the war years.¹¹⁴ They were not necessarily willing to give up that feeling and stop working once their husbands came home.¹¹⁵ The husbands, for their part, worried that they would lose power within the family if they were no longer acting as providers.¹¹⁶ These men were used to the tradition of a breadwinning man’s taking pride in his ability to support a stay-at-home wife and children.¹¹⁷ As one contemporary commentator opined, “Few men ever amount to much when their wives work.”¹¹⁸

Even the legal procedures of divorce reflected the new tension surrounding gender roles. According to one legal historian, divorce suits at this time often reflected old gender stereotypes. In many of the California cases, “[t]he women described themselves as delicate plants, married to insensate brutes, men who cared nothing for the tender feelings and feminine sensibilities of their wives.”¹¹⁹ The problem with this is that “ideas about women’s delicacy and refinement trap women in a web of stifling mock-protection.”¹²⁰ That is, using the old, outmoded gender stereotypes to end a marriage put women in the position of having to subjugate themselves that one final time in order to get out of a marriage already characterized by subjugation.

¹¹² See *id.* at 176; YALOM, *supra* note 70, at 351

¹¹³ BETTY FRIEDAN, *The Crises of Divorce*, in *IT CHANGED MY LIFE: WRITINGS ON THE WOMEN’S MOVEMENT* 318, 322 (1st ed. 1976).

¹¹⁴ See, e.g., YALOM, *supra* note 70, at 350.

¹¹⁵ *Id.*

¹¹⁶ See *id.* at 350.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 151.

¹¹⁹ Lawrence Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1527 (2000).

¹²⁰ *Id.* at 1528.

IV. BACKGROUND OF CALIFORNIA DIVORCE LAW IN 1952

Traynor addressed this problem by changing the focus of divorce law from the fault of either party to the simple fact of the breakdown of their marriage. He did so because, as the divorce rate grew, the cracks in the system began to show. The old story of the brutish man and the fainting woman was frequently nothing more than a charade, and with his decision in *DeBurgh*, Traynor played a large part in bringing the common law up to speed not just with the realities of divorce in practice, but also with post-war changes in gender politics.

Indeed, divorce as it actually existed in 1952 and that which the legal fault system prescribed were two very different things. The “divorce charade,” as Lawrence Friedman refers to it, “paraded before the courts an endless procession of men, and mostly men, who confessed by their silence to adultery, cruelty, gross neglect of their obligations, and other deep-stained sins. But everybody knew the allegations were often or mostly lies.”¹²¹ In fact, while the “official line was that marriages ended because of adultery, desertion, cruelty, or intolerable indignities . . . this was out of step with a growing sense in society . . . that marriages ended because they ‘didn’t work out,’ because the spouses were ‘incompatible.’”¹²² Such was the case nationwide, and certainly in California.

Historically, California divorce law followed the national tradition of promoting a general policy against granting a divorce, favoring instead preservation of marriage at almost any cost.¹²³ That view held that “[f]ault is the basic tenet of . . . divorce law” and that a divorce was only to be granted if the defendant, and the defendant alone, was at fault.¹²⁴ Again, under the recrimination doctrine, if the plaintiff had also been at fault, there could be no divorce.¹²⁵ Divorce was seen as an action between not two, but three parties: the plaintiff, defendant, and the state as a third party with a vested interest “in the maintenance of the marriage tie.”¹²⁶ A

¹²¹ *Id.* at 1530.

¹²² *Id.* at 1531.

¹²³ Armstrong, *supra* note 10, at 178.

¹²⁴ Johnstone, *supra* note 100, at 301.

¹²⁵ *Id.*

¹²⁶ Armstrong, *supra* note 10, at 178.

commentator in 1944, however, wrote that by that year there was “growing evidence . . . that the [courts] believe that the state’s interest in conserving the marriage tie may well be limited to cases where the marriage is a real and functioning husband–wife relationship and not a mere legal concept accompanied by separated, estranged parties.”¹²⁷

The Legislature, too, was making changes in the historically moralistic and disapproving tone of divorce law. One commentator noted that in the years leading up to *DeBurgh*, “American legislatures have made statutory changes in the law of divorce that materially weaken the basic doctrine that divorce will be granted only upon proof of marital fault of defendant, and blamelessness of plaintiff.”¹²⁸ Examples included “statutes permitting divorce for insanity or continuous separation, which have produced basic changes in other accepted elements of American divorce, and, perhaps more significantly, indicate a legislative interest in making American divorce law coincide with contemporary mores.” What’s more, that author argued that “the prevailing judicial interpretation . . . indicates that as to [certain grounds of divorce such as desertion] the doctrines of fault and recrimination are abolished, and . . . there has been acceptance of the fact that the divorce decree is only a ratification of the private agreement of the spouses to end the marriage.”¹²⁹ Still, even with this clear judicial and legislative movement away from reconciliation at any cost, California in 1950 remained a fault state, and the doctrine of recrimination remained alive and well.

In the years leading up to *DeBurgh*, California was a relatively liberal state in terms of divorce, allowing for seven possible grounds: adultery, cruelty, desertion, willful neglect, habitual intemperance, conviction of a felony, or incurable insanity.¹³⁰ In order to claim desertion, neglect, or intemperance, a plaintiff would have to show that the condition persisted for at least one whole year, without interruption.¹³¹ To claim insanity as grounds for divorce, a showing of three years’ institutional confinement

¹²⁷ *Id.*

¹²⁸ Thomas Carver, *Divorce: Statutory Abolition of Marital Fault*, 35 CAL. L. REV. 99, 99 (1947).

¹²⁹ *Id.* at 100.

¹³⁰ Armstrong, *supra* note 10, at 174.

¹³¹ *Id.* at 174–75.

was required.¹³² Adultery and cruelty were somewhat easier to prove, in that a single act of either would be enough, although continuous conduct would suffice as well, of course.¹³³ What's more, a plaintiff could allege mental rather than physical cruelty by showing that s/he experienced "grievous mental suffering" as a result of "conduct that reasonably could be believed to have such a result."¹³⁴

Plaintiff did not even need to show any physical manifestation of said suffering, and a multitude of types of mental cruelty were being accepted by the courts as sufficient for a grant of divorce. The California Supreme Court stated the test in the 1941 case *Keener v. Keener*, writing that in "each case the infliction of 'grievous mental suffering' is a question of fact to be deduced from the circumstances of the case, in the light of the intelligence, refinement and delicacy of sentiment of the complaining party."¹³⁵ Cruelty was thus in many cases the easiest ground to plead and prove, which was reflected in its popularity.¹³⁶ There were certainly instances of "real" cruelty,¹³⁷ but as one contemporary observed, the "legal theory of the innocent suffering spouse has long been regarded as a myth. In actual practice, divorce today is usually but a judicial ratification of prior agreement between the parties."¹³⁸ While it does appear as though Daisy DeBurgh suffered real cruelty at the hands of her husband, in deciding her case Traynor was surely also addressing the fact that her situation was not necessarily the norm.

Some judges were less willing than others to go on with the charade. One example is San Francisco judge Walter Perry Johnson, who in 1934 "more or less dropped the mask of ignorance, and talked openly about realities."¹³⁹ In yet another cruelty case, the plaintiff, Jessie Trower, alleged that her husband's cruelty consisted of his "'absence from home without explanation, his statement that he did not love her, and his objection to her music studies.'"¹⁴⁰ Johnson remarked that this did not "'really constitute

¹³² *Id.* at 175.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 18 Cal. 2d 445, 447 (1941) (referenced in Armstrong, *supra* note 10, at 175).

¹³⁶ Hill, *supra* note 5, at 297–98.

¹³⁷ Friedman, *supra* note 119, at 1530.

¹³⁸ 35 Cal. L. Rev. at 99.

¹³⁹ Friedman, *supra* note 119, at 1519.

¹⁴⁰ *Id.* at 1519–20.

cruelty in the proper meaning of the term.’ It amounted to nothing more than ‘incompatibility.’ But that was true of most of the ‘cruelty’ charges, he said, and, in his view, ‘incompatibility’ should be grounds for divorce. Of course, the legislature had never made such a move.”¹⁴¹ Johnson granted the divorce, regardless.¹⁴²

Another San Francisco judge, the Honorable Thomas M. Foley, took the opposite approach in his court in 1946.¹⁴³ He announced that as far as he was concerned, “‘cruelty, extreme or otherwise, mental or physical,’” would not constitute legally sufficient grounds for divorce unless “‘backed up with solid evidence.’”¹⁴⁴ The judge believed that divorce law at the time was “far too lenient,” and that generally, “‘differences between married couples’ . . . were ‘trivial.’”¹⁴⁵ He feared that “easy divorce” was “‘destroying the fabric of the home,’” and he was going to do his part to stop it.¹⁴⁶

However, evidence from the California case files shows that Judge Foley was losing that battle.¹⁴⁷ One contemporary posited that, despite the rigid party line of the statutes, “any divorce judge will admit that he rarely denies a divorce.”¹⁴⁸ It is of course true that there were legitimate stories of actual cruelty and abuse, both physical and psychological, like Daisy DeBurgh’s.¹⁴⁹ However, many California plaintiffs “also told stories that were essentially nothing more than stories of unhappy marriages — stories of nagging and cursing, and general marital misery.”¹⁵⁰ But regardless of how minor these offenses were, California “courts were willing to pin the label of ‘extreme cruelty’ on all sorts of behavior . . . ‘[E]xtreme cruelty,’ as Roscoe Pound remarked in 1943, was a ‘convenient legal phrase to cover up . . . incompatibility.’”¹⁵¹

¹⁴¹ *Id.* at 1520.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Johnstone, *supra* note 100, at 300.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

Indeed, Superior Court Judge Frank G. Swain wrote, in a 1945 article on default divorce: “It is impossible to formulate any hard and fast rules as to what constitutes extreme cruelty because of the varying degrees of sensibility of plaintiffs. The law recognizes the fact that what causes great mental anguish to a lady of refinements will not faze a Tugboat Annie.”¹⁵² He remembered a time at the beginning of his practice when there were “stalwarts on the bench . . . who did not grant divorce decrees on the ground of cruelty unless serious misconduct of the defendant was proven.”¹⁵³ But by the time Judge Swain was writing, he saw a trend of judges shrugging, “what is the use of denying a default decree, the parties know best, if they can’t get along they are better off divorced.”¹⁵⁴ While he himself did not ascribe to that practice,¹⁵⁵ he admitted that, at the time, there was “little or no uniformity among judges as to what amounts to extreme cruelty.”¹⁵⁶

As a result of this uncertainty, Californians were unsatisfied with the state of divorce law, generally.¹⁵⁷ Experts, like academics and legislators, “looked through the peephole, and what they saw was fraud and rot.”¹⁵⁸ Lawyers, for their part, “hated taking part in a disgraceful travesty.”¹⁵⁹ Laypeople were split between those thinking divorce was too easy to obtain, and those who believed it “was too hard, too expensive, too dirty.”¹⁶⁰ The legal academy “kept trying to reform the official law, to make it conform to what they considered social realities. They wanted, naturally enough, to get rid of the perjury, the chicanery, and the lying.”¹⁶¹ Traynor, seeing this problem, set about to do just that: to reform the common law by getting rid of the old recrimination doctrine which was an obstacle to the change to no-fault divorce.

With so much demand for divorce and such rampant deception besmirching the legal system surrounding it, a doctrinal change had to be

¹⁵² Frank G. Swain, *Default Divorce*, 21 L.A. B. BULL. 52, 53 (1945).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 56.

¹⁵⁷ Friedman, *supra* note 119, at 1531.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

made in order to bring the common law up to speed with what trial courts were already doing not so secretly. Traynor had already made a name for himself as an ‘activist’ with cases like *Escola v. Coca Cola*¹⁶² and *Perez v. Sharp*. In *Escola*, he made the rather startling argument that manufacturers should be held strictly liable whenever their products injured consumers, and in *Perez* he completely invalidated the California statutory ban on interracial marriages.¹⁶³ But Traynor was no activist, really, at least in the area of divorce law. He did not generate the changes himself. Rather, he put his name, and that of the Supreme Court of California, on what had already been decided by the people of that state. This fit perfectly with his judicial philosophy of pruning the hedges and ridding the common law of those ancient doctrines that had long since worn out their welcome. Traynor did not believe in making decisions hastily or without cause, and his opinion in *DeBurgh* was no different.

By 1940, jurists across the country were not only calling for divorce reform generally, but also specifically for an end to the doctrine of recrimination.¹⁶⁴ The basic argument was that the requirement under the recrimination scheme that one, and only one, party must be blameworthy should no longer apply.¹⁶⁵ The reality was “that the marital life of a married couple might be so stormy, so disagreeable, and so fraught with unhappiness that it would be in the public interest to grant a divorce,” even though both were at fault.¹⁶⁶ According to one judge, about half of all contested divorce actions involved wrongdoing by both parties at some point in the marriage, often serious enough to constitute grounds for divorce, thus precluding divorce if the recrimination rules were applied strictly.¹⁶⁷ Yet, that jurist argued, “no fair-minded person would contend that in such circumstances any public interest could be served by forcing the parties to remain as man and wife.”¹⁶⁸

¹⁶² 24 Cal. 2d 453 (1944) (Traynor, J., concurring).

¹⁶³ 32 Cal. 2d 711 (1948); see also G. EDWARD WHITE, *TORT LAW IN AMERICA*, 197–200 (1980); G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES*, 243–66 (2007).

¹⁶⁴ See, e.g., Everett C. McKeage, *More Flexible Procedure Urged for Divorce Actions*, 15 St. B.J. 158, 159–60 (1940).

¹⁶⁵ *Id.* at 159.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

Traynor thus had all the evidence he needed to face the reality that continuing to apply recrimination as an automatic defense to divorce was no longer in the public interest — that, as one female lawyer put it, “the old ecclesiastical theory that divorce could be granted only on the basis of penalty, and that one party must be innocent . . . and the other guilty” was contrary to contemporary mores;¹⁶⁹ that these “restrictive laws of the 19th Century . . . on the statute books . . . have no application to modern conditions;”¹⁷⁰ and that the law must be changed in order to “recognize and utilize modern attitudes, inventions and creations . . . [and] recognize that of all the ties which in previous ages held families together only the affectional tie remains unchanged, and that to be successful today, marriage must contribute directly to the satisfaction of the individuals.”¹⁷¹

The author of an article on the *DeBurgh* decision in the *California Law Review* in 1953 noted that, while the case may appear “to be a dramatic reversal by the California court in its position on recrimination,” it was really “not quite so startling when viewed against the background of recent developments in California and elsewhere.”¹⁷² He pointed out that while the “majority of jurisdictions still adhere to recrimination in its traditional form,” courts had recently been weakening it, such that there was a discernible and “marked trend away from the automatic application of the doctrine.”¹⁷³ He noted three specific ways in which courts had been pruning the doctrine.¹⁷⁴

First, courts would frequently apply a “comparative rectitude” analysis, in which recrimination would only bar a divorce where the plaintiff’s degree of fault was equal to or greater than the defendant’s.¹⁷⁵ Second, courts developed new grounds for divorce that were not based on fault.¹⁷⁶ Finally, even before *DeBurgh*, jurisdictions outside of California were beginning to consider recrimination to be a discretionary, rather than an absolute bar to

¹⁶⁹ N. Ruth Wood, *Marriage and Divorce Laws*, 33 *WOMEN LAW. J.* 23, 27 (1947).

¹⁷⁰ *Id.* at 29.

¹⁷¹ *Id.*

¹⁷² Basye, *supra* note 11, at 320.

¹⁷³ *Id.* at 320–21.

¹⁷⁴ *Id.* at 322.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 322–23.

divorce.¹⁷⁷ This contemporary commentator thus characterized *DeBurgh* as “a well-reasoned opinion which . . . brought California into the small but growing group of jurisdictions” that gave trial courts the discretion to apply recrimination more or less rigidly according to the circumstances at hand.¹⁷⁸ It was Traynor’s judicial philosophy that gave him the freedom to make this change in California common law.

V. ROGER TRAYNOR ENTERS THE FRAY

In 1940, when Traynor was appointed to the California Supreme Court, the role of courts as lawmakers was in transition.¹⁷⁹ From the mid-nineteenth century until the turn of the twentieth, the legal academy had promoted a variety of judicial formalism that required judges to simply “find” the law.¹⁸⁰ The assumption was that the law was predetermined but somewhat hidden, and that judges, having great legal minds, were singularly capable of discovering it. Then, at the beginning of the twentieth century, a new school of thought arose known as legal “realism,” which promoted judicial creation of the law.¹⁸¹ Realists promoted the idea that the people — via judges — could make the law as they saw fit for society as it existed at the time, creating a backlash in the mid-twentieth century as commentators began to decry what they saw as unrestrained judicial lawmaking power.¹⁸²

Coming to the Court at this moment of instability, Traynor had made his own feelings on the subject of law and judicial lawmaking known early

¹⁷⁷ *Id.* at 324.

¹⁷⁸ *Id.* at 326.

¹⁷⁹ Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 *BUFFALO L. REV.* 1267, 1290 (2010). For more information on the differing schools of thought on the judicial role, see LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* (2001); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS AND IDEOLOGY IN NEW YORK, 1920–1980* (2001); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* (1956).

¹⁸⁰ See WHITE, *supra* note 163, at viii–ix.

¹⁸¹ *Id.* at xi.

¹⁸² *Id.* at xii.

on.¹⁸³ “Unlike the [formalist] scholars, Traynor’s goal was not to limit judicial lawmaking. It was to encourage it.”¹⁸⁴ But he did not believe that judges should make the law as they saw fit. Indeed, from his first years on the Supreme Court, Traynor urged his fellow justices “to engage in policy-based lawmaking,” and by “the 1950s he converted the California Supreme Court to his view,” thus altering “the norms of judicial decision making and opinion writing for his court, which served as an example for courts across the nation.”¹⁸⁵ Under Traynor’s tutelage, in “the 1950s and 1960s the California Supreme Court left . . . [formalist] . . . thinking in the dust as it emerged as the most innovative court in the nation.”¹⁸⁶

According to one commentator on Traynor’s judicial philosophy, “Traynor’s process of decision making combined reason with intuition.”¹⁸⁷ Others have argued that Traynor was not guided by intuition, but by “a cohesive conception of the public interest.”¹⁸⁸ Traynor himself, though, gave his own definition of what drove his innovative decisions, writing that judges “do a great disservice to the law when [they] neglect that careful pruning on which its vigorous growth depends and let it become sicklied over with nice rules that fail to meet the problems of real people.”¹⁸⁹ In 1956, Traynor lamented:

In no other area has the discrepancy between law in dogmatic theory and law in action, evading dogma by fiction and subterfuge, become so marked as in divorce law. The withered dogma that divorce can be granted only for marital fault . . . is rendered still more irrational by the widespread rule that recrimination is an absolute defense. The result has been a triumph, not for dogma, but for hypocrisy. Rules insensitive to reality have been cynically circumvented by litigants and attorneys with the tacit sanction of the courts.¹⁹⁰

¹⁸³ Ursin, *supra* note 179, at 1327.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1335.

¹⁸⁶ *Id.*

¹⁸⁷ BEN FIELD, *ACTIVISM IN PURSUIT OF THE PUBLIC INTEREST: THE JURISPRUDENCE OF CHIEF JUSTICE ROGER J. TRAYNOR* (2003) at iii.

¹⁸⁸ *Id.*

¹⁸⁹ Roger Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 236 (1956).

¹⁹⁰ *Id.*

This glimpse into the justice's mind provides ample evidence of his reasons for deciding *DeBurgh* as he did: that it was merely a recognition of what was already happening in courts across the state.

And yet, despite the absurdity that clearly would have resulted if re-crimination remained as it had been, Traynor did not strike at it lightly. He was fully aware of the obligations of *stare decisis*, but he was just as acutely aware of the need to make changes to precedent that had outlived its use or, even worse, its fairness. He discussed this conflict in a 1962 article, writing that while “[a] judge coming upon a precedent that he might not himself have established will ordinarily feel impelled to follow it to maintain stability in the law . . . [t]here are of course precedents originally so unsatisfactory or grown so unsatisfactory with time as to deserve liquidation.”¹⁹¹

Traynor saw it as his duty to heal the breach between *stare decisis* on the one hand and progress on the other. He believed that pruning retrograde precedent required “forthrightness,” and that leaving it to fester still further showed a lack of “the wit or the will or the courage to spell out why the precedent no longer deserves to be followed. Such dogmatic adherence to the past perpetuates bad law.”¹⁹² Traynor, far from being an activist throwing caution (and precedent) lightly to the winds, believed that the greatest common law judges move “not by fits and starts, but at the pace of a tortoise that explores every inch of the way, steadily making advances though it carries the past on its back.”¹⁹³

While change was not to be undertaken thoughtlessly, it was surely necessary in order to “stabilize the explosive forces of the day.”¹⁹⁴ According to one commentator, “Traynor . . . saw the world in rapid flux. This was not simply a world view, but an empirical truth: Traynor sat on the California Supreme Court during one of the most dynamic periods in California’s history.”¹⁹⁵ That is, Traynor believed that he himself initiated nothing. Rather he only responded according to what he saw were new fact patterns that did not fit the old precedents. The world was changing around

¹⁹¹ Traynor, *supra* note 20, at 229–30.

¹⁹² *Id.*

¹⁹³ Traynor, *supra* note 21, at 291.

¹⁹⁴ Traynor, *supra* note 1, at 124.

¹⁹⁵ John W. Poulos, *The Judicial Philosophy of Roger Traynor*, 46 HASTINGS L.J. 1643, 1700 (1994–1995).

him, and Traynor believed that it was his duty, as a justice of the highest court in the state, to “keep the inevitable evolution of the law on a rational course.”¹⁹⁶ He wrote:

A reasoning judge’s painstaking exploration of place and his sense of pace give reassurance that when he takes an occasional dramatic leap forward he is impelled to do so in the very interest of orderly progression. When he has encountered endless chaos in his long march on a given track, the most cautious thing he can do is to take a new turn. He does so though he knows that ours is a profession that prides itself on not throwing chaos lightly to the winds.¹⁹⁷

Traynor believed that he did not initiate change because he personally felt it was the right change to make, but because it was his job to make law that applied to the world as it existed in his day. He rid California common law of recrimination because the realities of the time demanded it. He would have seen it as a dereliction of his duty to leave an unjust and outmoded law on the books.

VI. CONCLUSION

Daisy DeBurgh presumably got her divorce, in the end. Her story, at least the written record, ends with her case, but given the court’s opinion, she likely managed to escape what was evidently an abusive and deeply unhappy marriage. She was not the only miserable spouse who benefited from Traynor’s decision in *DeBurgh*. In fact, the justice was probably not as concerned with her particular story, pitiable as it was, as he was concerned with the collective plights of all the other miserable spouses in California: people who were trapped by the ancient rule precluding relief for the slightest smudge of dirt on their hands. Unhappy marriages had become a common thing in the years surrounding the Second World War. Gender roles were in transition, women were overburdened, ideologically as well as literally, by conflicting duties to work and stay home. Men were just as

¹⁹⁶ Roger Traynor, *The Limits of Judicial Creativity*, 63 IOWA L. REV. 1, 7 (1977–1978).

¹⁹⁷ *Id.* at 6.

confused about their roles as breadwinners at a time when it was no longer necessarily feasible for them to keep the family afloat all on their own.

Unhappy marriages meant even unhappier divorce battles, stymied by an antiquated set of laws that punished people for failing to keep their sacred unions intact. Rampant perjury and deception ensued, often needlessly, for the trial judges recognized the inevitable truth before the Legislature did. Enter Traynor, who observed the untenable situation and performed what he saw as his duty: to change the law to meet the demands of reality. Traynor's decision in *DeBurgh* is the perfect example of his judicial philosophy in action: "Things happen fast in our small world and we who tend the law must keep pace The law will never be built in a day, and with luck it will never be finished."¹⁹⁸

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¹⁹⁸ Traynor, *supra* note 20, at 236.

