CHIEF JUSTICE DAVID S. TERRY AND THE LANGUAGE OF FEDERALISM

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I. INTRODUCTION

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

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

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

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

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

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

DAVID S. TERRY, CHIEF JUSTICE OF CALIFORNIA (1857–1859)

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

Terry, who grew to be almost six-and-a-half feet tall, had no formal education after age 13. Instead, he was trained as a lawyer by his uncle, who had a law practice in Houston. Terry was a good apprentice, and he became a member of the Texas bar after two years. In 1846, at age 23, he served as a lieutenant of what later became known as the Texas Rangers in the war between the United States and Mexico. Terry settled in Galveston, Texas after the war. In 1847, he ran and lost the election for district attorney of Galveston. Shortly thereafter, he and his brother moved to California, with Terry settling in Stockton in 1849.[2]

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

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

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

Because the judge found it was only a superficial wound, and because Terry paid to have the wound dressed, he was fined only $50. In another incident, Terry