THE STORY OF THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT:

How Cesar Chavez Won the Best Labor Law in the Country and Lost the Union

DAVID WILLHOITE*

After many months of political wrangling, and after Governor Jerry Brown had staked his first year in office on bringing peace to the historically violent struggle for workers' rights in California agriculture, the Alatorre–Zenovich–Dunlop–Berman Agricultural Labor Relations Act was signed into law in the first week of June, 1975.¹ One would be hard

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¹ For contemporary reports of the event immediately preceding passage, see: *California Farm Bill Backed By Panel as Unionists Fight*, UNITED PRESS INTERNATIONAL, May 14, 1975; Leo Stammer, *Farm Labor Bill OK'd by Assembly Panel*, L.A. TIMES, May 13, 1975; *Parade Here Backs Efforts by Chavez To Unionize Farms*, N.Y. TIMES, May 11, 1975; Harry Bernstein, *McCarthy Joins Unions in Seeking Farm Bill Change*, L.A. TIMES, May 15, 1975; —, *Pact on Farm Bill Rejected by Teamsters*, L.A. TIMES, May 17, 1975; *2,800 Rally at Capitol to Back Farm Measure*, L.A. TIMES, May 19, 1975; Harry Bernstein, *Agreement Reached on Farm Labor Bill*, L.A. TIMES, May 20, 1975; —, *Farm Labor Accord Sets Stage for Special Session*, L.A. TIMES, May 20, 1975; *Teamsters Back Farm Labor Accord*, N.Y. TIMES, May 21, 1975; Jerry Gilliam, *Farm Bill Clears Senate Panel 4-1, Faces One More*, L.A. TIMES, May 22, 1975; —, *Senate Passes Farm Labor Bill*, L.A. TIMES, May 27, 1975; —, *Farm Labor Bill Moves Quickly Toward Passage*, L.A. TIMES, May 28, 1975; —, *Assembly Sends Farm Bill to Brown for Signing*, L.A. TIMES, May 30, 1975.

pressed to overestimate the significance of this legislation, which remains the only state law in the nation to govern the rights of farm workers to act collectively and engage in union activity.² In 1975, few could have predicted that this new legal order would lead to the disintegration of the farm worker movement in California.

Ever since the Delano grape strike a decade earlier, Cesar Chavez had grasped and utilized a national mood of social and legal transformation taking place across the country. This was, of course, a period of great social turmoil, including racial violence, police repression and armed military intervention that culminated in the passage of landmark legislation, massive student and youth activism, a War on Poverty, and what many have argued to be the high-water mark of judicial liberalism in America.

Chavez was a keen student of the civil rights movement and King's and Gandhi's incorporation of religion and nonviolence as a means of organizing. As an alumnus of the Community Service Organization started by Saul Alinsky and trained by the famous organizer Fred Ross, Sr., he had worked across California and Arizona to register hundreds of thousands of Hispanic voters and witnessed citizens of all races coming together to fight injustice. As the urban movements to register voters, oppose unconstitutional laws, and challenge stereotypes and bigotry expanded across the country, it became more difficult to separate issues of race and class. Claims of racial injustice in America became enmeshed with claims of economic justice. The federal government started initiatives addressed to poverty; Catholics and Jews, once excluded from the middle class, turned to help the entre of others; and young people began to focus on these issues in their own communities. By uniting the issues of fair pay and fair treatment in a demand for dignity, Chavez and his farm worker movement focused the nation's attention on some of the most invisible and vulnerable workers in the country.

However, Chavez's effort was not solely directed at consciousness-raising or the repeal of racist laws or even gaining legislative protection; he and the countless others who dedicated themselves to this struggle aimed to empower workers to form a union and bargain collectively with their employers for better wages and working conditions. These two goals, creating a farm

² Hawaii's state labor code includes agricultural workers along with the rest of the state's employees, but the code extends no special provisions to this sector of work.

worker union and creating a social movement focused on issues of the working poor, proved difficult to hold aloft simultaneously. Competing social and legal strategies had also led to conflict within the civil rights movement between the efforts of the NAACP and more radical groups like the Student Non-violent Coordinating Committee or Malcolm X's Nation of Islam.³

John Lewis, president of the SNCC and a future congressional leader, spoke at the March on Washington for Freedom and Jobs alongside Martin Luther King, Jr. and United Auto Workers president, Walter Reuther, among others.⁴ March organizers excised several phrases from his controversial speech including one about the proposed Civil Rights Act introduced by President Kennedy: "The revolution is a serious one. Mr. Kennedy is trying to take the revolution out of the streets and put it into the courts."⁵ This conflict between a revolution and a legal order, between gaining public support and gaining legislative victories, between organizing a union and organizing a social movement would prove to be a defining one for Chavez and the UFW.

In this article, I will address the tension between a movement for social justice and a legal regime designed to deliver that justice as manifested in the efforts to organize California farm workers and the passage and subsequent administration of the Agricultural Labor Relations Act (ALRA). I will describe how balancing the needs and priorities of maintaining a broad social movement for the vulnerable and dispossessed and a focused legal fight for good contracts and union rights ultimately led to the collapse of the United Farm Workers' organizing efforts. Ironically, winning the strongest, most protective labor law in the country produced new organizing victories at the same time it exacerbated the internal conflict between these two missions.

Although the events leading to the passage of the ALRA started with the "Great Delano Grape Strike" and the signing of the first contract with

³ See DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1940-1970* (1999).

⁴ It is interesting in this context to note that the name of the march at which Dr. King gave his most famous speech nodded at this dual goal of economic and racial justice and that the speakers included civil rights and union leaders.

⁵ JOHN LEWIS, *WALKING WITH THE WIND* (1998).

DiGiorgio, farm worker organizing in California had begun almost a century earlier. From the 1890s to 1960, there were several waves of farm worker organizing, all involving some admixture of ethnic workers' groups, traditional AFL-style unionism, and radical elements such as the International Workers of the World (IWW).⁶ Large-scale farming in California is nearly as old as the state itself. Ranchers and farming interests received large parcels of land in as much as 35 million acre "bonanza farms" because of exemption from the Homestead Act. With the new railroad and investments in irrigation, farming soon became more lucrative than ranching. Beginning with the hiring of thousands of Chinese, unemployed after the completion of the transcontinental railroad, the history of field labor in California agriculture can be told through various immigrant groups.⁷ In the end, several salient factors led to the failure of farm workers to successfully form a union or win lasting contracts: the transience and vulnerability of an immigrant workforce, the exclusion of agricultural workers from the National Labor Relations Act (NLRA), the introduction of the *Bracero* program, and the general unfamiliarity with and lack of interest in the agricultural sector by traditional AFL-CIO unionism — all set against a backdrop of employer violence and hostility toward organizing efforts backed by law enforcement, judges and politicians.

Field labor in California was initially performed by Asian immigrants, followed by Mexican and Filipino workers, with a brief interlude of white workers during the Depression. Early on, growers learned to recruit a workforce of non-citizen, newly-arrived immigrants who were often barred from other sectors of employment.⁸ But in 1882, with the passage of the Chinese Exclusion Act, huge tracts of newly irrigated land lay fallow,

⁶ MARSHALL GANZ, *WHY DAVID SOMETIMES WINS* 23 (2009). For the summary of California farm worker organizing, I have used the following sources: CAREY MCWILLIAMS, *FACTORIES IN THE FIELD: THE STORY OF MIGRATORY FARM LABOR IN CALIFORNIA* (1939); STUART MARSHALL JAMIESON, *LABOR UNIONISM IN AMERICAN AGRICULTURE*, BULLETIN 836 (BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR; reprint 1975); JUAN GOMEZ-QUIÑONES, *MEXICAN AMERICAN LABOR, 1790–1990* (1994); MAJKA & MAJKA, *FARM WORKERS, AGRIBUSINESS AND THE STATE* (1983). Although there are many others of high quality, these provide a concise account of the activity of the time and are sufficient for this survey.

⁷ MCWILLIAMS, *supra* note 6, at 66–67.

⁸ GANZ, *supra* note 6, at 24.

requiring a new source of cheap labor. Growers looked west and south. With the planting of sugar beets, large numbers of Japanese with specialized cultivation skills learned in Hawaii began arriving in California.⁹ With early organizing successes centered around a system in which crew bosses acted as agents of the workers rather than growers, the Japanese won season-long contracts and higher wages.¹⁰ The strategy was to accept below-market wages and corner the labor market in a certain crop, and then when the crops were ready to harvest, they would threaten to strike unless wages were raised.¹¹ Through ethnic solidarity and high-demand agricultural skills, as well as their accommodation to local market forces, this strategy proved successful from season to season; however, it never amounted to a stable labor organization.¹² Although two outside organizations attempted to recruit Japanese workers, both efforts ultimately failed. The AFL knew little about farm worker life or how to organize in the fields, and proved racially hostile. The IWW, on the other hand, was more concerned about revolutionary politics than about the concerns of workers, many of whom sought higher wages and entry into the landowning classes. Indeed, despite racist laws restricting land sales, many Japanese farmers became successful as growers. As Carey McWilliams wrote, “it is impossible to even approximate the enormous contribution the Japanese made, in the course of a quarter century, to California agriculture.”¹³

With the start of World War I, organizing in the fields came to a halt. In the postwar period the “red scare” in California led to the arrest of more than 500 IWW activists, prosecuted under the Criminal Syndicalism Act, and open-shop, anti-union campaigns led to the loss of a quarter of AFL membership and labor movement demoralization.¹⁴ After the war, with labor militancy all but vanquished, California growers looked to Mexico to provide the supply to meet the increase in agricultural labor requirements. Under pressure from the growers, Congress exempted

⁹ McWILLIAMS, *supra* note 6, at 103.

¹⁰ JAMIESON, *supra* note 6, at 53; GANZ, *supra* note 6, at 26.

¹¹ *Id.*

¹² For example, the Japanese and Chinese were favored for their ability to provide their own food and shelter, as well as disappearing after the harvests were over, thus saving growers considerable expense. See JAMIESON, *supra* note 6, at 51.

¹³ McWILLIAMS, *supra* note 6, at 110.

¹⁴ GANZ, *supra* note 6, at 30.

Western Hemisphere nations from immigration quotas established in 1921, and Mexican immigration soared to about 9 percent of all immigrants in the first half of the decade.¹⁵ This source of cheap labor was exploited by the growers — the Mexican workers were organized in work gangs much like the Japanese, only the loyalties of the contractors were with the bosses. The workers were paid piece rate, and so the contractors could increase their earnings by keeping the hourly wages down.¹⁶ This system worked to the advantage of the growers because organizing was hampered as workers were confused about for whom they were in fact working and a few contractors were able to set wages and conditions for their whole harvest.¹⁷ There was, however, intense opposition to this vast increase in Mexican labor, as reflected by the Box and Harris bills in Congress, which took up the same racist and nativist language used against the Chinese and Japanese and reflected racial divisions within the working-class population.¹⁸ To hedge against possible statutory limitations on the Mexican labor supply, growers also began recruiting Filipino workers from the Philippines and Hawaii — both U.S. territories and thus not subject to immigration quotas.¹⁹

In addition to exploiting the vulnerability of immigrant workers, who spoke little or no English, lacked knowledge of the legal system, and were often reliant on their employer for food and shelter, the growers received an added benefit with the passage of the NLRA in 1935. Because of the massive waves of unemployment caused by the Depression, the labor market was thrown into upheaval with plummeting wages and increased labor strife across the country. Senator Robert Wagner of New York introduced the NLRA with the purposes of bringing industrial peace and encouraging union organizing to raise wages. The Act gave workers and unions powerful organizing tools and protection from employer retaliation. It also established the National Labor Relations Board, an independent agency charged with overseeing the administration of the Act, running union elections, and certifying unions as the exclusive bargaining representative

¹⁵ *Id.* at 31; GÓMEZ-QUIÑONES, *supra* note 6, at 104.

¹⁶ GÓMEZ-QUIÑONES, *supra* note 6, at 130.

¹⁷ GANZ, *supra* note 6, at 32.

¹⁸ MAJKA & MAJKA, *supra* note 6, at 64.

¹⁹ JAMIESON, *supra* note 6, at 74.

of employees.²⁰ The NLRA initially proved quite successful, as union membership soared throughout the next twenty years. It unfortunately had quite the opposite effect for agricultural workers. In order to get the bill through Congress, Wagner and other northern New Deal Democrats were forced to compromise with conservative western and southern senators, who succeeded in excluding agricultural and domestic workers from the law's protections — both groups largely comprising people of color. So as it became clear that it was the Mexican and Filipino field workers, rather than the white packing shed and cannery workers who fell under the agricultural exception, AFL and CIO organizers took little interest organizing those not within the law's protective reach. It also meant that farm workers could only use unprotected strikes and slow-downs to achieve recognition.²¹

The great wave of organizing took place in the first twelve years after the Act's passage. In 1947, Congress, over the veto of President Truman, passed the Taft–Hartley Act. Also known as the Labor Management Relations Act, or the “slave-labor act” by labor leaders, Taft–Hartley amended the NLRA with many provisions hostile to unions, taking away many of their most potent weapons.²² The NLRA originally only provided for unfair labor practices committed by employers; now it included many that could be committed by unions. It prohibited wildcat strikes, jurisdictional strikes, and solidarity or political strikes. It outlawed the closed shop, and restricted the union shop by allowing states to pass “right-to-work” laws, which prohibited union-security clauses in contracts requiring employees to obtain union membership. It restricted political contributions by unions and required union officers to sign affidavits repudiating communism. Most importantly for the subsequent farm worker movement, it outlawed the secondary boycott. This involves a union engaging in picketing or other activity against a separate employer, who has no labor dispute, doing

²⁰ Exclusive representation means that, once certified, the employer must bargain with the union in good faith to arrive at a contract governing wages, hours, and other conditions of employment. The employer cannot deal directly with employees. Additionally, only one union may represent a certified group of workers, or bargaining unit at a time. Other unions are barred from running an election for the duration of the collective bargaining agreement.

²¹ MAJKA & MAJKA, *supra* note 6, at 95.

²² See 29 U.S.C. §§ 141–197.

business with a struck employer, with the goal of the secondary employer's pressuring the primary employer to settle its strike or dispute. While Taft-Hartley ultimately had a negative effect on unions' ability to organize, the fact the agricultural workers were excluded from the protections of NLRA, but were allowed to keep the economic weapons taken away from industrial unions with the LMRA would prove critical to the UFW's organizing success as well as its later decision to seek legislative protection and what kind.²³

The *Bracero* Program and undocumented workers presented further challenges to efforts to organize farm workers. The Depression saw a major contraction in the farm labor market, and the government began repatriating workers by the thousands to Mexico. During World War II, the demand for manual labor surged, and, in a series of diplomatic agreements with Mexico, the government began bringing in several hundred "guest" workers for the fields and railroads.²⁴ At the behest of growers, the program in agriculture was extended and would continue to be renewed every two years until 1964. Between 1942 and 1964, about 4.6 million Mexicans were admitted to do agricultural work. Many Mexicans returned year after year, but the one to two million individual workers who participated in the program gained U.S. work experience and wages, and some decided to remain illegally in the country.²⁵ Although the program stipulated that no *braceros* could replace domestic workers (and so could not be used as strikebreakers), the law was rarely enforced, and growers would replace workers with *braceros* after firing them.²⁶ The program gained a new lease on life when it was renewed and extended as PL-78 in 1952. Although the program would end in 1964, Chavez, the UFW, and other unions would continually struggle against the wealth and political connections of growers, and their ability to utilize cheap, surplus labor.

²³ Joseph Shister, *The Impact of the Taft-Hartley Act on Union Strength and Collective Bargaining*, 11 INDUSTRIAL AND LABOR RELATIONS REVIEW 339, Apr. 1958.

²⁴ See Michael Snodgrass, *The Bracero Program, 1942-1964*, in MARK OVERMYER-VELÁSQUEZ, ED., *BEYOND THE BORDER: THE HISTORY OF MEXICAN-U.S. MIGRATION* 79 (2011).

²⁵ *Braceros: History, Compensation*, 12 RURAL MIGRATION NEWS, Apr. 2006.

²⁶ DEBORAH COHEN, *BRACEROS: MIGRANT CITIZENS AND TRANSNATIONAL SUBJECTS IN THE POST-WAR UNITED STATES* 154 (2011).

And so, it was against this background of racism, exclusion from political and legal protection, and violent strikebreaking tactics that Cesar Chavez began organizing farm workers, founding the National Farm Workers Association (NFWA) in 1962. As this brief sketch shows, for over seventy years, efforts to organize field workers were met by growers and their allies in the courts, the Legislature and law enforcement with extreme hostility, violence, injunctions and arrests, anti-union ordinances and the importation of workers with no rights and no affiliations. Such efforts were also rewarded by tepid support from organized labor, which, even when finally fully engaged, found it difficult to win on the growers' turf.

By the time the Delano strike was called in 1965, Chavez had already formulated his response to many of these issues. It is impossible to understand the formation of this strategy apart from the context of the civil rights movement and the end of the *Bracero* program. In 1963, amid intense grower opposition, Congress voted to allow the *Bracero* program to end without further extension. This enraged California growers, who embarked on a propaganda campaign to consumers predicting soaring produce prices as a result of fewer crops and a dire labor shortage. In an effort to compromise, the Department of Labor allowed growers to bring in emergency green card workers under the condition that they raise wages.²⁷ The labor market contraction caused by the new absence of vulnerable nonresident workers created a new organizing opportunity, which Chavez would seize. The question remained how to effectively mobilize farm workers and avoid the fate suffered by earlier efforts. He would draw on three tactics utilized by civil rights leaders to achieve this: a broad base of support from the people actually facing injustice, massive mobilization of outside supporters and the media, and strategic utilization of the legal system.

After ten years of working as a director for the CSO, Chavez (along with Huerta and Padilla) resigned to start an organization focused on agricultural labor and the injustices of the *Bracero* program when the CSO convention voted not to go in that direction.²⁸ He established his new NFWA in Delano in the San Joaquin Valley, the heart of the table grape industry and the center of California's agricultural belt. Because of its prime

²⁷ GANZ, *supra* note 6, at 96.

²⁸ MAJKA & MAJKA, *supra* note 6, at 170.

location near year-round farming, Delano offered Chavez the opportunity to gain initial support among more stable residents rather than the difficult to organize and vulnerable migrant populations. He believed that many earlier efforts had failed due to a lack of a stable organizational base engendered by traditional union organizing strategies of focusing on one contract or workplace at a time.²⁹ For the next two years, the organizers solidified their base of support using the community organizing methods common to the CSO, such as orchestrating house meetings, constructing community service centers and establishing a credit union for farm workers.³⁰ Chavez began building allies for his movement with growing confidence of a potential victory, remarking “the reason the farm worker organizing drive could win was because they could ally themselves with a new feature in American social and political activity — the movement for civil rights, the movement of the youth, and the movement of the poor.”³¹ Chavez thought that the union should be a service-oriented movement, with organizers taking only the money donated to them by farm workers, and not organizing along a traditional AFL-CIO-style “business” model.³²

In 1965, when Filipino grape workers in the Coachella valley, led by AWOC director Larry Itliong, demanded the \$1.40 per hour prevailing wage set by the Secretary of Labor, the growers initially refused. After a short strike, however, management conceded the extra \$0.15. When the harvest moved north, the growers again refused the higher wage and ultimately prevailed. With the work now moving to Delano, and the growers repeating the low-ball offer, Filipino workers staged a sit-down strike, refusing to leave their camps. Although Chavez felt his fledgling union insufficiently prepared for a strike, the Mexican workers (many of whom toiled in the same fields as the Filipinos) voted to join the strike. At the center of the strike were two large ranches encompassing 10,000 acres, and ultimately more than 3,000 AWOC and NFWA workers participated in “La Huelga.”³³ The growers, quickly recognizing the size and enthusiasm of the strike and lacking *bracero* replacement workers, saw this as a battle for control over California agriculture, and

²⁹ *Id.* At 171; Gómez-Quiñones, *supra* note 6, at 244.

³⁰ *Id.*

³¹ Quoted in SAM KUSHNER, *THE LONG ROAD TO DELANO* 122 (1975).

³² GÓMEZ-QUIÑONES, *supra* note 6, at 244.

³³ MAJKA & MAJKA, *supra* note 6, at 173.

would not give in easily. The traditional methods were used. They evicted workers from the camps, sprayed picketers with pesticides, assaulted striking workers, and illegally brought in 2,000 undocumented strikebreakers from Juarez.³⁴ Local courts issued injunctions of the strike and local law enforcement staged mass arrests of strikers.

Recognizing that it would be difficult to outlast these powerful interests, Chavez took a page from the civil rights playbook and looked outward for support. The involvement of the federal government, the grower outcry over labor shortages and the end of the *Bracero* program, and efforts in the Assembly to pass legislation favorable to farm workers generated a great deal of press coverage and interest from the general public. Chavez staged a rent strike after the local housing authority raised rent in the migrant encampments by forty percent. He also used the media attention to craft a message of social injustice and moral imperative, and called on all segments of society for support — many of the images from the rent strike evoked those of the march that had taken place in Selma, Alabama, just three months earlier, with workers surrounded by police refusing to move. The Mexican trade union and the UAW gave generously to support the strike, with UAW president Walter Reuther making a nationally publicized appearance in Delano. Chavez started a farm worker newspaper, *El Malcriado*, contacted local civil rights leaders in Los Angeles about nonviolent protest training, and continued to orient the union alongside the larger civil rights struggle. In a July 9 editorial in *El Malcriado*, the union reiterated its message: “[E]very day more and more working people prove their courage as the Negroes are doing in their movement. The day we farm workers apply this lesson with the same courage the Negroes have shown in Alabama and Mississippi, on that day the misery of the farm worker will come to an end.”³⁵ Unlike the AWOC, the NFWA defined itself as a farm worker civil rights movement. And as the strike issue of *El Malcriado* read:

Sometime in the future they will say that in the hot summer of California in 1965 the movement of the farm workers began. It began with a small series of strikes. It started so slowly that at first it was only one man, then five, then one hundred. This is how a

³⁴ RONALD TAYLOR, *CHAVEZ AND THE FARMWORKERS*, 146 (1976).

³⁵ Quoted in GANZ, *supra* note 6, at 115.

movement begins. This is why the Farm Workers Association *is a movement more than a union*.³⁶

Clergy and students began to arrive on the picket lines and national media attention increased as a result. Students involved in the Free Speech Movement at Berkeley had politicized the population, including a law student named Jerry Cohen. Up to this point, the NFWA had relied on pro bono work from Bay Area labor lawyers, who turned out to be so mired in the NLRA restrictions on union activity that they could not approach the problems presented to the fledgling union through any other lens, despite the fact that farm workers were exempt from coverage.³⁷

However, this exemption allowed the union to take advantage of tactics unavailable to industrial unions. In October, the union called on the general public to boycott grapes. Both the Teamsters and the ILWU honored the picket lines at the points where the grapes were loaded for transport.³⁸ Reuther's visit to Delano helped spread support for the boycott throughout organized labor across the country. Importantly, Chavez declared that the strike would be for union recognition, not just a wage increase — serving as a reminder to labor, the clergy, and the public that farm workers, unprotected by the NLRA, had to strike for recognition and hence needed public support.³⁹ In order to garner further sympathy for the boycott and to remain in the national media spotlight, Chavez and the union staged a 280-mile march to the Capitol in Sacramento. The march was intended to stress the nonviolence of the strikers, evoking not only the Selma march, but also religious pilgrimages so familiar to the Catholic Mexican and Filipino workers. By this point, the boycott began to take its toll as liquor stores across the country cleared products from Schenley, the other grower targeted along with DiGiorgio, from their shelves.

Marching to Sacramento served another purpose: to put pressure on Governor Pat Brown in an election year to support the union. Ronald

³⁶ Quoted in GANZ, *supra* note 6, at 126 (emphasis added).

³⁷ Jennifer Gordon, *Law, Lawyers and Labor: The United Farm Workers Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. OF L. & EMP. 14 (2005).

³⁸ MAJKA & MAJKA, *supra* note 6, at 174.

³⁹ GANZ, *supra* note 6, at 125.

Reagan had announced his candidacy and his platform involved a return to the *Bracero* program. Although Brown had been an ally of farm workers in the past, his support took the form that all governors had taken going back to Hiram Johnson in 1912. By giving public funds to housing commissions and service centers for agricultural workers, politicians in the governor's mansion had framed the issue as a social problem rather than a labor problem. By treating the issue as one of providing social services, the politicians could avoid taking a side against the growers or the workers. Chavez sought to rectify this dichotomy. Workers picketed the 1966 State Democratic Convention, and supportive delegates introduced a unanimous resolution calling for the establishment of collective bargaining rights in agriculture, support of the boycott, and intervention by the governor.⁴⁰ The governor responded by saying that he would not intervene because "we have collective bargaining laws to take care of differences between workers and employers." He clearly had not read the NLRA.

Just as the march was beginning, at the urging of Reuther, the Senate subcommittee on migratory and farm labor arrived to hold hearings on SB 1866 which would bring agricultural workers under the purview of the NLRA.⁴¹ Chavez at this point had not seen the ultimate effectiveness that the boycott would go on to have, and so supported inclusion at this date, which would, of course, end his ability to utilize secondary activity such as picketing grocers. The growers vehemently opposed the plan, claiming over and over again that there was no strike, no labor problem, and that the workers did not support this group of radicals.⁴² Within five years the tables would be turned.

Before the march reached Sacramento, Schenley, fearing further negative press coverage and an illegal Bartenders Union boycott, agreed to recognize NFWA and negotiate a contract. The next day, DiGiorgio had agreed to hold secret-ballot elections for recognition. However, Chavez wanted NLRB rules to protect the election and the workers from unfair

⁴⁰ *Id.* at 150.

⁴¹ *Id.*; МАЈКА & МАЈКА, *supra* note 6, at 175. Senator Robert Kennedy also attended at the urging of Reuther. He would go on to become the farm workers' most outspoken supporter in national politics.

⁴² *Id.*

labor practices; without this guarantee, the union would neither suspend its pickets or boycotts.⁴³

Winning a contract with DiGiorgio would require not only bargaining with the grower, but also competing against another union for the votes of the workers. Strengthened by the passage of the NLRA and masters of secondary activity, the International Brotherhood of Teamsters (IBT) had spent the past three decades expanding their power base on the West Coast from the trucking and shipping at the ports, to the agricultural warehouses and packing sheds of the growers.⁴⁴ The Teamsters were a conservative union, which viewed unions as a business organization for the sale of labor services, not as a force for social change as did the Longshoremen or the Miners. The IBT had never sought to organize in the fields, and early on decided to leave the farm workers out of any agricultural organizing efforts.⁴⁵ As early as the thirties, the Teamsters took advantage of growers' anxiety about the radical CIO and the power of union field workers allied with the white women of the canneries and packing shed, and they employed a strategy that they would use against farm workers for four decades — they appealed to the employers rather than the workers, and growers signed contracts to avoid the social movement side of labor unionism.⁴⁶

Prior to the negotiations with DiGiorgio, the IBT had supported the farm workers from the shipping and packing sheds they represented. Yet, they had a rivalry with the AFL-CIO, having been expelled years prior for corruption. The reason the Teamsters decided to enter the fields, whether it was because they already had extensive contracts with growers including DiGiorgio in canneries, packing sheds, and cold-storage warehouses or because they were a conservative group that disfavored radical social unionism, or because there was a rift within the Teamsters leadership against its then-president Jimmy Hoffa, has never been fully understood.⁴⁷

But the Western Conference of the IBT decided, either on their own or at the behest of the bosses, to go into the fields and challenge the NFWA in the DiGiorgio elections. This signaled the beginning of a decade of strife

⁴³ GANZ, *supra* note 6, at 160.

⁴⁴ MAJKA & MAJKA, *supra* note 6, at 37–40.

⁴⁵ JAMIESON, *supra* note 6, at 144.

⁴⁶ *Id.* at 152–154; McWILLIAMS, *supra* note 6, at 270–273.

⁴⁷ MAJKA & MAJKA, *supra* note 6, at 180.

and conflict between the two unions. DiGiorgio then held a surprise election that the Teamsters won and the NFWA challenged. Under pressure, Brown's investigator recommended a new election, and DiGiorgio responded by firing 200 workers, most of whom were NFWA supporters. None of this would have been possible under the NLRA. As soon as the issues became focused on union recognition and long-term contracts rather than single-season wage increases, the protection of labor laws became much more appealing. Because the election represented the future of the union and fearing a loss of support for the boycotts in the case of a loss, Chavez agreed to merge the NFWA with AWOC and affiliate with the AFL-CIO, losing some of his cherished independence, to form the UFWOC.⁴⁸ Although the merger brought strength and capital, Chavez worried that the union would lose its image as a democratic, grassroots organization fighting for the freedom of an oppressed minority.⁴⁹ Now, however, the ethnic leaders, radical organizers and the AFL were on the same side for the first time in California history.

Despite DiGiorgio's pressuring its workers to vote Teamsters, the UFWOC won the election 530 to 331.⁵⁰ Though it had taken three quarters of a century, farm workers finally had a union contract. However, the UFWOC could neither have won the election without the secondary boycott nor without the NLRB-style election rules and the supervision of an arbitrator. Thirty years after the passage of the NLRA, and after several failed legislative attempts, the pieces — the secondary boycott, the IBT rivalry, the AFL-CIO affiliation, and union elections — were now in place to begin moving the nascent farm worker movement toward legislation. Would this revolution be taken out of the streets and placed in the courts, as John Lewis had feared?

After the success of the Delano strike, the UFWOC began targeting individual companies using a table-grape boycott to win union contracts. Growers soon consolidated their efforts and the union was essentially battling the entire industry. With the administration of contracts, the multiplicity of pickets and a nationwide secondary boycott of supermarkets, legal matters became considerably more complex. Chavez hired a young

⁴⁸ JACQUES LEVY, CESAR CHAVEZ: AUTOBIOGRAPHY OF LA CAUSA 239–244 (1975).

⁴⁹ GANZ, *supra* note 6, at 128–130.

⁵⁰ GÓMEZ-QUIÑONES, *supra* note 6, at 246.

lawyer named Jerry Cohen who had been working at the California Rural Legal Assistance nonprofit for only a few months when he met Chavez.

With no background in labor law, Cohen worried that he would be of little assistance to Chavez.⁵¹ He very quickly proved his worth. The pro bono lawyers had had a practice of signing consent decrees with the NLRB on the union's behalf stating that they would not engage in secondary boycotts because that's what the NLRA said, thus taking away the union's biggest and most strategic weapon. Although the NLRA excludes farm workers, if even one worker in the union is in fact a covered employee as defined by the Act, the union becomes a labor organization under the Act, and subject to prohibitions on the secondary boycott.⁵² So when Cohen discovered that nine workers in a peanut-shelling shed were NLRA employees, he quickly created the "United Peanut Shelling Workers of America," a new union under the AFL-CIO, successfully divesting the UFWOC of any NLRA covered employees.⁵³ As a result of this and other efforts, Cohen's role expanded quickly, and Chavez began using the law for the first time to his advantage — using discovery motions to gain access to bargaining unit information, and fighting back against restrictive legislation, as well as negotiating contracts with growers. The California Supreme Court handed down a case in 1968, *In re Berry*, holding that the violation of an order of the court, such as an injunction or temporary restraining order, which is unconstitutional, cannot result in a valid judgment of contempt.⁵⁴ This led Cohen and Chavez to a strategy where an injunction would be issued against the union, for example for the use of bullhorns, the union would then violate the injunction, and Cohen would challenge the order in court. This would result in case law explicitly granting the union their First Amendment rights, which Cohen would then wave in the face of local judges the next time they attempted to restrict the union's activities.⁵⁵

⁵¹ GORDON, *supra* note 37, at 15.

⁵² See NLRA § 2(5).

⁵³ GORDON, *supra* note 37, at 15.

⁵⁴ 68 Cal. 2d. 137, 147 (1968).

⁵⁵ GORDON, *supra* note 37, at 17. See Jerry Cohen, *Gringo Justice* (The Jerry Cohen '63 Papers at Amherst College), <https://www.amherst.edu/media/view/314670/original/Gringojustice.pdf> (last visited Oct. 11, 2012).

In 1968, with the boycott in full swing, Chavez and the UFWOC were put in a difficult position after the assassination of Robert Kennedy. Kennedy had been a loyal supporter since his first trip to Delano in 1965, and the UFW repaid him with a significant voter registration and turnout effort, which many attribute to putting him over the top in the important California primary. Both Chavez and Dolores Huerta attended the victory celebration at the Ambassador Hotel in Los Angeles where Kennedy was shot and killed. Now hesitantly backing the AFL-supported candidate, Hubert Humphrey, Chavez demanded that Humphrey pressure growers to negotiate.⁵⁶ He would not. Humphrey was convinced that the strife in California and the grape boycott resulted from the fact that agricultural workers were exempted from the NLRA.⁵⁷

Consensus in Washington began to build around bringing agricultural workers under the Act. Prior to 1968, Chavez and Larry Itliong had supported such legislation. Now, however, Chavez witnessed the benefits reaped by organizational strikes and secondary boycotts, both now prohibited by the NLRA. He also observed that few CIO unions had emerged after Taft-Hartley had stripped unions of many such weapons, placed damages provisions into the law creating union liability, and authorized the President to end strikes. Accordingly, he determined that such legal protection was no protection at all.⁵⁸ Furthermore, because of delays in the enforcement mechanisms, Chavez felt that the NLRA could not accommodate agricultural labor with its short harvesting periods and migrant work force.⁵⁹ According to Cohen, one of the most important reasons for opposing inclusion under the NLRA was the nature of bargaining units, which, after the AFL trade model, were organized by a community of interest, meaning by craft. The UFWOC wanted an industrial unit.

[U]nder the craft unit approach different groups of the work force, such as truck drivers, tractor drivers, irrigators, could be in different units from weeders, hoers, and pickers. Under an industrial unit approach all the grower's workers would be in one unit and

⁵⁶ MAJKA & MAJKA, *supra* note 6, at 191.

⁵⁷ *Humphrey Charges Nixon is Engaging in 'Razzle Dazzle, Frizzle Frazzle,'* UNITED PRESS INTERNATIONAL, Sep. 26, 1968.

⁵⁸ *Id.*

⁵⁹ Ronald Taylor, *Why Chavez Spurns the Labor Act*, THE NATION, Apr. 12, 1971.

have an opportunity to move to the more skilled, higher paying jobs. For example, a picker could aspire to drive a tractor or a truck. Given the racism of some growers, the craft unit approach could relegate Mexicans, Filipinos and other minorities to the harder, lower paying jobs. Therefore, craft units would create legislatively mandated ghettos in the fields.⁶⁰

Instead, Chavez envisioned a union where all agricultural workers on a ranch were in the same unit, under the same contract regardless of their job. Without UFWOC support, no efforts to incorporate farm workers would succeed. At this point, it seemed that the law might not even be necessary.

By 1970, the boycott had had a tremendous impact, resulting in the UFWOC's holding contracts with 85 percent of the table-grape ranches. When the Delano strike officially ended and the boycott on grapes was called off, farm workers' wages had nearly doubled, the union had established hiring halls for the ranches, a ban on DDT, and a health and welfare trust fund with accompanying medical clinics had been created.⁶¹ During this time Cohen and Chavez continued to use innovative legal strategies to pressure growers into negotiating. Because of the setting in state courts that historically favored growers, coupled with the fact that court decisions often came years after judicial action would prove an effective measure, Cohen had little interest in winning cases.⁶² Instead they focused on bringing cases regarding the lack of protection that workers had against toxic pesticides, the health and sanitation conditions in the fields, law enforcement assaults on picketers, antitrust violations and illegally utilizing federally subsidized water.⁶³ This litigation had the effect of putting pressure on regulators to step up enforcement, maintaining a presence in the press, continuing to convince consumers not to buy grapes or other boycotted products, and costing the growers significant money in legal

⁶⁰ COHEN, *supra* note 55, at 17–18.

⁶¹ GÓMEZ-QUIÑONES, *supra* note 6, at 247.

⁶² Jennifer Gordon interview with Jerry Cohen. Professor Gordon was kind enough to share with me all of the original transcripts of her extensive interviews with UFW legal personnel, and for this I thank her.

⁶³ GORDON, *supra* note 37, at 24; GORDON, *supra* note 62, at 306. For a list of cases, see <https://www.amherst.edu/media/view/69688/original/Case-summaries.pdf>.

expenses. The pesticide case in particular captured the public attention when tests conducted on grapes at Safeway stores, the target of a secondary boycott, revealed levels of the pesticide Aldrin far above government safety levels — linking the workers interests with those of the consumer.⁶⁴ The UFW now wielded the law as another organizing weapon in its arsenal. And indeed, the organizing priorities always took precedence over any individual legal victory.

As the pesticide cases continued, Cohen continued to file suits over back pay, torts for workers injured on the job, Section 1983 civil rights claims, and any cases he could find arising under the California Labor Code. This was a new kind of organizing, unprecedented from the growers' standpoint. They had previously done battle with their own employees and union organizers, which, given the sympathies of county courts and sheriffs, allowed them play to avoid legal constraints upon their conduct. Now they were forced to play by a different, much costlier, set of rules. This legal strategy, combined with the effectiveness of the boycott and religious support garnered by Chavez's fast for nonviolence eventually made growers eager to negotiate. The Teamsters sought to take advantage of the willingness to sign contracts, and their efforts to form a farm worker union of their own would drive a series of violent confrontations and create pressures on the UFWOC that would ultimately lead to a legislative solution.

In 1965 and 1966, the IBT, along with the ILWU, had supported the Delano strike and the grape boycott by refusing to pack, load, or ship non-union grapes and wines in areas where they controlled labor in the sheds, on the roads, or in the warehouses. In 1967, the two unions had even reached a temporary agreement: the UFWOC had jurisdiction over the fields and the Teamsters over the canneries, packing sheds and warehouses, trucking and processing facilities. Between 1970 and 1973, the Farm Workers initiated a campaign to organize lettuce workers from Salinas to Coachella. The UFWOC put intense effort and major resources into strikes in the fields, subsequently initiating another secondary boycott on lettuce in major grocery chains. This campaign occurred while other Teamster contracts were up for renegotiation. Fearful of what took place in the grape fields, growers reached out to the Teamsters to represent field workers as

⁶⁴ MAJKA & MAJKA, *supra* note 6, at 194.

well. Within days, the twenty-nine largest growers in the Salinas Valley had signed and negotiated sweetheart contracts with the Teamsters.⁶⁵ This was a major blow to both the UFWOC and the workers. These contracts were signed “without worker knowledge or input, and had few mechanisms for worker participation, no protection from pesticides, and inadequate grievance procedures. Workers who refused to agree to Teamster representation were immediately fired.”⁶⁶ This arrangement reaped benefits for both the Teamsters, who could collect dues without engaging in any organizing, and the growers, who could now exclude the UFW and count on a union that would not generate any problems.

The UFW called on growers to renounce the unfair contracts and sign with the UFW, but in August, when the president of the Grower–Shipper Vegetable Association announced that he would maintain the Teamster contracts and had received assurances that they would be honored, the strike was called. Cohen remarked that ironically the sweetheart contracts had organized the workers for them.⁶⁷ A general strike involving 10,000 workers swept through Salinas and down to Santa Maria. The *Los Angeles Times* called it the “largest strike of farm workers in U.S. history,”⁶⁸ virtually shutting down the fields. The courts, at the request of the growers and believing the conflict to be a jurisdictional dispute between unions, responded with a general injunction against picketing. This created huge problems leading to mass arrests and a restriction of UFWOC organizers to the strikebreakers that the growers brought in.⁶⁹ The Teamsters again responded with violence: attacking picketers, opening fire on UFWOC headquarters, bombing the Watsonville office, assaulting Jerry Cohen, and shooting three picketers.⁷⁰

During this time the Teamsters, the growers and their political allies placed a measure on the California ballot in 1972, which would have prohibited secondary boycotts and other agricultural-union activity. A

⁶⁵ *Id.* at 201. A sweetheart contract is a contract made through collusion between management and labor, which contains terms beneficial to management and unfavorable to union workers.

⁶⁶ GORDON, *supra* note 37, at 26–27.

⁶⁷ COHEN, *supra* note 55, at 22.

⁶⁸ Quoted in MAJKA & MAJKA, *supra* note 6, at 203.

⁶⁹ *Id.* at 204.

⁷⁰ *Id.*

massive effort to defeat Proposition 22 was undertaken while Cohen was fighting consolidated cases to overturn the injunctions against UFWOC pickets. Although the measure was defeated and the California Supreme Court overturned the injunctions and held the picketing to be legal, these efforts in addition to the strike and the boycott and false starts with growers who claimed they would relinquish their Teamster contracts, took a huge toll on the union's resources.⁷¹ To administer over 100 contracts and incorporate tens of thousands of workers required training farm workers as stewards and ranch committee members. In addition to running the vegetable boycott across the country, grievances had to be pursued, hiring halls and benefit programs managed, and medical care facilities coordinated, which in turn required an ever-increasing staff.⁷² In short, in addition to functioning as a grassroots, social justice movement, the UFW now had the traditional responsibilities of a union. With this growth, its income from dues and fundraising increased to the point where the AFL-CIO determined the union was no longer an organizing committee and chartered the union as the United Farm Workers of America. The union now had to revise its 1963 constitution, hold new executive board elections, and hold a constitutional convention.⁷³

Between the spring of 1972 and the end of 1973 the conditions came together that would ultimately force Chavez and Cohen to advocate for a farm worker labor law. First, around the country the Nixon administration, in alliance with growers and state governments spearheaded legislative initiatives, like that of Proposition 22, many of which banned secondary boycotts, harvest-time strikes, and collective bargaining over pesticide control.⁷⁴ In Oregon, Washington, Arizona, New York, Florida, and California, the UFW was forced to expend significant energy fighting these bills. Although the UFW efforts proved largely successful not only in defeating these measures through the political process, but also in registering and mobilizing many Chicano voters, they drained time, resources, and

⁷¹ See *Englund v. Chavez*, 8 Cal. 3d 572 (1972); GÓMEZ-QUIÑONES, *supra* note 6, at 248.

⁷² GANZ, *supra* note 6, at 230.

⁷³ *Id.* at 231.

⁷⁴ MAJKA & MAJKA, *supra* note 6, at 208.

precious attention — particularly from the administration of contracts and the management of their hiring halls.

Second, during this time many of the original contracts signed with the Delano grape growers were expiring, and the Teamsters' president Fitzsimmons urged the growers to sign with the Teamsters.⁷⁵ The growers wanted assurances that the hiring halls would be abolished and that the Teamsters would not negotiate over pesticide use. They received such assurances. When the contracts did expire, 90 percent of the grape growers signed contracts with the IBT.⁷⁶ The Teamsters, having been expelled from the AFL, were free to raid other AFL unions. As a result, the UFW lost a significant portion of its membership and thus important dues income. The workers across the valley, on all but the two ranches that re-signed with the UFW, were called out on strike.

Third, this conflict predictably grew violent. The Teamsters sent armed members to guard the fields as security personnel and prevent UFW organizers from speaking to the workers.⁷⁷ A superior court judge issued an injunction without providing notice to the parties, and just as quickly the UFW violated it. By the time the union called off the strike in August “two strikers were murdered, while picketers endured 44 shootings, 400 beatings, and 3,000 arrests . . . [W]hen it was all over, the UFW was left with 10 contracts, 6,000 members, a shattered dues income, and a fight for its life.”⁷⁸ The boycott of grapes, lettuce, and Gallo wine was reactivated.

Fourth, becoming chartered by the AFL-CIO did not come without strings. When the AFL-CIO president George Meany contributed \$1.6 million to the UFW strike fund, it came on the condition that the union pursue some kind of labor relations law. Meany saw all the UFW activity as disruptive and sapping energy. For the AFL-CIO, victory was not defined in terms of changing social consciousness through a movement, it was

⁷⁵ The NLRA, which governed the Teamsters, provides for exclusive representation of workers by bargaining representatives. This means that only one union can represent a unit of workers at a time. The Teamsters thus had to wait until the UFW contracts expired to attempt to represent those same workers, unless workers held an election to “decertify” a union as their representative.

⁷⁶ GORDON, *supra* note 37, at 29.

⁷⁷ MIRIAM PAWEL, *THE UNION OF THEIR DREAMS: POWER, HOPE, AND STRUGGLE IN CESAR CHAVEZ'S FARM WORKER MOVEMENT* 108 (2009).

⁷⁸ GANZ, *supra* note 6, at 232.

defined in terms of winning contracts, adding members, collecting dues, and gaining political leverage.⁷⁹ Cohen saw this correctly as an “NLRB” mentality, but there was no other legal way to protect the UFW from the Teamster raids on their contracts and for UFW organizers to gain access to workers on ranches. Additionally, in 1974, the Safeway boycott was ended in exchange for backing of the grape and lettuce boycott, in part to placate unionized grocery workers.⁸⁰

For many years, the UFW staff, particularly Chavez and Cohen, had struggled with whether to seek the protection of a law for farm workers. They had run up against problems with access to workers and private property issues with growers, conflicts with the Teamsters, and the lack of a method to protect workers who were fired for union organizing. However, there were far too many problems with the NLRA, such as inadequate remedies, the prohibition on secondary activity, and the structure of bargaining units, to seek its protection. Additionally, the political climate in California, with a Republican governor in office and strong grower support in the Senate, bode poorly for the passage of any good legislation. Chavez had observed what the Taft–Hartley Act had done to industrial unions once they lost some of their more potent weapons still available to the UFW, and he believed that legislative victories had quelled the momentum of the civil rights movement in the South.⁸¹ Cohen also believed that “legalizing” the farm worker struggle would come at a cost. He had not taken labor law in school, but he knew that it was only a matter of time before an industry of capable anti-union lawyers formed and began to use the law to erect barriers to organizing efforts.⁸² Most of the staff, and especially Chavez, wanted to maintain the social movement aspect of the UFW. They feared that being bogged down in an “administrative nexus” — in a lawyer’s game — threatened to sap the power the movement had worked so hard to build.⁸³

Nevertheless, the political dynamic in California was shifting. In 1974 two major political events coalesced to make passage of a favorable law seem feasible. The Democratic secretary of state, Jerry Brown, succeeded

⁷⁹ Gordon, notes from interview with Sandy Nathan.

⁸⁰ GÓMEZ-QUIÑONES, *supra* note 6, at 249.

⁸¹ TAYLOR, *supra* note 59; LEVY, *supra* note 48, at 529.

⁸² Gordon, Cohen interview.

⁸³ Gordon, interviews with Cohen and Nathan.

Ronald Reagan as governor, and had run on a platform of bringing peace to the fields.⁸⁴ A year earlier, the California Supreme Court had ordered reapportionment that ended decades long rural domination of the state Senate.⁸⁵ New, pro-farm worker senators from Southern California, Howard Berman and Richard Alatorre, were recently elected and commanded a majority in the Legislature ready to work with the governor. The union decided that its best chance to regain many of the workers it had lost, prevent sweetheart contracts, run fair elections and have structured bargaining lay in legislative action.⁸⁶ So Cohen began taking stock of all the innovations and protections needed to craft a law that would benefit farm worker organizing.⁸⁷

[W]e figured we needed elections in seven days. We needed an industrial unit. We needed access [to the fields] somehow. We needed some basic things like, for the workers who couldn't read and write, symbols on the ballots I went around and talked to some law professors just to find out what elements they would want if they were going to change the NLRB and things like the "make whole" remedy, which I didn't know about, came up. And we learned about some of those remedies and decided, "We'll just load up — we'll ask for everything. We'll ask for the whole damn thing."⁸⁸

Chavez remained ambivalent about seeking a law governing the fields. His primary concern was losing the boycott. With the kitchen sink approach, Cohen reassured Chavez that "we'll introduce a bill that can't be passed see what reasonable sounding things we can put in there that are impossible."⁸⁹ This strategy would either yield a powerful set of rights

⁸⁴ GANZ, *supra* note 6, at 234.

⁸⁵ In 1971 the governor vetoed the Legislature's reapportionment act following the decennial census. The California Supreme Court appointed three Special Masters to recommend to the Court plans for possible adoption together with their underlying rationale. The Special Masters report was adopted by the Court in November 1973.

⁸⁶ GORDON, *supra* note 37, at 30.

⁸⁷ Gordon, Cohen interview.

⁸⁸ *Id.*

⁸⁹ Tape of NEB meeting, Dec. 17–23, 1973, UFW, Wayne State, quoted in PAWEL, *supra* note 77, at 148.

and protections or at the least appease Meany and the AFL and Governor Brown that the UFW had attempted to seek a legislative solution. The union would then try to place the law on the ballot and win a constitutional amendment.⁹⁰ Cohen took up residence in Sacramento, and, over a period of months wrangled with Brown, his secretary of agriculture, Rose Bird, and numerous attorneys and legislators. Cohen attempted to convince Brown to support a version of the bill authored by Richard Alatorre that contained most of the union's demands, and promised UFW support.⁹¹

Rather than a wave of unified opposition, support for the measure came from expected sources as well as their traditional enemies. Both supermarket chains and rural county government advocated for the measure. Economic concerns from the boycott and from mass arrests and continual picket-line violence respectively had convinced them to support whatever measures would restore stability to agriculture.⁹² The Teamsters were ambivalent, fearing on the one hand that the law would nix their sweetheart contracts, and hoping that regulated elections could legitimize and stabilize their union in the fields on the other. Although most growers opposed the bill, some, including large ranches like Gallo, favored it because much of the economic harm they had suffered as a result of UFW activities had come from the boycott rather than a cadre of organized workers. They felt that they could win an election and free themselves from the burdensome tactics of the union.⁹³ Others felt that with the secondary boycott itself banned, they would be able to negotiate with the union terms more favorable to the employer.

By early in 1975, Chavez had resigned himself to the inevitability of legislation. The UFW applied considerable pressure on Brown to support Alatorre's bill rather than his original bill drafted by Rose Bird and based on the NLRA.⁹⁴ In 1975 there were six bills on agricultural labor relations introduced into the Assembly, and when a showdown in the labor relations committee

⁹⁰ PAWEL, *supra* note 77, at 149. The main point of this would be to protect the law from the changing of political tides.

⁹¹ GORDON, *supra* note 37, at 31. See Levy, interview with Cohen, Nathan and Gaenslen.

⁹² GANZ, *supra* note 6, at 234.

⁹³ GORDON, *supra* note 37, at 32. See Levy, interview with Cohen, Nathan and Gaenslen.

⁹⁴ MAJKA & MAJKA, *supra* note 6, at 238.

seemed inevitable, Brown amended his bill to include provisions more favorable to the UFW. The union and Alatorre endorsed the bill. After calling a special legislative session at Chavez's urging so that the bill could go into effect by late summer, the bill passed the Assembly and Senate without grower-backed amendments that would have removed key protections.⁹⁵

Certainly the bill did not give the union everything it wanted. It included a ban on recognition strikes, no secondary boycotts at delivery doors, and it maintained the Teamster contracts until elections were held.⁹⁶ Nevertheless, the bill gave the farm workers a powerful set of organizing tools, and its preamble began with an endorsement of farm labor organizing and a stated goal of "guaranteeing justice for all agricultural workers."⁹⁷ Although the ALRA was crafted around premises of the NLRA and required the Agricultural Labor Relations Board, created by the Act, to follow applicable NLRA precedent, it contained significant customized changes tailored to the nature of agricultural work.⁹⁸

The law significantly altered NLRA election rules by providing for elections within seven days of the filing of an election petition, essential for a workforce composed of many migrant laborers. It also required conducting elections within a 48-hour period during a labor dispute such as a strike. Additionally, elections had to take place during peak-season with more than 50 percent of the workforce present to prevent a small number of year-round employees loyal to the grower from determining an election outcome.⁹⁹ Unlike the NLRA, the ALRA contained a prohibition on voluntary employer recognition of any non-certified labor organizations.¹⁰⁰ The UFW insisted on such a restriction to prevent future sweetheart contracts with the Teamsters or any other union that did not have the support of the workers. In contrast to the NLRA's determination of bargaining units by craft or a community of interest-based job-specific issues, the ALRA created wall-to-wall or industrial units of all of an employer's "agricultural

⁹⁵ *Id.* at 239.

⁹⁶ Levy, interview with Cohen, Nathan and Gaenslen.

⁹⁷ 1975 CAL. STAT. AND AMENDMENTS TO THE CODE, 3D EXTRAORDINARY SESS. C. 1, § 1, at 4013, quoted in GORDON, *supra* note 37, at 33.

⁹⁸ CAL. LAB. CODE § 1140, et seq.

⁹⁹ CAL. LAB. CODE § 1156.3(a)(1)-(4).

¹⁰⁰ CAL. LAB. CODE § 1153(f).

employees.” This permits tractor drivers, irrigation employees, harvest employees, thin and hoe workers, mechanics and others to be covered by the same contract.¹⁰¹ This operated to the benefit of the union by disallowing the segregation of workers of color into lower paid units and by facilitating organizing among all workers on a ranch. It benefited growers because there could not be a series of staggered strikes continually halting production, nor year-round contract negotiations draining resources. The ALRA also expanded the NLRA’s make-whole remedies from reinstatement and back pay to include the loss of pay resulting from an employer’s refusal to bargain in good faith.¹⁰² Indeed, under existing labor law, the NLRB does not have the authority to award damages for an employer’s refusal to bargain.¹⁰³ This change created a powerful incentive for the grower to bargain once a union has won recognition as well as not to refuse to recognize the union in bad faith. Critically, the ALRA did not ban the use of secondary boycotts. Although the law prohibited picketing to support a secondary boycott staged by a union that had not yet been certified to represent the workers in question as well as supermarket delivery door picketing to ask for secondary boycotts, it retained the right to the secondary boycott by a certified union and pickets in support of that boycott at the site of the sale of struck products.¹⁰⁴ Although the ALRA did not specifically grant access to non-employee union organizers in the text of the statute, in 1975 the ALRB quickly adopted a rule to permit such access by a limited number of organizers one hour prior to the start or one hour after the end of the workday and one hour at lunch.¹⁰⁵

On top of securing rights designed to advance collective bargaining rights for farm workers, the UFW used its political muscle to gain sympathetic appointments to the Agricultural Labor Relations Board. Bishop Roger Mahoney of Fresno was the Board’s chair. Joe Grodin, a labor lawyer, law professor and future member of the California Supreme Court; Leroy Chatfield, a former UFW staff member and Brown’s director of administration; Joseph Ortega, an attorney for Los Angeles Model Cities

¹⁰¹ CAL. LAB. CODE § 1156.2. Agricultural employees are defined in § 1140.4(b).

¹⁰² CAL. LAB. CODE § 1160.3.

¹⁰³ *Ex-Cell-O Corporation v. NLRB*, 449 F.2d 1058 (D.C. Cir. 1971).

¹⁰⁴ CAL. LAB. CODE § 1154(d)

¹⁰⁵ 8 CAL. CODE OF REG. § 20900 et seq.

Program, and Richard Johnson, a grower attorney, filled the remaining four positions.. After over a century of struggles, and ten years of “organizing, boycotting, striking, people going to jail,” by the UFW, California now had a law governing the fields, and one that was arguably the strongest labor law in the country.¹⁰⁶

The law signaled a sea change in the way that the UFW had to move forward with its organizing. Cohen hurried about to ensure that the measures that were not included in the law, such as organizer access, were implemented in the form of regulations by the ALRB and to train the union’s legal and organizing staff in the new rules of the game. However, Chavez’s mind was elsewhere. “‘The whole fight is going to change,’ he predicted. Until now, his movement had been rooted in the quest for recognition, ‘which is the one that appeals to the human mind and the heart more than anything else.’ From now on the fight would center on issues Chavez considered more mundane — contracts, wages, benefits and grievances,” in short, the administration of a labor law.¹⁰⁷

In order to turn the ALRA into a tool benefiting workers, the union had to both run and win elections and generate enough pressure through boycotts and strikes to win good contracts. Chavez’s commitment to volunteer organizers increased as the union deployed over 200 farm workers who left their jobs to organize elections on ranches across the state, surviving on subsistence wages.¹⁰⁸ Cohen split the legal department in two with one half dedicated to existing litigation and the other, under Sandy Nathan, a young attorney working with Cohen, to ALRA issues. The legal department quickly grew to its height with 17 attorneys, 44 paralegals and numerous volunteer lawyers and law students in various roles.¹⁰⁹ Before the Board opened its doors in early September, the UFW frantically sent organizers and lawyers to ranches across the state to communicate to workers their new rights and to organize them around the power of the new law. The day the Board opened, 30 election petitions were filed, 28 by the UFW. By February of the next year, the UFW shocked the Teamsters,

¹⁰⁶ Gordon, Cohen interview. COHEN, *supra* note 55, at 27.

¹⁰⁷ PAWEL, *supra* note 77, at 156.

¹⁰⁸ GANZ, *supra* note 6, at 235.

¹⁰⁹ GORDON, *supra* note 37, at 35.

winning over half the elections in which they went head to head. In the first five months of operations, 45,915 farm workers had cast ballots in 382 elections, with the UFW winning representation in 214 of them.¹¹⁰

During the period leading up to the elections until late in 1975, the union faced numerous problems with the Board itself and enforcement of the new law. Many of the field agents and attorneys, including General Counsel Walter Kintz, were brought in from the NLRB, steeped in its ways of doing things and accustomed to its tectonic pace.¹¹¹ Growers favored Kintz for the position. Cohen considered his appointment by Governor Brown a concession to their anger once they realized that the law had not banned secondary boycotts.¹¹² The union experienced immediate problems with Kintz, accusing him of issuing rulings legitimizing the grower–Teamster alliance, failing to take action against violent Teamster and grower tactics during the first 200 elections, and acting in favor of employers rather than with impartiality.¹¹³ According to Sandy Nathan, the growers seemed to simply disregard the law.¹¹⁴ Kintz allowed the Teamsters to use dues cards as proof of qualification for election ballots. The growers would hire crews simply for the purpose of voting for Teamsters in the elections. And most importantly, growers continued to deny access to UFW organizers for the purpose of organizing for elections and gathering signatures for the ballots.¹¹⁵ The union filed hundreds of complaints based on sworn affidavits. Eventually the Board began processing unfair labor practice charges against growers and appointed a special enforcement team to oversee election-related activities, which seemed to diminish employer abuses.¹¹⁶ The union fought with the Board to influence election procedures at any chance possible. “Every step of every election procedure was contested — the order in which regional offices accepted petitions, the scheduling of elections, election rules, worker education, pre-election conference proceedings, unfair labor practice processing, and throwing

¹¹⁰ *Id.* at 39; GANZ, *supra* note 6, at 236.

¹¹¹ GORDON, *supra* note 37, at 36.

¹¹² *Id.* at 36 n.125.

¹¹³ UNITED FARM WORKERS OF AMERICA/AFL-CIO, THE SABOTAGE AND SUBVERSION OF THE AGRICULTURAL LABOR RELATIONS ACT: A WHITE PAPER 4–5 (1976).

¹¹⁴ Levy, interview with Cohen, Nathan, and Gaenslen.

¹¹⁵ UFW WHITE PAPER, *supra* note 113, at 6–7; MAJKA & MAJKA, *supra* note 6, at 243.

¹¹⁶ MAJKA & MAJKA, *supra* note 6, at 243.

elections out. The whole process was political and subject to pressure.”¹¹⁷ Jerry Brown created a task force of independent attorneys to train Board staff and engage in external enforcement against growers.¹¹⁸ Under extreme pressure from the UFW, Kintz resigned at the end of 1975. As increased enforcement of the law led to more and more election results in the UFW’s favor, growers and the Teamsters turned their efforts to attacking the ALRA.

The UFW, with its huge strategic capacity and army of volunteers, overcame many of these problems to win an historic number of election victories further strengthening the continuing boycott. However, in processing the complaints, stepping up enforcement and handling hundreds of elections, the Board had blown through its entire budget in a mere five months. In January of 1976, the Legislature was scheduled to consider additional appropriations to keep the Board functioning through the fiscal year. Advocates in the Legislature failed to receive the necessary two-thirds vote to fund the Board, although they were able to defeat grower initiatives to weaken the law and bring it more into line with the NLRA.¹¹⁹

In response, Chavez put considerable resources into a petition drive to protect the law from legislative changes. If passed, Proposition 14 would have placed the ALRA in the state constitution. This would have allowed modification of the legislation only by a ballot initiative, thus insulating the union from political opposition when unfavorable parties came to power as well as AFL-CIO insistence on compromises.¹²⁰ Proposition 14 also called for continued legislative funding of the ALRB, enshrinement of the right of access by organizers to the fields, and treble damages against growers for ULPs. In what seemed like a tactic to get lawmakers to restore funding to the Board, legislators buckled when the union turned in twice the requisite signatures to place the measure on the ballot. The Board’s funding was restored and it was set to reopen by the end of the year. The measure went down to defeat by a significant margin after growers

¹¹⁷ GORDON, *supra* note 37, at 38, from Miriam J. Wells & Don Villarejo, *State Structures and Social Movement Strategies: The Shaping of Farm Labor Protections in California*, 32 *POLITICS & SOCIETY* 291, 305 (quoting Marshall Ganz).

¹¹⁸ *Id.*; MAJKA & MAJKA, *supra* note 6, at 244–45.

¹¹⁹ MAJKA & MAJKA, *supra* note 6, at 244.

¹²⁰ *Id.* at 245.

spent \$2 million on an ad campaign focused on private property rights and protecting small farms. The tremendous effort that the union placed on winning the ballot referendum again deprived organizers of precious resources to consolidate gains made in the elections, continue fighting legal challenges in the courts, and preparing for contract renewal campaigns in the following year. Many privately questioned Chavez's pursuit of Proposition 14 and allocation of resources. Nathan would call it one of the worst mistakes the union made.¹²¹ While the union would experience several more fat years, the seeds had been sown for its eventual contraction. Chavez had become paranoid about losing control of the union to the legal department; he ceased allocating resources to new organizing drives; he distrusted the power of new independent citrus strikes near Oxnard; he began purging those who wanted to focus on organizing, like former farm worker and executive board member Eliseo Medina; and he paid little attention to existing contracts — in short, he stopped using the law.¹²² By the mid-eighties, the UFW, as well as the ALRB, was all but comatose.¹²³

The United Farm Workers of America's efforts in the years immediately following the passage of the ALRA were more successful than any of their previous efforts. Much like the NLRA did for industrial unions, the law seemed to deliver on its promises to support farm worker organizing and bringing peace to the fields. There are many critics of the NLRA who claim that the law de-radicalized the labor movement or that the union would have been better off sticking to the AFL model of controlling the flow of labor.¹²⁴ Many of these critics agree that the law eventually came to encumber unions as Taft–Hartley restricted their weapons, and the NLRB and courts came to interpret the law against, rather than on behalf of, union organizing efforts.¹²⁵ “This remarkable melding of movement and law did

¹²¹ Gordon, notes from Nathan interview.

¹²² See PAWEL, *supra* note 77, at 238–252; GANZ, *supra* note 6, at 241–250.

¹²³ See GORDON, *supra* note 37, at 40, n.146.

¹²⁴ See CHRIS TOMLINS, *THE STATE AND THE UNIONS* (1985); NELSON LICHTENSTEIN, *THE STATE OF THE UNION* (2002); JAMES ATLESON, *LABOR AND THE WARTIME STATE* (1998).

¹²⁵ Jennifer Gordon, *A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act 2–3* (Jun. 1, 2005), Fordham Law Legal Studies Research Paper No. 86, available at SSRN: <http://ssrn.com/abstract=733424> or <http://dx.doi.org/10.2139/ssrn.733424> (last visited Oct. 5, 2012).

not last.”¹²⁶ Unlike many scholars’ accounts of the fall of the New Deal’s political coalition and the structural limits of postwar liberalism, where labor unions clashed with other social movements, the UFW survived attacks by the Nixon administration, conservative working-class labor like the IBT and George Meany, and co-opting efforts by politicians to bring it under an established administrative rubric.¹²⁷ Perhaps because whites and blacks were not competing for jobs in agriculture, perhaps because of the de facto segregation of Mexican migrant farm workers, perhaps because of their prominent public image as vulnerable, low-wage workers who put food on America’s plates, or perhaps because of Chavez himself, *La Causa* enjoyed legislative, labor, and public support for a decade after the conflict between the struggle for independent rights and collective power had rent many liberal alliances asunder. However, the UFW ultimately succumbed to internal struggles.

As a result of incredibly dedicated and creative lawyering by Cohen and other UFW attorneys, in 1977 the UFW settled an antitrust suit with the Teamsters originally filed in 1970 after the initial sweetheart contracts were signed with the growers in exchange for a five-year jurisdictional settlement similar to that of 1967. The Teamsters were out of the fields, Brown was governor, and the Board was open for business. However, with the external competition from the Teamsters gone, Chavez turned inward, and became increasingly worried about his power over the union.¹²⁸ As Cohen relates, with the completion of the ALRA victory, Chavez seemed to lose interest in the union as an objective.¹²⁹ He was easily bored by the administrative tasks required in running a bureaucratic organization. He was committed to maintaining the original principles of *his* movement — volunteerism, self-sacrifice, and a commitment to the poor. Indeed, he sought to create a poor people’s union that would live and worship and work together. That farm workers were demanding higher and higher wages and accumulating real political power seemed to bother him.¹³⁰ Yet he would

¹²⁶ *Id.* at 2.

¹²⁷ See Reuel Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Post-war Liberalism* 25 BERKELEY J. EMP. & LAB. L. 129, 131 (2004).

¹²⁸ See GANZ, *supra* note 6, at 243–247; PAWEL, *supra* note 77.

¹²⁹ Gordon, Cohen interview.

¹³⁰ PAWEL, *supra* at note 6, at 156.

not let go: “[for Cesar], ‘This is *won*. I’m going to go do something else.’ And a lot of people didn’t understand that element of him, and they expected him to be focused in a way that wasn’t interesting to him . . . and I think the shame was that he couldn’t then just delegate it. Let us generate the dues money so that he could go do whatever the hell he wanted.”¹³¹ As several sources have noted, he turned inward, requiring staff to participate in a cultish psychological game run by the drug-rehab group Synanon.¹³² Years previously he had moved union headquarters away from the farm workers to a remote compound called La Paz in the foothills outside of Fresno, while the legal department stayed in Salinas, near the action.¹³³

Under the ALRA two sources of independent power began to grow within the union over which he had little control. The legal department had refused to relocate to La Paz from Salinas. As the department grew in numbers, it grew in significance under the ALRA, as occurs under any administrative regime that requires a cadre of lawyers. Additionally, lead organizers Marshall Ganz and Jessica Govea had a great deal of success organizing citrus and vegetable growers out of Salinas and Oxnard. Due to the rights granted by the ALRA, the youth of the workers, and their independence from the boycott, the workers were confident in asserting demands for higher wages and improved conditions without support from Chavez. The real break came when the legal department asked for an increase in their monthly salary. In 1977, staff lawyers for the UFW were earning \$7,200 a year, in some cases, less than farm workers.¹³⁴ Chavez demanded that the lawyers, who up until this time had been exempted from the union’s volunteer system, receive the same subsistence wages as organizers. When they refused, he dismissed the legal staff. Those who were not fired quit.¹³⁵ Chavez also put down attempts by workers to run their own candidates for the Executive Board and sent organizers like Ganz to far-off places like Toronto to run boycotts.¹³⁶ Additionally, by 1977 the UFW had stopped organizing and moved to direct mail and marketing campaigns. Between 1979 and 1981, almost all voices

¹³¹ Gordon, Cohen interview.

¹³² GANZ, *supra* note 6, at 243–250.

¹³³ PAWEL, *supra* at note 77, at 80–82.

¹³⁴ *Id.* at 240–41.

¹³⁵ GANZ, *supra* note 6, at 246. PAWEL, *supra* note 77, at 265.

¹³⁶ GORDON, *supra* note 37, at 43.

that disagreed with the direction Chavez was taking the union, including farm worker representatives, had been purged from the union.¹³⁷

By the early eighties, the union organized few workers under the law and allowed many contracts to lapse unattended.¹³⁸ Things got so bad that when George Deukmejian, elected governor in 1982, appointed an anti-union general counsel to the ALRB and gained control of the Board in 1986, the UFW actively sought to de-fund the agency it had once tried to protect with a constitutional amendment.¹³⁹ By the time of Chavez's death in 1993, the union clung to between 5,000 and 10,000 members and fewer than 40 contracts.¹⁴⁰ The UFW was no longer functioning as a farm workers union, but rather as a series of nonprofit organizations run by the Chavez family.¹⁴¹ It operates radio stations in Phoenix, builds affordable housing in Bakersfield and Texas, runs political campaigns for Indian casinos, and attempts to organize workers in some other sectors ranging from furniture factories to construction; but, it engages in little to no activity with farm workers.¹⁴² In fact, it eliminated any reference to farm workers in its constitution in an effort to appeal to a broader Latino constituency.¹⁴³ When the union organized a group of furniture assemblers in Bakersfield who qualified as employees under the NLRA, it even gave up its right to the once cherished secondary boycott that Jerry Cohen early on so innovatively protected by creating the United Peanut Shelling Workers union.

In recent years, amendments to the ALRA have been made in response to a more conservative California Supreme Court's limitations on the ALRB's make-whole remedy, including adding mandatory mediation for first contracts in 2002 and, most recently in 2011, giving the Board the power to certify a union after an employer has corrupted the environment for an election such that a re-run would be presumptively unfair. However, these provisions will be of little use if unions are not running representation campaigns. In fact, rather than ushering in a new era of farm labor

¹³⁷ GANZ, *supra* note 6, at 246–49.

¹³⁸ GORDON, *supra* note 37, at 43.

¹³⁹ *Id.* at 44.

¹⁴⁰ *Id.*

¹⁴¹ Miriam Pawel, *Farm Workers Reap Little as Union Strays from its Roots*, L.A.

TIMES, Jan. 8, 2006.

¹⁴² *Id.*

¹⁴³ *Id.*

organizing, the mandatory mediation provision has only been utilized eight times since it went into effect nine years ago, most of the time by the United Food and Commercial Workers at dairy farms.

Now in California, as we drive down Cesar Chavez boulevards, past Cesar Chavez middle schools and celebrate Cesar Chavez's birthday, the labor organizer from Yuma, Arizona has been memorialized in much the same way as Martin Luther King, Jr., as a civil rights leader, with relatively little public emphasis on the UFW or the ALRA. Yet farm workers in the state remain some of the most vulnerable workers in the country, the labor contractor system has returned in force, and little but changing national economic conditions has stemmed the flow of undocumented immigrants into the fields. Out of the some 250,000 farms in California, fewer than 1 percent are working under a union contract. During the peak season, the minimum wage earned by the 650,000 to 800,000 farm workers, most of them undocumented, is less in today's dollars than that earned by workers under UFW contracts in 1970.¹⁴⁴ California remains the only state in the country, with the exception of Hawaii's general labor code, to have passed a law giving its farm workers the right to bargain collectively. In a great irony of California legal history, a fledgling farm worker union used the strategies of the civil rights movement and the early labor movement to achieve sufficient political influence to win powerfully protective legislation that their attorney didn't think they could get passed, and that their leader neither wanted at the time, nor vigorously employed as it matured. Ultimately, the great wave of farm worker organizing, like that of industrial workers before them, receded, leaving many to continue to question the extent to which the process of a legal regime must necessarily displace the energy of a social movement.

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¹⁴⁴ Philip Martin, *Labor Relations in California Agriculture: Review and Outlook*, http://giannini.ucop.edu/media/are-update/files/articles/V15N3_2.pdf (last visited Oct. 5, 2012).

CALIFORNIA v. CALIFORNIA:

Law, Landscape, & the Foundational Fantasies of the Golden State

ELAINE KUO*

According to the venerable Wikipedia, there are approximately 900 popular songs about California (including at least 76 simply titled “California”).¹ There are, perhaps, just as many — and frequently contradicting — cultural perceptions about this Golden State.

For some, there is Jack Kerouac’s (and Dean Moriarty’s) California: “wild, sweaty, important, the land of lonely and exiled and eccentric lovers come to forgather like birds, and the land where everybody somehow looked like broken-down, handsome, decadent movie actors.”²

For others, there is Mark Twain’s California, full of a “splendid population”:

[F]or all the slow, sleepy, sluggish-brained sloths stayed at home — you never find that sort of people among pioneers — you can-

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¹ *List of Songs About California*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_songs_about_California (last visited May 5, 2012).

² JACK KEROUAC, *ON THE ROAD* 168 (1976).

not build pioneers out of that sort of material. It was that population that gave to California a name for getting up astounding enterprises and rushing them through with a magnificent dash and daring and a recklessness of cost or consequences, which she bears unto this day — and when she projects a new surprise the grave world smiles as usual and says, “Well, that is California all over.”³

Truman Capote, meanwhile, believed that “[i]t’s a scientific fact that if you stay in California you lose one point of your IQ every year.”⁴

There is the California embodied in the majestic mountains of Yosemite, and the notion of a state that is natural and free and part of the Wild West.⁵ There is the California embodied in the box office, and the notion of a state that is all silicone and silicon. All of it is ultimately bound by and built by the same foundational fantasies of a state at the crossroads of backcountry and concrete. This paper explores those fantasies, and discusses the ways in which legal actions over seminal environmental issues of water, travel, and air both mirrored and made the California identity.

California becomes a place not quite as “west of the West” as Alaska, not always as rugged and rural as Washington and Oregon, and yet far

³ MARK TWAIN, *ROUGHING IT* 282 (1976).

⁴ *Truman Capote quotes*, THINKEXIST.COM, http://thinkexist.com/quotes/truman_capote/ (last visited May 5, 2012).

⁵ John Muir’s national park movement and Jack London’s words on the will, struggle, and power of nature were seen as fighters against capitalist emasculation and the mechanization of modernity at the turn of the nineteenth century. This fight has persisted in San Francisco’s resistance to development, and organizations and (grassroots) movements such as the Greenbelt Alliance and Save the Bay.

At the same time, this resistance is arguably an exercise in capitalism and (concentrated) wealth. As Richard Walker puts it, “rich people want a pretty view.” But “wanting green space may have the detrimental effect of not making enough low-income housing to more people.” *Forum: The History of Bay Area Environmentalism* (KQED radio broadcast Nov. 16, 2007), available at <http://www.kqed.org/a/forum/R711161000>.

Consider, too, the relationship between San Francisco and Lake Tahoe: industrial leisure under the guise of “outdoorsmanship” has resulted in lake sedimentation and algae fertilization. Contrast that, however, with the (somewhat unexpected) role of hunters and sportsmen (including Teddy Roosevelt) as early and ardent conservationists. See generally JOHN F. REIGER, *AMERICAN SPORTSMEN AND THE ORIGINS OF CONSERVATION* (2000) (arguing that “gentlemen” hunters and anglers came together to lobby for laws regulating the taking of wildlife and wilderness preservation, both out of a desire to protect their hobbies and a nineteenth-century sportsman’s code demanding that its followers take responsibility for the total environment).

out enough to be a place where “you can’t run any farther without getting wet.”⁶ Perhaps like much of the West, California is a place and people trying to create community and history from scratch. It is as much fiction as it is fact: a place as carefully constructed in courtrooms as it has been by adjoining tectonic plates. Either way, California has more often than not been built by conquering and controlling nature.

People were here for the jobs, here for their slice of the dream, and natural beauty gilded connections between the two. The Mediterranean climate churned out mild winters, low humidity and long “Indian” summers promoting outdoor life so convincingly, in fact, that many newcomers seemed to overlook the fact that they’d moved into earthquake country.⁷

In many ways, life here is only possible with the manipulation of water and air. So first came the golden climate; then came the Golden State; and then came the lawsuits.

Indeed, for all its perceived “chill surfer” character, contentious litigation underlies some of the most compelling stories of California: “it is also the place where the American Dream is pursued most fiercely, its spoils contested most brutally.”⁸

Law acts as both a conscious reflector and a subconscious creator of culture.⁹ And this analysis is not limited to abstract ruminations on an intangible ethos. This paper connects law and film, “two of contemporary society’s dominant cultural formations, two prominent vehicles for the

⁶ Brian Gray, *American West*, class lecture at UC Hastings College of the Law (2012); Neil Morgan quotes, THINKEXIST.COM, http://thinkexist.com/quotation/california_is_where_you_can_t_run_any_farther/217039.html (last visited May 5, 2012).

⁷ CHIP JACOBS & WILLIAM J. KELLY, SMOGTOWN: THE LUNG-BURNING HISTORY OF POLLUTION IN LOS ANGELES 24 (2008). Consider, too, UC Berkeley’s decision to build its Memorial Stadium directly atop the Hayward Fault — against the wishes and warnings of geologists — because that was where the best view would be. It is currently undergoing a massive renovation and seismic retrofit, such that the fault line that runs “from goal post to goal post” will not literally split the stadium in two. *The Hayward Fault at UC Berkeley*, http://web.archive.org/web/20110716064610/http://seismo.berkeley.edu/seismo/hayward/ucb_campus.html (last visited Sep. 7, 2012). (NB: It is nevertheless this writer’s opinion that it does make for the best view and is well worth it.)

⁸ R.C. Lutz, *On the Road to Nowhere?: California’s Car Culture*, 79 CAL. HIST. 50 (2000).

⁹ See generally LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* (2002).

chorus through which society narrates and creates itself.”¹⁰ Both law and film alike are “dominant players in the construction of concepts such as subject, community, identity, memory, gender roles, justice and truth; they each offer major socio-cultural arenas in which collective hopes, dreams, belief, anxieties and frustrations are publicly portrayed evaluated, and enacted.”¹¹ Whether art has imitated life and the law in the Golden State or vice versa, lawsuits have built California based on a “double mystery” of erasure and positive reinvention: blessed by nature, yet having to battle against it in order to grow and flourish.¹²

Call it “California v. California.”

WATER WARS

“Forget it, Jake — it’s Chinatown.”

First and foremost, the story of California is a story of water.¹³ There are the ocean waves along California’s 840 miles of coastline, from the seaside cliffs of Mendocino to the surf and sand of San Diego. There is the snow melting off of the Sierra Nevada. There is a flooded valley and an

¹⁰ Orit Kamir, *Why ‘Law-and-Film’ and What Does it Actually Mean?: A Perspective*, 19 CONTINUUM: J. OF MEDIA & CULTURAL STUD. 255, 256 (2005); see also JOHN DENVIR, *LEGAL REELISM: MOVIES AS LEGAL TEXTS* (1996). In fact, the entire fledgling field of “law-and-film” is arguably an exercise in Friedmanism.

In fact, much of American history has been shaped by popular fictions; the nation is built upon stories of “cowboys and Indians” and war. In the couple centuries of its existence, the United States has used these tales of absolute victory of its “Goodness and rosy plumpness” to justify its birth, its expansion, and, indeed, its empire. GORE VIDAL, *IMPERIAL AMERICA* 6 (2004); STANLEY CORKIN, *COWBOYS AS COLD WARRIORS* 3 (2004).

¹¹ Kamir, *supra* note 10, at 264.

¹² See generally CAREY MCWILLIAMS, *CALIFORNIA: THE GREAT EXCEPTION* (1999) (“Is there really a state called California or is all this boastful talk? [. . .] Like all exceptional realities, the image of California has been distorted in the mirror of the commonplace. It is hard to believe in this fair young land, whose knees the wild oats wrap in gold, whose tawny hills bleed their purple wine — because there has always been something about it that has incited hyperbole, that has made for exaggeration.”); —, *SOUTHERN CALIFORNIA: AN ISLAND ON THE LAND* (1946).

¹³ The “history of California in the twentieth century is the story of a state inventing itself with water.” WILLIAM L. KAHRL, *WATER AND POWER* 1 (1983). Simply put, California is a “hydraulic society.” DONALD WORSTER, *UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST* 53 (1994).

aqueduct that turned a desert into a metropolis. And they are all part of a complicated water system that “might have been invented by a Soviet bureaucrat on an LSD trip.”¹⁴ Indeed, ingrained in California’s very identity is drought and [artificial] abundance. (Or, conversely, artificial drought: “[t]he concomitant reallocation of water away from consumptive uses as needed to fulfill these environmental commitments has created for some users a ‘permanent regulatory drought.’”¹⁵) In California — a place where north and south alike face challenges in rainfall, storage, and distribution — water is power.

Broadly speaking, California has a dual system of water rights which recognizes both appropriation and riparian doctrines.¹⁶ The appropriation doctrine, which originated during the Gold Rush days, allows for diversion of water and applies to “any taking of water for other than riparian or overlying uses.”¹⁷ The riparian doctrine, by contrast, “confers upon the

¹⁴ Peter Passell, *Economic Scene; Greening California*, N.Y. TIMES, Feb. 27, 1991.

¹⁵ Brian E. Gray, *Dividing the Waters: The California Experience*, 10 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 141, 144 (2004). Indeed, water and environmental legislation has at times caused further water shortage problems. This places the state in a bit of a bind: also ingrained in California’s identity is a deep connection to the land and the environment (specifically, this has been created and reflected in landmark interpretations on the public trust and reasonable use doctrines). As such, California faces unmatched resource challenges, as it must grapple with issues both personal and principled.

For better or worse, California has always been on the “cutting edge” in both contention and conservation: the state was built on limited resources. The rest of the nation, meanwhile, did not feel the squeeze until the post-World War II/Cold War period, at which point America — as a rising “empire” — realized that “the special imperatives of maintaining economic and political dominance on a global scale required a degree of planning that helped promote conservationism.” Thomas Robertson, “*This Is the American Earth*”: *American Empire, the Cold War, and American Environmentalism*, 32 DIPLOMATIC HIST. 561, 562 (2008). Perhaps — in somewhat maudlin terms — with great power did come great responsibility, as suddenly America’s resources had to extend further and beyond its borders.

¹⁶ *Lux v. Haggin*, 69 Cal. 255 (1886), recognized both the appropriation and the riparian systems. While this put the doctrines on equal legal footing, however, the two in their essentially inverse relationship will perhaps always be in conflict. Nonetheless, both systems are in turn viewed through the lens of the reasonable use doctrine. See, e.g., *Peabody v. City of Vallejo*, 2 Cal. 2d 351 (1935); see also CAL. CONST. art. X, § 2 (codifying the reasonable use doctrine); Cal. Penal Code § 370.

¹⁷ *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 925 (1949) (citations omitted). The California Supreme Court first articulated the doctrine — adopting it from de facto miner’s laws — in *Irwin v. Phillips*, 5 Cal. 140 (1855).

owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his land.”¹⁸ Thus this dual system is one that can be internally contradictory and certainly complicated.¹⁹ At its most basic, the conflict is often one between landowners and those who simply seek to use the water connected to a given piece of land.

Amidst all the complicated doctrines, fact becomes stranger than fiction. Law, culture, and the water system — “labyrinthine and convoluted, full of double-crosses, triple-crosses, and twists piled upon twists” — converge in Roman Polanski’s *Chinatown* (1974), which tracks the California Water Wars at the turn of the twentieth century.²⁰ Water and power lie at the root of all evil in a neo-noir Los Angeles — a Los Angeles both fictionally and factually devoid of natural resources and a natural port; a Los Angeles that essentially has “no geographic reason to exist.”²¹

Yet exist it does, in large part (if not entirely) due to William Mulholland and the Owens Valley. In the late 1800s, Los Angeles had started to outgrow its already-limited water supply. City representatives identified the Owens Valley as a reliable source of water and began to quietly buy up parcels of land there. At first they did so secretively, for fear of driving up the cost of land.²² When word got out, however, they unapologetically made known their true intentions. Meanwhile, Mayor Frederick

¹⁸ *Pasadena*, 33 Cal. 2d at 943.

¹⁹ In fact, “large-scale water transfers [in California] more closely resemble complex international diplomatic negotiations than they do simple market exchanges.” Gray, *supra* note 11, at 146.

To clarify: the state (as trustee to its people) owns, controls, and regulates the physical water while the people simply enjoy rights to the use of water under state law. *Eddy v. Simpson*, 3 Cal. 249, 252 (1853); *Kidd v. Laird*, 15 Cal. 161, 180 (1860); CAL. WATER CODE § 102. As such, “no water rights are inviolable; all water rights are subject to governmental regulation.” *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d 82, 106 (1986).

²⁰ Josh Spiegel, *Classic Movie Review: Chinatown*, BOX OFFICE PROPHETS (Aug. 2, 2010), <http://www.boxofficeprophets.com/column/index.cfm?columnID=13075>; *CHINATOWN* (Paramount Pictures 1974).

²¹ Richard Walker, *The American City*, class lecture at UC Berkeley (2008). The same can actually be said of Napa Valley, which is not necessarily conducive to growing grapes save for the wonders of water engineering.

²² As Jack Nicholson’s Jake Gittes says in *Chinatown*, “Do you have any idea what this land would be worth with a steady water supply? About \$30 million more than they paid for it.”

Eaton had tapped his friend, Mulholland, to be superintendent of the newly-created Los Angeles Department of Water and Power.²³ Together, they employed what some saw as “chicanery, subterfuge, spies, bribery, a campaign of divide-and-conquer, and a strategy of lies to get the water [the city] needed.”²⁴ There were allegations that Eaton, Mulholland, and the city’s power brokers “conspired to snatch water for their own enrichment.”²⁵ The fact was that Los Angeles did indeed acquire all land and water rights relating to Owens Valley through decades of smart (or, perhaps, sly) legal, legislative, bureaucratic, and economic action.²⁶ Eaton even lobbied President Teddy Roosevelt to halt a federal irrigation project for farmers in the Owens Valley.²⁷ And though everything the city did was technically legal, even Catherine Mulholland (William Mulholland’s granddaughter) wrote: “Few seemed to care about the action’s moral niceties.”²⁸

Nevertheless, William Mulholland’s “engineer’s eye plotted the Los Angeles Aqueduct and brought the water over 230 miles to these dry valleys by gravity alone, an engineering marvel and a civic triumph, albeit at the expense of the Owens Valley, which quickly turned to dust.”²⁹ As the

²³ The department has been the source and subject of contention and controversy every since. See, e.g., *Cnty. of Inyo v. Los Angeles*, 78 Cal.App.3d 82 (1978). In fact, Inyo County and the department are at it again as of last year in a battle over groundwater.

²⁴ MARC REISNER, *CADILLAC DESERT* 48 (1993).

²⁵ *William Mulholland’s Gift: Modern L.A.*, L.A. TIMES, Jul. 10, 2011, <http://articles.latimes.com/2011/jul/10/opinion/la-ed-mulholland-20110710>.

²⁶ These actions included bond measures and a lot of court time for Mulholland. REISNER, *supra* note 24, at 62–66.

²⁷ JACOBS & KELLY, *supra* note 7, at 23.

²⁸ *Id.* As its 1974 *New York Times* movie review put it, *Chinatown* — and the events on which it is based, in which fact is every bit as strange as fiction — is a “melodrama that celebrates not only a time and a place (Los Angeles) but also a kind of criminality that to us jaded souls today appears to be nothing worse than an eccentric form of legitimate government enterprise.” Vincent Canby, *Chinatown*, N.Y. TIMES, Jun. 21, 1974.

²⁹ JACOBS & KELLY, *supra* note 7, at 23. In fact, Mulholland “had demonstrated that a city could bend nature to meet its interests. Before and after this water-grab, men here dredged massive harbors from silt, dragged a cosmos-searching observatory onto a mountaintop, smashed flight-speed records, and harnessed ocean currents for electricity. A near-religious devotion to technology had made Southern California’s nature seem malleable.” *Id.* at 24.

first gush of water rushed down the aqueduct, Mulholland famously proclaimed: “There it is. Take it.”³⁰

Take it they did. And this would not be the last battle of the water wars: in its eternal thirst, Los Angeles would attempt — though ultimately unsuccessfully — to divert water from Mono Lake.³¹ Starting in 1940, after purchasing riparian rights pertaining to Mono Lake, the city applied for permits to appropriate the waters of four tributaries feeding into the lake. By 1941, the city had extended its aqueduct system into the Mono Basin. By 1970, the city had completed a second aqueduct designed to increase the total flow into the aqueduct by 50 percent. Each year over the next decade, the city would divert a combined 156,647 acre-feet of water from the Mono Basin and cause Mono Lake’s surface level to recede at an average of 1.1 feet.³² Though the “ultimate effect of continued diversions [was] a matter of intense dispute . . . there seem[ed] little doubt that both the scenic beauty and the ecological values of Mono Lake [were] imperiled.”³³

In 1979, the public interest groups led by the National Audubon Society brought suit against the city of Los Angeles, arguing that the Department of Water and Power’s diversions violated the public trust doctrine. The doctrine stands, broadly, for the idea that each state is “trustee of the tide and submerged lands within its boundaries for the common use of the people” — that state waters are a public resource equally owned by all citizens.³⁴ As such, the state has a duty to ensure equal access to and enjoyment of those waters.

The case eventually made its way to the California Supreme Court. While the Court recognized that common law public trust actions had thus far been focused on navigation, commerce, and fishing, it went on to

³⁰ *Id.*

³¹ Mono Lake is the second largest lake in California, and sits at the base of the Sierra Nevada near the eastern entrance to Yosemite National Park. Historically, most of its water supply comes from snowmelt in the Sierra Nevada carried in by five freshwater streams. The lake is saline; it contains no fish but supports a large population of species. *Nat’l Audubon Soc’y v. Superior Court*, 33 Cal. 3d 419, 424 (1983).

³² *Id.* at 428.

³³ *Id.* at 424–25.

³⁴ CAL. STATE LANDS COMM’N, *The Public Trust Doctrine*, http://www.slc.ca.gov/policy_statements/public_trust/public_trust_doctrine.pdf; see also *Martin v. Waddell*, 41 U.S. 367, 410 (1842). The public trust doctrine can be traced back to Roman laws of common property.

rule that the “recreational and ecological” “principle values” the plaintiffs sought to protect — “the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds” — were “clear[ly] . . . among the purposes of the public trust.”³⁵

The Court ultimately concluded:

The public trust doctrine serves the function in [California’s integrated water system] of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources.³⁶

Thus the plaintiffs succeeded in imposing upon the state “the duty . . . to protect the people’s common heritage of streams, lakes, marshlands and tidelands.” In short, they saved Mono Lake.

And perhaps the courts deserve some credit too, “for they are the ultimate guardians of the rights secured by the common law, statutes, the California Constitution, and in some cases the Fifth and 14th amendments to the United States Constitution.”³⁷ Indeed, as Brian Gray has argued, the California Supreme Court has actively adapted the development and division of water resources to changes in the state’s economy, demographics, resource base, natural environment, and social values.³⁸

In its interpretation of the public trust doctrine in *Audubon*, the California Supreme Court subjected state water rights to “the requirement that they be exercised in accordance with contemporary social values.”³⁹ On one level, the Court ensured that environment, law, and society would al-

³⁵ *Audubon*, 33 Cal. 3d at 435 (internal citations omitted). In fact, a decade earlier, the California Supreme Court had expressly held that public trust protects “the preservation of those lands [covered by the trust] in their national state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.” *Marks v. Whitney*, 6 Cal. 3d 251, 259–60 (1971).

³⁶ *Audubon*, 33 Cal. 3d at 452.

³⁷ Gray, *supra* note 15, at 147.

³⁸ *Id.*

³⁹ Brian E. Gray, “*In Search of Bigfoot*”: *The Common Law Origins of Article X, Section 2 of the California Constitution*, 17 HASTINGS CONST. L.Q. 225, 228 (1989). Thus, the last two centuries of California Supreme Court jurisprudence have been an exercise

ways be inexorably intertwined. On another level, the decision confirmed that they always were.⁴⁰

California water rights have always been “a peculiarly fragile species of property rights, heavily dependent on judicial perceptions that the private right is consistent with the broader public interest.”⁴¹ Every water case and every water right in the state of California is examined through the lens of the reasonable use doctrine. Enacted by initiative in 1928, article X, section 2 of the state constitution provides that all uses of water resources must be “exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.”⁴² As a whole, this represents “one of the most forceful and interventionist definitions of reasonable use in the western United States.”⁴³

Yet “reasonable use” is as flexible as it is forceful. After all, “[w]hat constitutes a reasonable use of water is dependent upon not only the entire circumstances presented but varies as the current situation changes [R]easonable use of water depends on the circumstances of each case, [and] such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance.”⁴⁴ Water rights, resources, and law in California are, then, necessarily products of culture. As such, courts are in a position to articulate and enforce cultural values. Indeed, a “principal responsibility (which will be exercised only on rare occasions) will be for the courts to hold the parties’ feet to the fire — to apply the established law

in “shap[ing] and, where appropriate . . . reshap[ing] water rights as necessary to facilitate the economic and social development of the state.” *Id.* at 253.

⁴⁰ Indeed, with common law doctrines such as public trust, reasonable use, and public nuisance, common citizens have as much control over California’s environmental law and enforcement as do the courts. This is coupled with the already-heightened sense of environmentalism of California’s political culture. As Carey McWilliams put it, “the lights came on all at once” in California. See, also, the next section on air pollution lawsuits for further discussion on the importance and implications of common law in conservation and culture.

⁴¹ Gray, *supra* note 39, at 227.

⁴² CAL. CONST. art. X, § 2.

⁴³ Gray, *supra* note 15, at 146.

⁴⁴ *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 140 (1967). “What is a [reasonable and] beneficial use at one time may, because of changed conditions, become a waste of water at a later time.” *Tulare Irrig. Dist. v. Lindsay-Strathmore Irrig. Dist.*, 3 Cal. 2d 489, 567 (1935).

to present clearly to the competing interests the consequences of adhering to hardline positions and refusing to negotiate in good faith to achieve fair and creative solutions to the problems and challenges Californians face.”⁴⁵

Thus, on one hand, California used the law to create the identity of “adventure, indulgence, romance, [and] delight” on which it has always prided itself.⁴⁶ In the last couple of centuries of California history, the manipulation of water has allowed for gold mining, wine country, and the continued existence and bragging rights to a place fondly known as “the Bay Area” to the north, and for orange groves, palm trees, and the Beach Boys’ “Surfin’ Safari” to the south. On the other hand, California laws protecting public interests in the environment reflect the will of a people that have always had a special affinity with the land unspoiled by such developments. To choose between the two explanations is an endless exercise in “chicken or egg?”

In the end, the California water system requires constant vigilance and occasional vitriol from courts and citizens so that they may separate fact from fiction in facing the state’s resource challenges. Or perhaps the people must simply roll with the proverbial punches and accept the tangled web of water rights and injustices they have woven. Perhaps it is better to simply “[f]orget it, Jake — it’s Chinatown.”

TOONS, TRAINS, & AUTOMOBILES

“Who needs a car in L.A.?”

The story of another California emblem — the automobile — belies similar legal drama and deep disquiet. California law has on one hand protected

⁴⁵ *Id.* at 149–50.

⁴⁶ *Life in California*, VISITCALIFORNIA, www.visitcalifornia.com/Life-In-California (last visited May 15, 2012). “California: Find Yourself Here” commercials happily perpetuate the stereotype that “board meetings” here necessarily involve surfboards and snowboards. *California: Find Yourself Here*, YOUTUBE, <http://www.youtube.com/watch?v=Md69zCJKD1c> (last visited May 5, 2012). In the beginning, boosters sold the state as an Eden of gold and orange groves, images built upon the mythical Argonaut tales to the north and the romanticizing of *Ramona* and the Spanish missions to the south. See, e.g., JACK LONDON, *THE CALL OF THE WILD* (1903); *RAMONA* (1910) (based on the eponymous novel by Helen Hunt Jackson). Indeed, in many ways, “California” is a brand unto itself, the “sale” of which has led its people to actively seek and artificially create the pieces necessary to fit into notions preconceived on storyboards.

the state's legendary car culture and on the other hand been at the forefront of the fight against vehicle emissions.

Distinctly fashioned after *Chinatown* and loosely disguised as a Disney "kid flick," *Who Framed Roger Rabbit?* (1988) tells the story of Los Angeles's automotive industry and the so-called General Motors conspiracy from the 1920s to the 1960s.⁴⁷ The first ten minutes of *Roger Rabbit* show a Los Angeles where protagonist and private investigator Eddie Valiant takes the train everywhere and proudly proclaims: "Who needs a car in L.A.? We've got the best public transportation system in the world!"

And perhaps they did. By 1910, Los Angeles boasted 1,164 miles of track, the largest electrical transit system in the world. Each day, 600 trains passed through the Los Angeles Terminal alone, which stood as the largest building west of the Mississippi. Behind its identity as a sprawling suburban autopia — "indeed inherent in it — was the historical creation of Los Angeles by the [b]ig Red Cars of the Pacific Electric Co. and the [Y]ellow [C]ars of the Los Angeles system." At its peak in 1946, the average Los Angeles resident rode transit 424 times in a year. By 1950, however, transit ridership had decreased 41 percent. By 1955, in an attempt to solve problems in rail transit and reduce traffic congestion, trains had been abandoned in favor of buses. Cars had already caught on, and all the more so with the introduction of public transportation that was arguably worse than its railway predecessor.

Moreover, this was a deliberate business move: Pacific Electric had sold its passenger rail cars and buses to the Metropolitan Coach Lines bus company; Los Angeles Railway had sold its controlling interest to National City Lines, a Chicago-based company whose investors included General Motors, Firestone, Standard Oil of California, and the Mack Truck Company.⁴⁸ By 1963, the last Yellow Car (the last train standing) made its last run from Vermont Avenue to Pico Boulevard.⁴⁹

⁴⁷ WHO FRAMED ROGER RABBIT? (Touchstone Pictures 1988).

⁴⁸ See *United States v. Nat'l City Lines*, 186 F.2d 562, 566 (7th Cir. 1951). The case eventually reached the United States Supreme Court, twice, but on procedural issues. See *United States v. Nat'l City Lines*, 334 U.S. 573 (1948); *United States v. Nat'l City Lines*, 337 U.S. 78 (1949).

⁴⁹ *Los Angeles Transit History*, L.A. METRO, <http://www.metro.net/about/library/about/home/los-angeles-transit-history/> (last visited May 5, 2012).

So the conspiracy theory goes something like this: “the evil auto giant, General Motors bought up the beloved Los Angeles transit company, replaced its charming red streetcars with soot-spewing GM buses” (that, incidentally, used Standard Oil gas and Firestone tires), and “greedily pocketed profits while transforming L.A. from a balmy paradise into a smoggy, congested parking lot” by making transit so unattractive that eventually there were so few riders that GM could abandon transit and drive people to cars instead.⁵⁰

It would seem *Roger Rabbit* was on to something. In 1946, the Department of Justice filed an antitrust suit against National City Lines for conspiracy to monopolize the transit industry. The parties agreed that “in 1938, National conceived the idea of purchasing transportation systems in cities where street cars were no longer practicable and supplanting the latter with passenger buses.”⁵¹ They disagreed, however, on whether this constituted a “concerted conspiracy by the City Lines defendants and supplier defendants to monopolize that part of interstate commerce which consists of all the buses, all the tires and tubes and all the gases, oil and grease, used by the public transportation systems of some 45 cities owned and controlled by the City Lines companies.”⁵² The court found against the defendants, ruling that “by their united and concerted action” they had contracted to “exclude competitors from selling buses, tires, tubes and petroleum products” in violation of the Sherman Act.⁵³ Each company paid a fine of \$5,000 while seven key executives each paid a \$1 fine for the elimination of a system that “in order to reconstitute today would require maybe \$300 billion.”⁵⁴ Over the next twenty-five years, there would

⁵⁰ Christine Cosgrove, *Roger Rabbit Unframed: Revisiting the GM Conspiracy Theory*, ITS REV. ONLINE 3 (2004–2005), <http://americandreamcoalition.org/transit/rrunframed.doc> (last visited Sep. 7, 2012). Cosgrove goes on, however, to criticize the conspiracy theory and offer alternative explanations for the demise of the Los Angeles rail system.

⁵¹ *Nat'l City Lines*, 186 F.2d at 567.

⁵² *Id.*

⁵³ *Id.* at 571.

⁵⁴ TAKEN FOR A RIDE (New Day Films 1996). The documentary purports to expose “how things got the way they are. Why sitting in traffic seems natural. Why [Los Angeles’s] public transportation is the worst in the industrialized world. And why superhighways cut right through the hearts of our cities.”

be three more major investigations into GM's alleged monopoly practices: two settled out of court; one was eventually dropped.⁵⁵

Yet to make conspiracy the controlling narrative here is perhaps to put a romantic gloss over the realities of a transit system that had been fraught with problems (and arguably needed a conspiracy to save it). They had been "streetcars not desired."⁵⁶ Instead, some had reviled the transit companies as "monopolistic and greedy operators whose trolleys were filthy and so slow that sometimes it was faster to walk."⁵⁷ And all monopoly and greed aside, the companies had struggled even before GM entered the market: they had first tried and failed to procure government subsidies before selling to the likes of GM out of necessity.⁵⁸

Conspiracy or not, railroads opened the door to the car culture that would eventually drive them out. The vast transit network spurred suburbanization and, in turn, the rise of the automobile. Car culture sold and signaled visions of suburbia: of home ownership, of constructing a string of villages rather than a city, of moving ever outward in a new iteration of Manifest Destiny — of something synonymous with the American Dream.⁵⁹ The post-World War II period saw the construction of highways and the

⁵⁵ *Id.*

⁵⁶ Cosgrove, *supra* note 50. Many transit companies made far more money as real estate developers and as such encouraged families to move from the city to the suburbs. This resulted in longer commutes that made automobiles all the more attractive and efficient methods of transportation.

⁵⁷ *Id.* Under this analysis, the rise of the automobile becomes nearly inevitable, especially accompanied by certain cultural shifts. For example, the rise of middle class income (in conjunction with a decrease in automobile prices) gave suburban families the means to buy the cars they had always desired in the first place. Moreover, the car was simply an easier and better way for married women in these families to juggle work (as the number of women entering the work force had been steadily increasing since 1920), household duties, and childcare.

⁵⁸ *Id.*

⁵⁹ See generally KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985). Indeed, "[t]he car culture that emerged in Southern California had a profound impact on American culture, as other cities began to develop along similar lines, with the automobile at the center of regional planning, and the oil industry essential for that growth. Los Angeles had the oil and the cars at the start of the 20th century, a combination we are still paying for." *'Oil!' and the History of Southern California*, N.Y. TIMES [online edition], Feb. 22, 2008, http://www.nytimes.com/2008/02/22/timestopics/topics_uptoninclair_oil.html?pagewanted=all.

Interstate Highway Act of 1956 to “protect the nation.” The war effort had required the movement of men and materials, and this mobility evolved into the sense of individual freedom, industrial progress, and consumerism with which “the democratic automobile” was imbued after the war was over. Thus, “[w]ith the nation exploding in wealth . . . the car quickly became the hottest of the new consumer items, and nowhere was the apotheosis of the car more pronounced than in the Golden State.”⁶⁰

In fact, prior to the war, Los Angeles had already pioneered the incorporation of cars into everyday life: “Los Angeles during the 1920s was a laboratory of the future. It was the first city created to serve the needs of the automobile — it’s where the car culture was born.”⁶¹ It was the first city to adopt a simplified traffic code (one that included a “Jaywalking Ordinance” solidifying certain “car rights”), the first to install an interconnected signal system, and the first to have pedestrian-activated signals.⁶²

Even now, the Los Angeles freeway experience can be described as the mystical marriage of man and machine. Joan Didion describes driving in the city as an exercise in letting go and submitting to “the only secular communion Los Angeles has.”⁶³ She certainly has a point about commuting as community: Didion’s comments came in the context of backlash against efforts by the California Department of Transportation (Caltrans) to reduce the number of drivers on Los Angeles freeways in the 1970s by

⁶⁰ Lutz, *supra* note 8, at 50. Consider, too, nostalgia-inducing drives up and down a small town street in George Lucas’s *American Graffiti* (1973), a tribute to his hometown of Modesto; or James Dean and his iconic — and ultimately deadly — Porsche-powered tear down a rural stretch of Highway 46.

In California, cars are a part of both state and personal identity. As one auto consultant told the *New York Times*, “In other states, you do not see or hear, ‘I want it to say something about me.’” Brian Alexander, *Almost as Many Vehicles as People, and Every One Says, ‘Me!’*, N.Y. TIMES, Oct. 22, 2003.

⁶¹ ‘Oil!’ and the History of Southern California, *supra* note 59.

⁶² John E. Fisher, *Transportation Topics and Tales: Milestones in Transportation History in Southern California 2*, LOS ANGELES DEPARTMENT OF TRANSPORTATION, available at <http://ladot.lacity.org/pdf/PDF100.pdf>.

⁶³ JOAN DIDION, *Bureaucrats*, in THE WHITE ALBUM 79, 83 (1979). “Anyone can ‘drive’ on the freeway . . . Actual participants think only about where they are. Actual participation requires a total surrender, a concentration so intense as to seem a kind of narcosis, a rapture-of-the-freeway. The mind goes clean. The rhythm takes over.”

creating a new Diamond (carpool) Lane.⁶⁴ “Citizen guerillas” covered the Diamond Lanes with splattered paint and scattered nails, and even hurled objects at maintenance crews.⁶⁵ They formed the Citizens Against Diamond Lanes organization to lobby against the project.⁶⁶ And Caltrans received several thousand letters on the matter, ninety percent of which opposed Diamond Lanes.⁶⁷ Ironically enough, it was the desire to protect the right to drive alone that brought people together.⁶⁸ It caused, Didion observes, “large numbers of Los Angeles County to behave, most uncharacteristically, as an ignited and conscious proletariat.”⁶⁹

On the opposite end of the spectrum, Joel Schumacher’s *Falling Down* (1993) depicts a drive-home-gone-amok, in which William Foster (better known as “D-Fens,” by his vanity plate) is literally driven mad by Los Angeles — and its infamous traffic — like an Odysseus or Dorothy gone bad.⁷⁰ Indeed, the film opens with the irony of rush-hour gridlock in a city that is supposed to be about mobility. D-Fens simply wants to get home in time for his daughter’s birthday party, but he cannot. In fact, his entire life is — as the movie posters put it — a “tale of urban reality” in which he is “an ordinary man at war with the everyday world.” As this terrible truth sets him free (in all the worst ways), D-Fens’s rampage through the streets shows turf wars and freeway politics where roads cut through poor, ethnic neighborhoods.⁷¹

⁶⁴ *Id.*

⁶⁵ *Id.* at 82.

⁶⁶ EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 401 (1962).

⁶⁷ *Id.*

⁶⁸ Paul Haggis’s *Crash* (2004) takes this idea to its logical extreme in its opening lines: “It’s the sense of touch. In any real city, you walk, you know? You brush past people, people bump into you. In L.A., nobody touches you. We’re always behind this metal and glass. I think we miss that touch so much that we crash into each other just so we can feel something.” *CRASH* (Lions Gate Films 2004).

⁶⁹ DIDION, *supra* note 63, at 83.

⁷⁰ *FALLING DOWN* (Warner Bros. 1993).

⁷¹ The same might be said of the Embarcadero Freeway that ran through downtown San Francisco (torn down following the Loma Prieta Earthquake of 1989) and the double-decker Central Freeway that used to run through Hayes Valley (and whose concrete form created a dark underbelly for drugs and prostitution). Raymond A. Mohl, *Stop the Road: Freeway Revolts in American Cities*, 30 *J. OF URBAN HIST.* 674 (2004).

Out of its arguably schizophrenic love for both cars and conservation, Californians have fought against cars every bit as vehemently as they have protected them. This has most notably played out in the form of air pollution litigation. It was California that first discovered the link between automobiles and air pollution, and it was California that first took measures to control it. As a direct result of these measures, “the state came to occupy a unique position in vehicular emission control.”⁷² Indeed, California state efforts have been a major influence in shaping the federal approach to emissions and pollution.⁷³

To start at the very beginning:

Something happened in Southern California in the early 1940s. In the first year of that decade . . . the area experienced a brownish, hazy, irritating, and altogether mysterious new kind of air pollution that was more persistent than, and quite different from, the isolated instances of irksome smoke that had troubled major urban centers from at least the mid-1800s. The new problem was, of course, smog.⁷⁴

In contrast to the Didion’s car-loving community, in October 1946 “hundreds of ‘aroused’ Pasadenans held a protest march [over the inability of existing law to deal with smog]. It wasn’t a full-scale uprising, but the message from the suburbs was powerful: united they stood, wheezing they’d fall.”⁷⁵ Meanwhile in nearby Altadena, the district attorney’s office, “acting then as both smog cop and public guardian, had advised the Altadenans to relax; the ‘obnoxious fumes’ had mainly a psychological effect. [Property-rights leader James] Clark, responding cleverly, invited the D.A. to travel there, then, to ‘get [his] lungs full of psychology.’”⁷⁶ In the people’s minds,

⁷² JACOBS & KELLY, *supra* note 7, at 2.

⁷³ *Id.*

⁷⁴ JAMES E. KRIER & EDMUND URSIN, *POLLUTION & POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940–1975* 1 (1977). The focus on the 1940–1975 is notable: the time period is bookended first by World War II and then by the creation of the federal environmental regime. The result is a purely state story in a post-Progressive era.

⁷⁵ JACOBS & KELLY, *supra* note 7, at 22.

⁷⁶ *Id.* at 20. Lest Los Angeles’s prosecutors get short-changed here, however, the District Attorney’s office did, “in a blast at . . . manufacturers, file[] thirteen smoke-abatement lawsuits, including two against well-known outfits — Standard Oil’s coastal refinery and Vernon’s Bethlehem Steel Corporation.” *Id.* at 29.

smog was still just a temporary problem though: “Los Angeles had rearranged nature in the past, why not again?”⁷⁷

Rearrange it did: in 1947, the city established the Los Angeles County Air Pollution Control District, the first of its kind in the nation (the Bay Area Pollution Air Control District was subsequently established in 1955).⁷⁸ Between 1947 and 1950, the state adopted the Ringelmann System, which measured the quantity of smoke rising from stacks and other resources, and limited smoke accordingly. In 1960, the passage of the Motor Vehicle Pollution Control Act “brought the state into the active role of control for the first time” under the first piece of motor vehicle emission control legislation in the country.⁷⁹ All in all, California started the nation’s first air quality program more than a decade before the passage of the Federal Clean Air Act.

Yet even before the landmark legislation, litigation had already been under way in California. Starting before 1940, citizens annoyed with the growing “smoke nuisance” had been seeking redress through civil suits. The public nuisance doctrine has provided the basis for air pollution cases ever since (including, in most recent jurisprudence, lawsuits over greenhouse gases, global warming, and even challenges over whether alternative energy sources such as wind turbines end up creating more — albeit different — environmental problems than solutions).

A longstanding common law notion, the public nuisance doctrine protects the public against “a substantial and unreasonable interference with a right held in common by the general public, in use of public facilities, in health, safety, and convenience.”⁸⁰ The California Penal Code defines “public nuisance” as anything injurious to health, offensive to the senses, or obstructive to free use of property so as to interfere with comfortable enjoyment or free passage by the public.⁸¹

⁷⁷ *Id.* at 23.

⁷⁸ *Id.* at 8.

⁷⁹ JACOBS & KELLY, *supra* note 7, at 8.

⁸⁰ DAN B. DOBBS, *THE LAW OF TORTS* 1334 (2000).

⁸¹ “Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . .” CAL. PENAL CODE § 370.

In practice, public nuisance has been in many ways the “inland” or “atmospheric” version of the public trust doctrine employed in water cases.⁸² Both aim to protect communal interests in the environment and natural resources; “they protect collective interests against the excesses of private activity, operating flexibly as common law backstops to political failures.”⁸³ It would seem that the use of common law doctrines — such as public nuisance and public trust — that enforce societal norms also demonstrates how environmental issues are very much a part of California’s fabric.

Indeed, cultural voices have sounded alongside litigious ones even in the early days of air pollution litigation. Heading into the 1950s, at a time when smog and sparing the air were still new, the *Los Angeles Times*, “as the loudest voice around, was the world’s first environmental soldier, and [publisher Norman] Chandler was its General Patton.”⁸⁴ As the smog swirled over the next few months (and ever after), the *Times* “chaperoned readers through trash heaps, refinery boilers, chemical factories and every other operation unofficially indicted for the scourge.”⁸⁵

Some argue that this model of mutual reinforcement between common law and culture better protects the environment than the sweeping federal legislation that has followed — and at times tried to replace — it:

[T]he common law enforces the norms of society, whereas the administrative state tries to impose intellectually generated norms on society. Common law rules tend to limit liability to conduct that

⁸² WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 2.16 173 (1977).

⁸³ Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in a Pod?*, 45 DAVIS L. REV. 1075, 1078 (2012). Still, the two differ in scope, function, and legal foundation, resulting in differing applications to different environmental challenges. Nevertheless, there have also been water lawsuits based on public nuisance, especially early on in California’s history. See, e.g., *People v. Glenn-Colusa Irrig. Dist.*, 127 Cal. App. 30 (1932) (enjoining diversion from Sacramento River into an unscreened canal as a public nuisance on the ground it killed many fish species in the area); *People v. Russ*, 132 Cal. 102 (1901) (enjoining construction of dams in the Salt River area as a public nuisance because the dams’ diversion of water obstructed the public’s free use of a navigable stream).

⁸⁴ JACOBS & KELLY, *supra* note 7, at 28. Yet, ironically, Chandler’s family had been at the forefront of the diversion of water away from the Owens Valley.

⁸⁵ *Id.*

society deems unjust, whereas the administrative state imposes liability where the state deems it useful to achieve its objectives.⁸⁶

Certainly the common law — which, as a practical matter, mobilizes and relies on the actions of ordinary citizens rather than politicians — is a “bottom up” approach that may be “more likely to draw upon existing social understandings and norms in the development of law, which may in turn be more effective.”⁸⁷ Others, however, argue that reliance on ever-changing cultural trends actually weakens rights (reliance which, in turn, gives rise to a litigious approach that is neither effective nor efficient in creating long-term solutions) and that public nuisance suits are improper means of environmental enforcement.⁸⁸

Legal theory aside, California has led the way in environmental protection, particularly where air pollution is concerned. In fact, California continues to occupy a special place in environmental protection even under the federal regulatory scheme. While federal laws such as the Clean Air Act generally preempt state law, California is — and always has been — permitted to set more stringent standards in certain instances (usually through waivers issued by the Environmental Protection Agency). This means, of course, the relationship between state and federal law has sometimes been rocky: “[t]he time since 1970 has been one of struggles in California . . . to cope with these bold new breaks, struggles that put — are still putting — the federal system to a fine test.”⁸⁹ Still, the “California exception” exists in part to enable the state to cope with its exceptionally severe problems (especially in Los Angeles).⁹⁰ At the same time, “it was also motivated by California’s pioneering experience in the field (an experience, like

⁸⁶ DAVID SCHOENBROD, *Protecting the Environment in the Spirit of the Common Law*, in *THE COMMON LAW AND ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW* 17–18 (2000).

⁸⁷ Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 *SUPREME COURT ECONOMIC REVIEW* 21, 26 (2007).

⁸⁸ See Gary D. Libecap, *The Battle over Mono Lake*, 6 *HOOVER DIGEST* (2006), available at www.hoover.org/publications/hoover-digest/article/6467 (arguing for a market approach to resource allocation); *Am. Elec. Power v. Connecticut*, 131 S. Ct. 2527 (2011) (declining, essentially, to allow interstate nuisance to supersede the current regulatory regime under the Clean Air Act).

⁸⁹ KRIER & URSIN, *supra* note 70, at 10.

⁹⁰ *Id.* at 2.

most pioneering ones, characterized as much by failure and frustration as by grand accomplishment), and by the accompanying purpose to employ California as a testing ground for new approaches to control.”⁹¹

In 2002, California adopted the Clean Cars Law (Assembly Bill 1493), the world’s first law targeting global warming pollution from new cars and trucks.⁹² Successive legislation required automakers to cut their carbon emissions 30 percent by 2016. In 2004, thirteen Central Valley car dealers and the Alliance of Automobile Manufacturers (which represents, among others, GM, Ford, DaimlerChrysler, and Toyota) sued the state to stop implementation of the Clean Cars program.⁹³ Undeterred, the state brought a public nuisance suit against the six biggest automakers in the country.⁹⁴ The automakers’ claims were ultimately denied, and the state suit dismissed. Most recently in January, the California Air Resources Board unanimously passed the so-called “Advanced Clean Cars” package. The plan mandates a 75 percent reduction in smog-forming pollutants by 2025 and that one in seven of new cars sold in California in 2025 be an electric or other zero-emission vehicle.⁹⁵

Again, as with water, California deliberately and eagerly used the law to embrace car culture. At the same time, reactions to and regulation of car

⁹¹ KRIER & URSIN, *supra* note 74, at 2. “[T]he state’s efforts have been a major influence in shaping the federal approach to vehicular pollution control, and have also of late been much shaped by the federal approach.” *Id.* at 3.

⁹² AB 1493 amended CAL. HEALTH & SAFETY CODE § 42823 and added § 43018.5; *California Clean Car Law Prevails over Big Auto Challenge*, Natural Resources Defense Council, www.nrdc.org/globalwarming/fauto.asp (last visited May 15, 2012).

⁹³ *Cent. Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); *Cent. Valley Chrysler-Jeep v. Goldstene*, 563 F. Supp. 2d 1158 (E.D. Cal. 2008).

⁹⁴ *California v. General Motors*, 2007 WL 2726871 (N.D. Cal. 2007). Meanwhile, the United States Supreme Court had held in *Massachusetts v. EPA*, 549 U.S. 497 (2007), relevant part, that the Clean Air Act gives the EPA authority to regulate tailpipe emissions of greenhouse gases and that such gases fell within the Clean Air Act’s definition of “air pollutant.”

⁹⁵ *California passes sweeping auto emission standards*, FOX NEWS (Jan. 28, 2012), <http://www.foxnews.com/politics/2012/01/28/california-passes-sweeping-auto-emission-standards/> (irony of citing to Fox News for a global warming story intended); see also Katrina Schwartz, *California’s “Clean Car” Rules: A Historical Perspective*, KQED NEWS (Jan. 27, 2012), <http://blogs.kqed.org/climatewatch/2012/01/27/californias-clean-car-rules-a-historical-perspective/>.

culture's environmental impacts show a people and a place trying to ease its conscience.

Perhaps California is destined to be a state of irreconcilables where law stands at the intersection:

What, for example, is an auto executive to make of the fact that Californians bought more Hummer H2's from January to July [2003] . . . than any other state, yet drivers have also bought so many gas-electric hybrids that Detroit has been forced to play catch-up with the Japanese? On one hand, the Hummer sales say Californians are rich and therefore entitled to two parking spaces, but the new hybrids say the state is full of environmental advocates. Both pictures are true.⁹⁶

Perhaps over the last few decades, Eddie Valiant's train-filled town has given way to a sprawling state more accurately and at best embodied in Roger Rabbit's Car Toon Spin at Disneyland. Perhaps that is California all over:

We've been on the run
 Driving in the sun
 Looking out for number one
 California, here we come
 Right back where we started from⁹⁷

CONCLUSION

“ . . . where we run out of continent.”

California has always been the main character — and sometimes even a caricature — in its own stories. It is paradoxically the most populous state and yet a “new frontier.” It is “a world that is simultaneously old and new. The public trust doctrine and the Endangered Species Act have been laid down alongside one-hundred-year-old water rights, and we somehow have to figure out how they can, and should coexist.”⁹⁸

⁹⁶ Alexander, *supra* note 60.

⁹⁷ PHANTOM PLANET, *California, on THE GUEST* (Epic 2002).

⁹⁸ Gray, *supra* note 15, at 151.

These are the plots and the protagonists that underlie the creation of California, both in legal facts and in social and silver screen fictions. Foundational fantasies, after all, “seem to have originated as a way of giving human form to all that is titanic and inchoate about nature.”⁹⁹ In California’s “dynamic and utilitarian conception” of water rights, “we have our Bigfoot. He is more than a myth. Inhabiting our remote mountain canyons, wild rivers, high desert lakes, and bays and estuaries, he is also a vital part of our legal imagination.”¹⁰⁰ This Bigfoot has at times allowed politicians and engineers to pillage the Owens Valley and at other times save Mono Lake from the same fate. Indeed, California’s water laws and litigation have been aptly fluid in allowing for very different endings to very similar stories.

In California’s roadways, road rules, and anxiety over air pollution, there is an attempt to reclaim nature in the unnatural — an attempt to recast a manmade exercise into the ultimate form of wilderness and freedom (picture, for a moment, hugging the California coastline on the Highway 1 or winding through the snowy peaks en route to Lake Tahoe, perhaps even in a hybrid car). Of course, these days, “Californians do not cruise much anymore, nor do they hang out at drive-ins. . . . Still, the car culture persists because drivers continue to spend a lot of time sitting on freeway on-ramps, imagining they could be doing these things instead of waiting for the two-cars-per-green-light-meter light to join the herd on Interstate 5.”¹⁰¹ Dreams of the state with the most cars having the smallest carbon footprint turn ignoble smog and traffic into something decidedly noble.

Taken together, California has indeed been a frontier for environmental law and culture. On one level, the lack of a federal system prior to the 1970s forced California into this role out of necessity; on another level, California gladly filled that role. Its ability to operate, unconstrained, using common law doctrines allowed California to mold itself into the “Golden State[®]” it wanted to be by manipulating the environment in the name of the

⁹⁹ Gray, *supra* note 15, at 272 (quoting D.R. WALLACE, *THE KLAMATH KNOT* 137 (1983)). Such myths affirm “a desire for human power over wilderness. [. . .] They link us to lakes, river, forests, and meadows that are our homes as well as theirs. They lure us into the wilderness . . . not to devour us but to remind us where we are, on a living planet. If [they] do not exist, to paraphrase Voltaire, it is necessary to invent them.” *Id.* at 272–73.

¹⁰⁰ *Id.* at 273.

¹⁰¹ Alexander, *supra* note 60.

public good, and also to actually protect the public good. Sometimes the two have meant the same thing; sometimes they have not. The result has been creative yet complicated.

Perhaps this makes California a place every bit as crazy and sun-addled as outsiders make it out to be. Yet out of these lawsuits, California is also a place that 37,691,912 people have created and called “home” where once there was none.¹⁰²

More than anything, as “native daughter” Didion notes:

California is a place in which a boom mentality and a sense of Chekhovian loss meet in uneasy suspension; in which the mind is troubled by some buried but ineradicable suspicion that things had better work here, because here, beneath the immense bleached sky, is where we run out of continent.¹⁰³

But only if the continent and the California landscape — so capable of both bounty and bust — do not run out on us first.

★ ★ ★

¹⁰² *State & County QuickFacts: California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited May 15, 2012).

¹⁰³ JOAN DIDION, *Notes from a Native Daughter*, in *SLOUCHING TOWARDS BETHLEHEM* 171, 172 (1968).

THE *CAL FED* CONTROVERSY:

Distinguishing California's Pregnancy Leave Law and the Family and Medical Leave Act

JENNIE STEPHENS-ROMERO*

In the modern history of the United States, the feminist movement has been marked by a great divide between those women favoring formal equality and those favoring substantive equality.¹ While supporters of formal equality believe that men and women should be treated the same, including under the law, supporters of substantive equality believe that where men and women are actually situated differently, different rules may be needed in order to achieve equal results.² The debate rose to a peak in the 1970s and 1980s in a national debate over pregnancy discrimination and benefits in the workplace.³ After two devastating U.S. Supreme Court decisions in the 1970s, the divide appeared most prominently between

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¹ Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARVARD C.R.-C.L. L. REV. 415, 417–20 (2011).

² KATHERINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 1, 127 (5th Ed. 2010).

³ Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279 (1998). Williams also provides a comprehensive analysis of the theoretical debate between feminists in the different ideological camps.

California women's activists and those working on the national level. For the most part, California women's groups came out in support of a substantive approach to equality which provided leave specifically to pregnant women while not specifically mandating leave for other temporarily disabled employees.⁴ On the other hand, national women's groups generally favored a formal approach where pregnant women would receive the same leave benefits as any other employee.⁵

In 1987, a Supreme Court case involving California's substantive approach to equality showcased the feminist debate to everyone in the country.⁶ *California Federal Savings & Loan Association v. Guerra* truly illuminates the main figures in the leave debate and their beliefs on the issue.⁷ But the debate was not over then — national women's groups worked in Washington to promote their formal view. The long-standing feud between supporters of formal and substantive equality can perhaps best be observed in the history of pregnancy and parental leave statutes in the U.S.

“IT NEVER OCCURRED TO ME THAT I MIGHT LOSE MY JOB BECAUSE I’D HAD A CHILD.”⁸

In 1982 Lillian Garland, an employee at California Federal Savings & Loan Association (Cal Fed), took maternity leave to have a cesarean section.⁹ When she returned to work, she had been replaced, and her job was no longer available.¹⁰ Garland filed a complaint with the California Fair Employment and Housing Commission (FEHA) claiming that Cal Fed had violated California's Pregnancy Disability Leave Law.¹¹ She was among 300 other women who had filed complaints for violations of that law in

⁴ See, *infra*, text associated with fns. 110–119, for more detail.

⁵ *Id.*

⁶ *California Federal Sav. & Loan Ass'n v. Guerra (Cal Fed)*, 479 U.S. 272, 278 (1987).

⁷ *Id.*

⁸ Tamar Lewin, *Maternity Leave: Is It Leave, Indeed?*, N.Y. TIMES, Jul. 22, 1984, at F1 (quoting Lillian Garland).

⁹ RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 17 (1995).

¹⁰ *Id.*

¹¹ *Cal Fed*, 479 U.S. at, 278.

1982.¹² Before the administrative hearing date with FEHA, Cal Fed filed suit in the Federal District Court for the Central District of California seeking a declaration that California's Pregnancy Disability Leave Law had been preempted by the federal Pregnancy Discrimination Act.¹³ Cal Fed was joined by the Merchants and Manufacturers Association and the California Chamber of Commerce in what the business community saw as an opportunity to attack the leave law.¹⁴

In 1984, the District Court characterized the California law as requiring "preferential treatment" for pregnant employees, and agreed with Cal Fed that the Pregnancy Disability Leave Law was preempted by the Pregnancy Discrimination Act.¹⁵ In his opinion, Judge Real not only invalidated a law aimed at helping women achieve equality, but he did so by using another law aimed at the same purpose.¹⁶ The decision caused consternation among many women activists.¹⁷

"DEBATE OVER PREGNANCY LEAVE"¹⁸

Cal Fed wound its way through the courts and in October of 1986, the case reached the U.S. Supreme Court.¹⁹ Amicus briefs were filed in support of various points of view — Cal Fed's stance was supported by business and commerce associations, California women's groups supported the Pregnancy Disability Leave Law, and national women's groups supported Lillian Garland's right to leave, but not the Pregnancy Disability Leave Law itself.²⁰ If the debate between different camps of feminist thought was not

¹² ELVING, *supra* note 9, at 18.

¹³ *Cal Fed*, 479 U.S. at 278–79.

¹⁴ *Id.* See ELVING, *supra* note 9, at 18.

¹⁵ *California Federal Sav. & Loan Ass'n v. Guerra*, 34 FAIR EMPL. PRAC. CAS. (BNA) 562, 1 (1984).

¹⁶ *Id.*

¹⁷ ANNE L. RADIGAN, CONCEPT & COMPROMISE: THE EVOLUTION OF FAMILY LEAVE LEGISLATION IN THE U.S. CONGRESS 6 (1988).

¹⁸ Title of a *New York Times* article describing *Cal Fed*. Tamar Lewin, *Debate Over Pregnancy Leave*, N.Y. TIMES, Feb. 3, 1986, at D1.

¹⁹ *Cal Fed*, 479 U.S. at 272.

²⁰ See, e.g., Brief for the Chamber of Commerce of the United States as Amicus Curiae in Support of the Petition, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494); Brief of Equal Rights Advocates, the California Teachers Ass'n, the Northwest Women's Law

clear before, Cal Fed's amici highlighted the internal dispute. While both California and national women's groups called for Lillian Garland's right to leave, they did so with significant differences.

First, California women activists pointed out that the Pregnancy Disability Leave Law was not inconsistent with Title VII and the Pregnancy Discrimination Act; in fact, they shared the same goals of ending discrimination against women in the workplace.²¹ While Title VII preempted legislation which relied on stereotypical notions of women's proper roles, California's legislation simply recognized an objective difference between the sexes, namely pregnancy.²² Accordingly, different policies are necessary to ensure equal opportunities for women.²³ For example, the Equal Rights Advocates Brief suggested comparing men who have engaged in reproductive behavior to pregnant women.²⁴ That way any difference in treatment between the two groups could be seen as manifestly unjust.²⁵ Title VII, their brief pointed out, prohibits facially neutral policies that result in adverse impacts on women, and that is what happens when pregnant women are treated the same as everyone else.²⁶ True to their ideological underpinnings, the California women's groups were not afraid to point out the differences between men and women, and they were not afraid to demand a right to equality while taking that difference into consideration.²⁷

Center, the San Francisco Women Lawyers Alliance as Amici Curiae, *Cal Fed*, 479 U.S. 272 (1987) (No. 85-494) [hereinafter *Equal Rights Advocates Brief*]; Brief for the National Organization for Women, Now Legal Defense and Education Fund, National Bar Ass'n Women Lawyers' Division Washington Area Chapter, National Women's Legal Defense Fund as Amici Curiae in Support of Neither Party, *Cal Fed*, 479 U.S. 272 (1987) (No. 85-494) [hereinafter *NOW Brief*].

²¹ *Equal Rights Advocates Brief*, *supra* note 20.

²² *Id.*

²³ Brief for California Women Lawyers, Child Care Law Center, Jessica McDowell, Lawyers Committee for Urban Affairs, Mexican American Legal Defense and Education Fund, Women Lawyers' Association of Los Angeles, and Women Lawyers of Sacramento as Amici Curiae in Support of Respondents, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494) [hereinafter *California Women Lawyers Brief*].

²⁴ *Equal Rights Advocates Brief*, *supra* note 20.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *infra*, text associated with fns 110–119.

California women were also quick to point out that their legislation did not give women special or protective treatment. First, the Pregnancy Disability Leave Law's intent was different. While protective legislation attempted to bar women from doing men's work, California's legislation was attempting to allow women access to that work.²⁸ In a similar argument, the California Women Lawyers Brief stated that the legislation was not an effort to put women in a superior, or special, position, but rather just an equal opportunity to compete with men in employment.²⁹ The Pregnancy Disability Leave Law, then, was just a form of recognition that facially neutral policies do not always provide equality.³⁰

Alongside the California groups in favor of the Pregnancy Disability Leave Law, stood Betty Friedan, a nationally-recognized feminist, who was one of the founders of the National Organization for Women (NOW) in 1966, and 9 to 5, another national women's rights organization.³¹ Like the California organizations, Betty Friedan and 9 to 5 argued in their brief that gender-neutral policies failed to provide equality in procreative choices between men and women.³² Additionally, the authors went out of their way to show that the Pregnancy Disability Leave Law was not protective legislation.³³ But what was most interesting about this brief was the fact that Betty Friedan was one of the signatories. NOW, like Friedan, had also submitted an Amicus Brief for the *Cal Fed* case — only it was for the different argument of extending leave to all temporarily disabled workers, rather than solely pregnant women.³⁴

Also in support of California's Pregnancy Disability Leave Law were the states of Connecticut, Hawaii, Montana, and Washington, all of which

²⁸ *Equal Rights Advocates Brief*, *supra* note 20.

²⁹ *California Women Lawyers Brief*, *supra* note 23.

³⁰ *Id.*

³¹ Brief of the Coalition for Reproductive Equality in the Workplace, Betty Friedan, 9 to 5 National Association of Working Women, Congressman Howard Berman, et al. as Amici Curiae In Support of Respondents, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494); Rita Kramer, *The Third Wave*, *THE WILSON QUARTERLY* (Autumn 1986), at 115.

³² *Id.*

³³ *Id.*

³⁴ *NOW Brief*, *supra* note 20.

had similar leave laws on their books.³⁵ Connecticut's statute, for example, allowed women a "reasonable leave of absence for pregnancy" and guaranteed women their same, or substantially similar jobs, upon their returns.³⁶ The other states also maintained their interest in protecting their statutes and the way they related to Title VII.³⁷

National women's groups had the difficult task of upholding Lillian Garland's right to leave while simultaneously disagreeing with California's approach to pregnancy leave generally. Their solution was to argue not that California's pregnancy leave be denied, but that leave be extended to *all* temporarily disabled employees.³⁸ While they did not agree that California should provide leave solely for pregnant women, these groups stated that the Pregnancy Disability Leave Law did not conflict with Title VII and the Pregnancy Discrimination Act.³⁹ Cal Fed was in violation of the Pregnancy Discrimination Act where it was providing leave only for pregnant women and not for other temporarily disabled workers, but it was possible for them to comply with both laws by extending leave to all temporarily disabled employees.⁴⁰ Therefore, the two statutes were not in direct conflict per se, but only in the way Cal Fed was applying California's law.⁴¹ The two statutes could lawfully coexist.

Looking more closely at the briefs submitted by the national women's organizations, there were other clues marking the divisiveness of the debate even more clearly than their differing stances on the legal issues. NOW's brief was authored in part by Wendy Williams and Susan Deller Ross, the very women Donna Lenhoff called to her side to resist Berman's attempts

³⁵ Brief of the State of Connecticut, Connecticut Commission on Human Rights and Opportunities, Connecticut Permanent Commission on the Status of Women, State of Hawaii, State of Montana, and State of Washington as Amici Curiae, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *NOW Brief*, *supra* note 20; Brief for the American Civil Liberties Union, the League of Women Voters of the United States, the League of Women Voters of California, the National Women's Political Caucus, and the Coal Employment Project as Amici Curiae, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494) [hereinafter *ACLU Brief*].

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

at a national pregnancy leave law.⁴² At the same time they were submitting this brief, they were continuing their work on Federal gender-neutral leave legislation.⁴³ The same year that NOW submitted its amicus brief, Deller Ross was actually quoted in the *New York Times* as saying, “We think there is a conflict between the Federal Pregnancy Discrimination Act . . . and the California Law [W]e think that the correct remedy is not to take away the benefits for women disabled by pregnancy, but to extend those same benefits to any disabled workers.”⁴⁴ Women on different sides of the debate were openly stating their critiques of the other’s approach.

Additionally, while on a national level the American Civil Liberties Union (ACLU) filed an amicus brief to show that it rejected “laws that single out pregnancy, pregnancy-related conditions, or the capacity to become pregnant for ostensibly advantageous treatment,” the ACLU of Southern California openly rejected the national organization’s stance on the issue.⁴⁵ Not only did they refuse to sign on to the amicus brief, but the Southern California branch firmly stated that it agreed with upholding the Pregnancy Disability Leave Law in the same way other California organizations were expressing in their amicus briefs.⁴⁶

The debate among the advocates was also picked up by the general public. A *New York Times* article from 1986 exposed what many people working directly on addressing leave already knew: the leave issue was dividing feminists in the U.S.⁴⁷ One article showcased the divide between California and federal law and also the divide between different women’s rights organizations. The article summarized what was being said in the amicus briefs — both sides of the debate wanted women to be able to take time off for pregnancy, they just disagreed as to how that should work.⁴⁸

On the one hand, NOW and the ACLU were quoted as taking a stance against gender-specific legislation.⁴⁹ They were afraid that labeling

⁴² NOW Brief, *supra* note 20.

⁴³ ELVING, *supra* note 9, at 60–61.

⁴⁴ Lewin, *supra* note 18.

⁴⁵ ACLU Brief, *supra* note 38.

⁴⁶ *Id.*

⁴⁷ Tamar Lewin, *Maternity-Leave Suit Has Divided Feminists*, N.Y. TIMES, Jun. 28, 1986, at 52.

⁴⁸ *Id.*

⁴⁹ *Id.*

pregnancy as a “special disability” would allow the use of stereotypes against women.⁵⁰ Stereotyping had been used to produce so much harm to women in the past, that the better approach was to remain gender-neutral.⁵¹

But Betty Friedan and 9 to 5 preferred leave policies aimed at creating equality of procreative choice, and they wanted to do away with the traditional male model for employees.⁵² Betty Friedan was quoted as saying, “[T]he time has come to acknowledge that women are different from men, and that there has to be a concept of equality that takes into account that women are the ones who have the babies. We shouldn’t be stuck with always using a male model.”⁵³ Like California feminists, they were willing to accept that women were different from men in their ability to become pregnant, but they were not willing to let that hold women back from being gainfully employed.⁵⁴

“THE STATUTE IS NOT PRE-EMPTED BY TITLE VII”⁵⁵

In the end, the U.S. Supreme Court upheld California’s Pregnancy Disability Leave Law.⁵⁶ Writing the opinion, Justice Marshall first looked to Congress’s intent in passing the Pregnancy Discrimination Act in order to determine whether it preempted any state fair employment laws.⁵⁷ What the Court determined was that Congress’s intent in passing the Pregnancy Discrimination Act was much the same as the California State Legislature’s intent in passing the Pregnancy Disability Leave Law, that is “to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”⁵⁸ Therefore, California’s law did not conflict with Congress’s intent in passing the Pregnancy Discrimination Act.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Majority decision in *Cal Fed.* 479 U.S. at 292.

⁵⁶ *Id.*

⁵⁷ *Id.* at 280.

⁵⁸ *Id.* at 289 (quoting 123 CONG. REC. 29658 (1977) (Statement of Senator Williams in support of the PDA)).

Furthermore, Congress did not show any intent to prevent states from passing statutes granting pregnant women further protection than that provided for in the Pregnancy Discrimination Act.⁵⁹ While the record showed that Congress had acknowledged the existence of such state statutes in Connecticut and Montana, nothing was said about any possible conflicts with those and the proposed PDA.⁶⁰ As well as having a common goal, state statutes promoting substantive equality were not considered as overstepping the bounds of the Pregnancy Discrimination Act when it was enacted. Indeed, the Court found that Congress had intended the PDA “to construct a floor beneath which pregnancy disabilities may not drop — not a ceiling above which they may not rise.”⁶¹

Justice Marshall, much like California women’s rights organizations had done in their amicus briefs, distinguished California’s law from historically protective legislation.⁶² He did so by pointing out how limited the statute was — it only applied to the period of actual physical disability due to pregnancy.⁶³ Therefore, it was not analogous to statutes employing “archaic and stereotypical notions about pregnancy and the abilities of pregnant workers.”⁶⁴ California’s law defined a more objective and clearly determined time period that could not be as easily subjected to stereotyping. This seemed to be a blow to the formal equality argument, which had rested on the negative effect of stereotypes found in gender-specific statutes.⁶⁵

“GOOD WOMEN ARE IN DEMAND NOW. . .”⁶⁶

From the 1950s to the 1970s, the rates of both U.S. women who worked and the proportion of the workforce made up of women rose significantly.⁶⁷ By 1977, women even constituted 18 percent of traditionally male-occupied blue

⁵⁹ *Id.* at 286.

⁶⁰ *Id.* at 287.

⁶¹ *Id.* at 280 (quoting *Cal Fed*, 758 F.2d at 395).

⁶² *Id.* at 290.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See Lewin, *supra* note 47.

⁶⁶ Quote from a husband with an employed wife, referring to women in the workplace. Georgia Dullea, *Vast Changes in Society Traced to the Rise of Working Women*, N.Y. TIMES, Nov. 29, 1977, at 77.

⁶⁷ *Id.*

collar jobs involving heavy manufacturing.⁶⁸ This rise in employment held ramifications for both the home and the workplace, playing a role in increased divorce rates, higher reported incidents of sexual harassment, and more out-of-home child care.⁶⁹ The last issue became particularly salient in the 1970s.

In the early 1970s, a recession hit multiple sectors of the economy with decreasing levels of both employment and consumer purchasing.⁷⁰ Additionally, high rates of inflation were making it more difficult to raise a family on a single income.⁷¹ For many, the only way to afford to have children was if both parents worked outside the home.⁷² That meant that women had to work in order to have children, raising concerns regarding the ease with which women could become pregnant, have children, and maintain their employment at the same time.

A number of Supreme Court decisions decided in the 1970s expanded the rights of women in different facets of society. For example, *Reed v. Reed* overturned an Idaho state statute which automatically appointed a father as administrator of a deceased child's estate because it discriminated based on sex.⁷³ And a mandatory unpaid maternity leave regulation was struck down by the Court in *Cleveland Board of Education v. LaFleur*.⁷⁴ For that reason, some may have been optimistic about women in the workplace and their ability to have children.

"SHOCK AND ANGER EXPRESSED"⁷⁵

However, the U.S. Supreme Court shocked women's rights activists around the country with two major decisions in the mid-1970s. First, in 1974 it

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Peter T. Kilborn, *More Sectors of Economy Are Pinched by Recession*, N.Y. TIMES, Oct. 31, 1974, at 1.

⁷¹ Dullea, *supra* note 66.

⁷² Fewer than half of the jobs in the U.S. economy in 1976 were sufficient to reasonably sustain a family. Ellen Goodman, *Pregnancy disability — the battle has just begun*, S.F. CHRONICLE, Dec. 22, 1976, at 15.

⁷³ 404 U.S. 71 (1971).

⁷⁴ 414 U.S. 632 (1974).

⁷⁵ Subheading from a *New York Times* article describing *General Electric v. Gilbert*, *infra* note 185. Lesley Oelsner, *Supreme Court Rules Employers May Refuse Pregnancy Sick Pay*, N.Y. TIMES, Dec. 8, 1976, at 53.

held that discrimination against pregnant women did not constitute sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.⁷⁶ California had developed a disability insurance program for temporarily disabled workers and the program excluded pregnancy from its definition of disability.⁷⁷ When the state was sued for discriminating against women by failing to provide insurance for pregnancy while providing it for other temporary disabilities, the Supreme Court held in *Geduldig v. Aiello* that California had not discriminated on the basis of sex, but instead on the basis of pregnancy.⁷⁸ According to the Court, they were not one and the same.⁷⁹ In the Court's own words, "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy."⁸⁰ Excluding pregnancy from state-distributed disability insurance was permissible.⁸¹

Then, in 1976, the Supreme Court handed down its decision in *General Electric v. Gilbert*, holding that pregnancy discrimination did not amount to sex discrimination under Title VII, either.⁸² Until then, the Equal Employment Opportunity Commission (EEOC) had construed the words, "because of sex," in Title VII as protecting against pregnancy as well as other forms of sex discrimination.⁸³ In *Gilbert*, however, Justice Rhenquist distinguished the discrimination as only against pregnant versus non-pregnant persons, not against women versus men.⁸⁴ Therefore, a private company could also exclude pregnancy from its disability benefits while at the same time covering other temporary disabilities.⁸⁵

The two decisions were major blows to the women's rights movement not only because they approved both state and private exclusion of pregnancy benefits, but also because they differentiated pregnancy discrimination

⁷⁶ *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974).

⁷⁷ *Id.* at 486.

⁷⁸ *Id.* at 497.

⁷⁹ *Id.*

⁸⁰ *Id.* at n.20.

⁸¹ *Id.*

⁸² 429 U.S. 125 (1976).

⁸³ 29 C.F.R. § 1604.10(b) (1975).

⁸⁴ *Gilbert*, 429 U.S. at 135.

⁸⁵ *Id.* at 145.

from sex discrimination. Indeed, they both caused an uproar. There were a wide range of opinions on the issue. Writing on the opinion page of the *San Francisco Chronicle*, Andrew Tully said that while he supported pregnancy disability benefits, including them in disability insurance programs could only be done by Congress, not through the EEOC's "presumptuous guidelines."⁸⁶ Ellen Goodman, on the contrary, referred to the *Gilbert* majority as "six upper-class, upper-aged men whose own children were born and weaned long ago" to bring some reason to their "bizarre" decision to distinguish pregnant working women from other women.⁸⁷ And James Kilpatrick applauded the decision, going so far to as to call the Burger Court "the girls' best friend" due to some of its decisions on gender equality.⁸⁸

For many who supported the opinions it seemed that feminists wanted it both ways — equality and special treatment. Even though they had gained equality and could work some of the same trades jobs as men, they still wanted female-only pregnancy disability insurance, which many considered special treatment. For example, *Washington Star* cartoonist Pat Oliphant depicted the National Organization for Women (NOW) as electrical workers griping about their lack of pregnancy disability insurance despite gaining equality.⁸⁹ Like Kilpatrick, Oliphant's observant insect in the cartoon (facing page) shows that some people believed feminists would never be happy with the state of gender relations no matter what the Court held.⁹⁰

On the other hand, writing in the *New York Times*, Lesley Oelsner pointed out that the *Gilbert* decision had overruled six different Courts of Appeal in addition to the EEOC's guidelines in its interpretation of pregnancy discrimination under Title VII.⁹¹ Additionally, companies which had provided pregnancy benefits now felt that they could drop them,

⁸⁶ Andrew Tully, *Insult to Mothers*, S.F. CHRONICLE, Dec. 27, 1976, at 33.

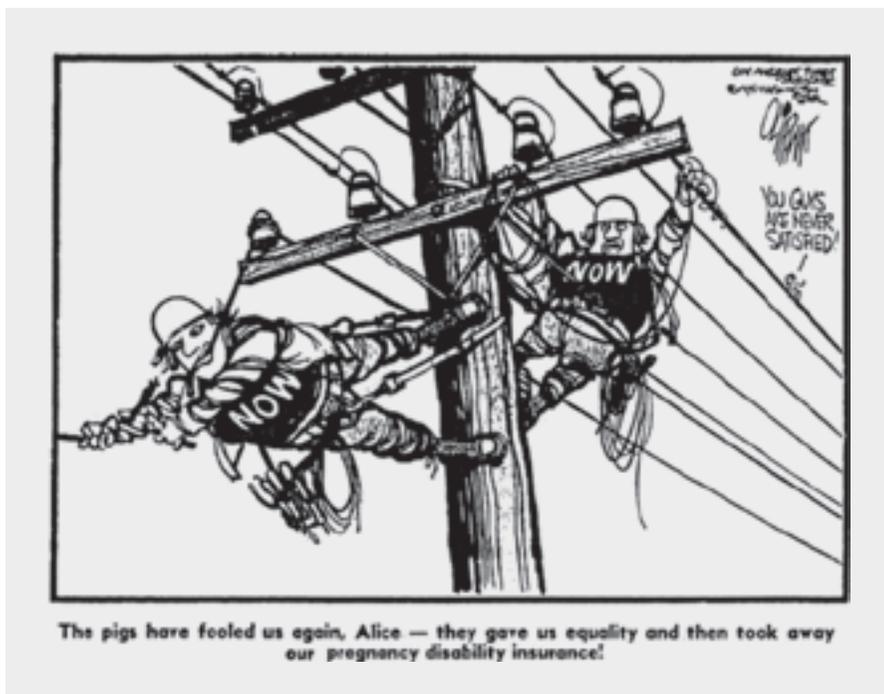
⁸⁷ Goodman, *supra* note 72.

⁸⁸ James Kilpatrick, *The Court Was Right*, S.F. CHRONICLE, Dec. 17, 1976, at 60. See, e.g., *Kahn v. Shevin*, 416 U.S. 351, which struck down a Florida state tax exemption for widows but not widowers because it discriminated on the basis of sex in assuming that women were less economically capable than men; *LaFleur*, 414 U.S. 632.

⁸⁹ Pat Oliphant, S.F. CHRONICLE, Jan. 3, 1977, at 38 (via L.A. Times Syndicate).

⁹⁰ *Id.*

⁹¹ Oelsner, *supra* note 75.



©1976, PAT OLIPHANT, *THE WASHINGTON STAR*⁹²

Courtesy The Washington Post

while companies lacking those benefits no longer felt any pressure to adopt them.⁹³ Oelsner's article certainly hinted at despair when it quoted an attorney at the ACLU's Women's Rights Project claiming that the Court had "legalized sex discrimination."⁹⁴

While the decisions produced a wide range of opinions among the more general populace, women's organizations both in California and on the national level promised to fight back to ensure that discrimination against pregnant women would be legally barred.⁹⁵ Their motives to promote equality for women were the same, but their approaches were distinct.

⁹² Oliphant, *supra* note 89.

⁹³ Oelsner, *supra* note 75.

⁹⁴ *Id.*

⁹⁵ See Damon Stetson, *Women Vow Fight For Pregnancy Pay*, N.Y. TIMES, Dec. 9, 1976, at 19.

“THIS LEGISLATION PROTECTS PREGNANT WOMEN FROM UNFAIR EMPLOYMENT PRACTICES”⁹⁶

In California, discrimination against women may have felt like a bigger problem than almost anywhere else in the country. In 1977, San Francisco had the second highest number of federal employment sex discrimination cases filed in the country at 259.⁹⁷ It was well above much larger cities like New York (181) and Chicago (224).⁹⁸ Despite the difficulty with time delays, high expenses, and the psychological stress associated with bringing sex discrimination suits, a significant number of people in San Francisco thought it was necessary to take their grievances to court.⁹⁹

Some attorneys working on sex discrimination cases also noticed that many of the complaints they received from women dealt with issues they faced upon becoming pregnant.¹⁰⁰ According to Shauna Marshall, previously a staff attorney at Equal Rights Advocates, one of California’s first organizations focusing on women’s legal rights, attorneys working with female employees at the time largely saw pregnancy as the main impediment to women’s long-term employment.¹⁰¹ Linda Krieger, then an attorney at the Employment Law Center in San Francisco was also quoted as saying, “I get calls all the time from women . . . who lost their jobs when they took time off for pregnancy or childbirth.”¹⁰² More so than equal pay or sexual harassment, pregnancy was not a problem to be ignored.

According to Marshall, women on the West Coast were also more comfortable accepting that women and men were inherently different when it

⁹⁶ Summary of AB 1960, the bill for the Pregnancy Disability Leave Law. Governor’s Chaptered Bill File: LL Summary, Bill No. AB 1960, Dep’t of Industrial Relations (Jan. 17, 1978).

⁹⁷ Ralph Craib, *How S.F. Sex Bias Suits Are Faring*, S.F. CHRONICLE, Jan. 7, 1978, at 4.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Interview with Shauna Marshall, Academic Dean, UC Hastings College of the Law, in San Francisco (Apr. 16, 2012).

¹⁰¹ *Id.*

¹⁰² Tamar Lewin, *Maternity Leave: Is It Leave, Indeed?*, N.Y. TIMES, Jul. 22, 1984, at F1.

came to pregnancy.¹⁰³ While women's rights activists at the national level were aiming for equal treatment, California women's activists were looking to redefine the model for employment.¹⁰⁴ Instead of treating women as exactly the same as men, California feminists wanted to do away with the straight white male model of an employee and embrace differences among workers.¹⁰⁵ For example, while attorneys working at the national level at the ACLU were afraid that treating pregnancy differently would raise historic issues of discrimination against women, Brian Hembacher, an attorney at California's Department of Fair Employment and Housing (DFEH) who eventually represented Lillian Garland in her suit against Cal Fed, agreed with pregnancy-specific leave, stating, "A lot of things that seem to be unequal on their face actually create equal effects."¹⁰⁶ Furthermore, Linda Krieger, then an attorney at the Employment Law Center in San Francisco, believed that "[t]he point isn't that men and women must be treated alike, it's that they must have equal opportunities."¹⁰⁷ In fact, Krieger was known for frequently debating Wendy Williams, a professor at Georgetown University Law School, on the issue of pregnancy leave.¹⁰⁸ Williams was an outspoken formal equality feminist who opposed pregnancy-specific leave as a form of special treatment that would actually prevent women from entering the workforce.¹⁰⁹

And while many of these women believed that difference should be embraced, they also believed that both parents should participate in the raising of a child.¹¹⁰ Passing a leave law addressing only pregnancy was considered by many to be just a first step.¹¹¹ The ultimate goal seemed to be passage of a leave law for both parents.¹¹² In fact, years after California's

¹⁰³ Interview with Shauna Marshall, *supra* note 100.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Lewin, *supra* note 102.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* See Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984) for more detail on her stance on the equality debate.

¹¹⁰ Interview with Shauna Marshall, *supra* note 100.

¹¹¹ *Id.*

¹¹² *The Family and Medical Leave Act of 1987: Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H.*

Pregnancy Disability Leave Law was passed, its author, Howard Berman, recognized that “*all* workers face the prospect of needing to take time off due to disability or serious family responsibilities”¹¹³ Passing a maternity leave statute, many seemed to have thought at the time, was easier than trying to pass a leave law that would apply to all workers.¹¹⁴

Soon after the *Gilbert* decision, Howard Berman, then a California Assembly member, began working on a bill that would extend workplace protections to pregnant women.¹¹⁵ As the legislative history for the bill shows, the *Geduldig* and *Gilbert* decisions were central to the California Legislature’s motivation in considering a bill extending pregnancy leave to working women.¹¹⁶ About half of the documents in the California State Archives concerning AB 1960’s legislative history include an analysis of the *Geduldig* and *Gilbert* decisions.¹¹⁷ Furthermore, California legislators were apprehensive about the possibility that the California Supreme Court might make a similar decision regarding state pregnancy protections.¹¹⁸ As the Department of Industrial Relations noted, neither the Division of Fair Employment Practices nor the Fair Employment Practices Commission, California’s state equivalents to the EEOC, had developed regulations on how to address pregnancy disabilities, and there was fear that the state supreme court might interpret the current state of fair employment law to exclude pregnancy disability due to the cost to employers.¹¹⁹

The legislative record also shows that legislators were aware that the California Supreme Court viewed gender in much the same way as the U.S. Supreme Court.¹²⁰ A memo from the Department of Industrial Relations recognized that while the U.S. Supreme Court did not recognize sex classifications as suspect and the California Supreme Court did recognize them as

Comm. on Education and Labor, 100th Cong. 2 (1987) (statement of Howard L. Berman, U.S. Representative, 26th District, California).

¹¹³ *Id.*

¹¹⁴ Interview with Shauna Marshall, *supra* note 100.

¹¹⁵ Governor’s Chaptered Bill File: Bill No. AB 1960, Office of the Legislative Counsel (Jan. 4, 1977).

¹¹⁶ *See generally*, Governor’s Chaptered Bill File: Bill No. AB 1960.

¹¹⁷ *Id.*

¹¹⁸ Governor’s Chaptered Bill File: Enrolled Bill Rpt., Bill No. AB 1960, Dep’t of Industrial Relations (Sep. 26, 1978).

¹¹⁹ *Id.*

¹²⁰ Governor’s Chaptered Bill File: Bill No. 1960, Memorandum from the Agriculture and Services Agency to Howard Berman (Sep. 14, 1978).

suspect, “the actual record of the U.S. Supreme Court in sex discrimination cases is not that bad . . . and the record of the California Supreme Court is not that good.”¹²¹ In other words, the courts analyzed gender similarly, and that could mean that the California Supreme Court could come out with a decision similar to *Gilbert* in the absence of any contrary legislation.

Additionally, a California case regarding workers’ compensation made clear that the California Supreme Court preferred leaving extension of employment benefits to the State Legislature.¹²² In *Arp v. Workers’ Compensation Appeals Board*, the state supreme court determined that a statute providing workers’ compensation benefits to widows whose husbands died on the job, but not to widowers whose wives died on the job, was unconstitutional in its differential treatment of men and women.¹²³ Instead of automatically extending the benefits to include widowers as well as widows to correct the differential treatment, the state supreme court struck down the entire provision and expressed its belief that the Legislature should be in charge of determining what to do with the now unconstitutional law.¹²⁴ Legislators took this to mean that the Court would most likely be unwilling to correct discrimination by extending a benefit because of the potential cost to employers.¹²⁵ Instead, it would leave that type of decision to the Legislature, which was better equipped to handle such potentially costly decisions.¹²⁶ Therefore it was clear to the 1978 California Legislature that the Court would probably not be willing to extend pregnancy benefits unless the Legislature expressly stated it, and that is what it set out to do.¹²⁷

It may have been fortuitous that California already had a labor code protecting pregnant school employees against discrimination and providing them with leave.¹²⁸ The code prohibited discrimination based on pregnancy or a related medical condition in hiring, promoting, discharging, or compensating pregnant employees.¹²⁹ AB 1960 was to amend the La-

¹²¹ *Id.*

¹²² *Arp v. Workers’ Compensation Appeals Board*, 19 Cal. 3d 395, 409 (1977).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Enrolled Bill Rpt., *supra* note 118.

¹²⁸ CAL. LABOR CODE § 1420.2 (1975) (repealed 1980).

¹²⁹ *Id.*

bor Code to allow pregnant school employees to take maternity leave for a reasonable period of time, and guaranteed that they receive the same benefits and privileges as other employees not affected by pregnancy.¹³⁰ Then AB 1960 was to extend those same benefits awarded to pregnant school employees to all pregnant employees throughout the state.¹³¹ In doing so, California would be naming pregnant women a protected class.¹³²

California also looked to other states to see what approaches they had taken to address the leave issue. For example, Oregon was looked to for information on its pregnancy disability laws and the problems in passing and implementing them.¹³³ Oregon, much like California, responded to the *Gilbert* decision by passing subsequent legislation to protect against pregnancy discrimination, and it prohibited employers from failing to provide pregnant women with equal medical benefits, disability benefits, and sick leave as other employees.¹³⁴ Furthermore, after the *Gilbert* decision the New York Court of Appeals, the highest court in that state, determined that private employers were required to pay disability benefits under the state human rights law prohibiting pregnancy discrimination.¹³⁵ Employer costs were brushed aside in favor of upholding human rights and protection against discrimination.¹³⁶

Interestingly, there were few objections to the substantive changes AB 1960 proposed. One of the major concerns happened to be the fear that new federal changes to Title VII might preempt, and therefore undermine, the California Legislature's efforts.¹³⁷ However, one provision was clearly exempt from preemption: the four months of time permissible for pregnancy

¹³⁰ Governor's Chaptered Bill File: Bill No. AB 1960, Assembly Committee on Labor, Employment and Consumer Affairs (Jan. 11, 1978).

¹³¹ *Id.*

¹³² *Id.*

¹³³ See Governor's Chaptered Bill File: Bill No. AB 1960, Minnesota House Committee on Labor-Management Relations to California Senate Committee on Industrial Relations (Feb. 15, 1978); Governor's Chaptered Bill File: Bill No. AB 1960, Oregon Department of Justice Memo (Sep. 21, 1977).

¹³⁴ *Id.*

¹³⁵ LL Summary, *supra* note 96.

¹³⁶ *Id.*

¹³⁷ Memorandum from the Agriculture and Services Agency, *supra* note 120 ("The main objection to the signing of AB 1960 is § 4, the federal preemption of state legislation . . .").

leave.¹³⁸ Perhaps this demonstrated the conviction with which California legislators adopted the leave provision above all else. Despite those fears, AB 1960 was passed as California's Pregnancy Disability Leave Law in September of 1978.¹³⁹ It provided for up to four months of pregnancy leave, inclusion of pregnancy and childbirth into any employer-administered disability program, and mandatory accommodation upon request for a woman disabled by pregnancy.¹⁴⁰

“THE TERMS ‘BECAUSE OF SEX’ AND ‘ON THE BASIS OF SEX’ INCLUDE . . .”¹⁴¹

The California Legislature was correct in anticipating federal legislation addressing pregnancy discrimination. Just a short while after the Pregnancy Disability Leave Law was passed in California, the Pregnancy Discrimination Act was passed in the U.S. Congress.¹⁴² However, Congress took a different path in remedying the *Geduldig* and *Gilbert* decisions. Instead of setting forth affirmative rights to which pregnant women were entitled, the Pregnancy Discrimination Act simply made clear that pregnancy discrimination was tantamount to sex discrimination — they were one and the same.¹⁴³ Therefore, the words “because of sex” in Title VII were clarified to include “because of or on the basis of pregnancy, childbirth, or related medical conditions.”¹⁴⁴ Furthermore, “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”¹⁴⁵ However, there is evidence in the legislative record that Congress did not intend to create any particular

¹³⁸ *Id.*

¹³⁹ Enrolled Bill Rpt. to Governor, *supra* note 118.

¹⁴⁰ *Id.*

¹⁴¹ Wording of the Pregnancy Discrimination Act as it amended Title VII in 1978. 42 U.S.C.A. § 2000e(k) (1978).

¹⁴² RADIGAN, *supra* note 17, at 5.

¹⁴³ § 2000e(k), *supra* note 141.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

disability benefits or special treatment for pregnant workers, significantly distinguishing it from California's Pregnancy Disability Leave Law.¹⁴⁶

“AN ARGUMENT OVER MEANS, NOT ENDS”¹⁴⁷

Simultaneously with Cal Fed's challenge to California's Pregnancy Disability Leave Law, Howard Berman, the law's author, was campaigning for a seat in the U.S. House of Representatives.¹⁴⁸ The leave law was one of his great successes as a state legislator, and he hailed it during his campaign for representative.¹⁴⁹ He touted his belief that the law would be upheld, but that he would also work toward a similar federal leave law upon arriving at Washington.¹⁵⁰ Soon after the district court decision, Berman, now a member of the House of Representatives, sought help from Donna Lenhoff at the Women's Legal Defense Fund, an organization now known as the National Partnership for Women and Families that works toward ending employment discrimination against women.¹⁵¹ When she was hired there, Lenhoff had participated in the effort to draft and pass the Pregnancy Discrimination Act, and she was considered a seasoned expert in legislation aimed at guaranteeing equality.¹⁵² Lenhoff, however, did not share Berman's views on how to handle the leave issue.¹⁵³ First, Lenhoff disagreed with a legislative reaction to the recent *Cal Fed* decision — she believed the case should be appealed through the courts.¹⁵⁴ Second, she was firm in her support of a leave policy applicable to all workers, regardless of sex, for either a temporary disability or a family medical issue.¹⁵⁵ When Berman requested a written proposal, Lenhoff turned to her Washington colleagues, including Judith Lichtman, Wendy Williams, and Susan Deller Ross, who shared her ideas on how to approach leave.¹⁵⁶

¹⁴⁶ H. R. Rep. No. 95-948, at 4 (1978).

¹⁴⁷ RADIGAN, *supra* note 17, at 8.

¹⁴⁸ ELVING, *supra* note 9, at 18.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 19.

¹⁵² *Id.* at 19–20.

¹⁵³ *Id.* at 21–22.

¹⁵⁴ *Id.* at 22.

¹⁵⁵ *Id.* at 23.

¹⁵⁶ *Id.* at 29.

Fresh in these women's minds was not only the recent *Cal Fed* decision, but also a Montana case, *Miller-Wohl v. Commissioner of Labor and Industry*.¹⁵⁷ Montana, like California, had a statute specifically providing pregnancy leave for women, the Montana Maternity Leave Act (MMLA).¹⁵⁸ The statute provided that no employee would be fired due to her pregnancy, and a woman was guaranteed a "reasonable leave of absence for the pregnancy."¹⁵⁹ Tamara Buley, an employee at a store owned by Miller-Wohl, missed time from work due to morning sickness and was shortly thereafter fired.¹⁶⁰ Just like Lillian Garland had done in California, Buley filed a complaint with Montana's Labor and Industry Commissioner, claiming that Miller-Wohl had violated the leave statute when they fired her due to her pregnancy.¹⁶¹ Miller-Wohl claimed that the MMLA was preempted by the Pregnancy Discrimination Act, and should therefore be invalidated.¹⁶² After being appealed to the Montana Supreme Court, the MMLA was upheld and Miller-Wohl was found to have violated not only the state statute, but also Title VII and the Pregnancy Discrimination Act.¹⁶³

In both cases, employers attempted to pit two pieces of legislation aimed at helping women against one another in order to deny women maternity leave. Only a small number of states had statutes requiring pregnancy leave at this time, and already two such statutes had been seriously challenged.¹⁶⁴ Similar federal legislation, applicable to women and employers all over the country, could have an even more detrimental effect. Moreover, the conservative Reagan administration had given women activists the feeling that they had to fight for long-accepted rights all over again.¹⁶⁵ Passing pregnancy-specific legislation at this time could be politically dangerous,

¹⁵⁷ 214 Mont. 238 (1984).

¹⁵⁸ Mont. Code Ann. § 49-2-310 (1983).

¹⁵⁹ *Id.*

¹⁶⁰ 214 Mont. at 242.

¹⁶¹ *Id.*

¹⁶² *Id.* at 249.

¹⁶³ *Id.* at 241. Note that the Montana Supreme Court mistakenly refers to the "Pregnancy Disability Act" where it should refer to the "Pregnancy Discrimination Act."

¹⁶⁴ Five states, California, Connecticut, Massachusetts, Montana, and Wisconsin, had maternity statutes between 1972 and 1981. LISE VOGEL, *MOTHERS ON THE JOB: MATERNITY POLICY IN THE U.S. WORKPLACE* 73 (1993).

¹⁶⁵ RADIGAN, *supra* note 17, at 8.

and any feminist issue presented to Congress should be presented as narrowly as possible if it wished to succeed.¹⁶⁶

While Lenhoff and her associates worked on a gender-neutral draft of a leave policy, Berman continued in his efforts to create a federal maternity leave law.¹⁶⁷ To him, passing a leave law which would apply to everyone was far-fetched.¹⁶⁸ A maternity leave statute, however, could be spun more easily in order to attract the votes of family-oriented conservatives in Congress.¹⁶⁹ Additionally, as he later stated in a Congressional hearing in 1987, it seemed a maternity leave law could be just a stepping stone to a more broad-spectrum leave law.¹⁷⁰ Much like many California women's activists saw the Pregnancy Disability Leave Law as a gateway to a more expansive leave law, Berman saw the role of a possible federal maternity leave law in the same way. However, after a fateful meeting in June of 1985 with Lenhoff, her associates, and lawyers from the League of Women Voters, the National Organization for Women, the National Women's Political Caucus, and the American Civil Liberties Union, Berman changed course.¹⁷¹ Observing the strength of women activists in support of a gender-neutral bill, and seeing that some of the congressional staff supported that approach, Berman shifted his position.¹⁷²

Around the same time, the House Select Committee on Children, Youth and Families was preparing legislation of its own based on the importance to children of parents' staying home with them after birth.¹⁷³ For the first time, two expert witnesses introduced to a congressional committee scientific research proving that *parents*, and not just mothers, should stay home with their children, ideally for a year after birth.¹⁷⁴ The idea that both parents could and should take part in child-rearing was introduced to Congress.

¹⁶⁶ *Id.*

¹⁶⁷ ELVING, *supra* note 9, at 30.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Hearing on H.R. 925, supra* note 112.

¹⁷¹ Elving, *supra* note 9, at 32.

¹⁷² *Id.*

¹⁷³ *Id.* at 23.

¹⁷⁴ Sheila Kamerman, Professor at Columbia University's School of Social Work, and Edward Zigler, Professor of Psychology at Yale University's Bush Center in Child

Pat Schroeder, the senior female representative from Colorado and also a member of the Select Committee, was eager to get involved when Berman ceded control of the bill.¹⁷⁵ She was considered the foremost women's rights activist in the House, and she was looking for a big issue to take on herself.¹⁷⁶ In April of 1985, she sponsored the Parental and Disability Leave Act.¹⁷⁷ The bill provided for eighteen weeks of unpaid parental leave, maintenance of existing health benefits during the leave, and the creation of a commission to study the possibility of paid parental leave.¹⁷⁸ Less than two weeks later, the Ninth Circuit Court of Appeals handed down its decision in the *Cal Fed* appeal.¹⁷⁹ The decision brought publicity to the issue of family leave and kept the ball rolling on the federal push for parental leave.¹⁸⁰ While the 1985 bill turned out to conflict with already-existing labor laws, and defined disability in a manner with which disability rights activists disagreed, the Ninth Circuit decision focused enough attention on the issue to allow for revisions.¹⁸¹ In March of 1986, a new bill addressing disability and labor law issues was once again proposed.¹⁸² After positive votes in two committees, Congress was adjourned before final consideration.¹⁸³

“A WINDFALL FOR THE SUPPORTERS OF THE FAMILY AND MEDICAL LEAVE ACT”¹⁸⁴

After a long battle, Lillian Garland's right to pregnancy leave was upheld and California's Pregnancy Disability Leave Law was left intact. However, the debate over how to handle leave was not over. A few days after the *Cal*

Development and Social Policy both testified before the House Select Committee on Children, Youth and Families in 1984. *Id.* at 26–28.

¹⁷⁵ *Id.* at 26; RADIGAN, *supra* note 17, at 13.

¹⁷⁶ *Id.*

¹⁷⁷ RADIGAN, *supra* note 17, at 15.

¹⁷⁸ THE FAMILY AND MEDICAL LEAVE ACT 4–5 (Michael J. Ossip & Robert M. Hale et al., eds., 2006).

¹⁷⁹ California Federal Sav. & Loan Ass'n v. Guerra, 758 F.2d 390 (9th Cir. 1985).

¹⁸⁰ RADIGAN, *supra* note 17, at 15.

¹⁸¹ *Id.* at 16.

¹⁸² *Id.* at 16–17.

¹⁸³ THE FAMILY AND MEDICAL LEAVE ACT, *supra* note 178, at 8.

¹⁸⁴ RADIGAN, *supra* note 17, at 23 (describing the effect of the Supreme Court's *Cal Fed* decision).

Fed decision was published, the *New York Times* published its own article explaining the decision and proposing an alternative: Schroeder's Parental and Medical Leave Act.¹⁸⁵ Not only did the article display fear that the *Cal Fed* decision would result in companies' refusing to hire women, it also claimed that the proposed act would result in the women's movement doing what it always did: benefiting men by promoting health, job, and family stability.¹⁸⁶ Articles like this one, highlighting leave as it was presented to the Supreme Court, put the issue in the spotlight and brought new energy to those still working on a national leave law.¹⁸⁷

When the parental leave bill was once again brought before Congress in 1987, many of the same reasons California considered in passing its Pregnancy Disability Leave Law were raised. For example, Howard Berman, Donna Lenhoff, and Karen Nussbaum, then executive director of 9 to 5, all testified about the large percentage of women in the workforce.¹⁸⁸ Nussbaum also emphasized the difficulty of raising a family on one income, which had been a concern in the 1970s as well.¹⁸⁹ However, many of those who testified in 1987 also stressed the bill's modernity in approach — it supported leave for *both* fathers *and* mothers, spotlighting the differences between the California law and the push for a national law.¹⁹⁰

¹⁸⁵ *Pregnancy Leave for Women, and Men*, N.Y. TIMES, Jan. 18, 1987, at E28.

¹⁸⁶ *Id.*

¹⁸⁷ ELVING, *supra* note 9, at 80.

¹⁸⁸ Statement of Howard Berman, *supra* note 106; *The Family and Medical Leave Act of 1987: Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 100th Cong. 2 (1987) (statement of Donna Lenhoff, Women's Legal Defense Fund); *The Family and Medical Leave Act of 1987: Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 100th Cong. 2 (1987) (statement of Karen Nussbaum, Executive Director, 9 to 5 National Association of Working Women).

¹⁸⁹ Statement of Karen Nussbaum, *supra* note 188.

¹⁹⁰ See Statement of Howard Berman, *supra* note 106; statement of Donna Lenhoff, *supra* note 173 (“[I]t makes leaves available to men and women for . . . a variety of their family needs.”); *Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 100th Cong. 2 (1987) (statement of Eleanor Smeal, President, National Organization for Women) (“This bill is a modern bill . . . that takes into consideration our modern living experiences This bill goes well beyond maternity leave.”)

From this point forward, the fears that national women's activists had held earlier about the conservative politics seemed to ring dangerously true.¹⁹¹ The parental leave bill suffered a series of delays attributed to its lack of support from conservative politicians. When it was proposed again in 1988, it was defeated by a filibuster.¹⁹² In 1989, after passing through both the House of Representatives and the Senate, the bill was vetoed by Republican President George H.W. Bush in his first year in office.¹⁹³ It came even closer to passage in 1991 when, despite President Bush's second veto, the Senate overrode the decision.¹⁹⁴ Unfortunately, the House failed to do the same, and the bill went no further that year.¹⁹⁵ Finally, in 1993 under a new Democratic President, Bill Clinton, and a Democratic-majority Congress, the bill passed and was signed into law as the Family and Medical Leave Act.¹⁹⁶

The Family and Medical Leave Act provides for twelve weeks of unpaid leave for mothers and fathers in order to take care of children and other close relatives.¹⁹⁷ While the process for passing such a bill was long and difficult, national women's activists achieved the result they were in favor of — a gender-neutral protection that would allow women, and men as well, to take the leave necessary to care for their families.

Probably more than any other women's rights issue in the U.S., pregnancy and parental leave has shown the clear division in ideology that has split American feminists for decades. The "shock and anger" that *Geduldig* and *Gilbert* produced could have been an opportunity for feminists in the U.S. to unite and fight discrimination together. Instead, the pregnancy issue became the centerpiece of the ideological and legal debate, and the conflict among American women's rights activists was openly aired to the public. Despite the conspicuous controversy, both California's Pregnancy Disability Leave Law and the federal Family and Medical Leave Act remain in place. Perhaps that is the testament that both approaches really do have value.

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¹⁹¹ See, *supra* page 25.

¹⁹² THE FAMILY AND MEDICAL LEAVE ACT, *supra* note 178, at 11.

¹⁹³ *Id.* at 13.

¹⁹⁴ *Id.* at 14.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ 29 U.S.C.S. § 2612 (1993).



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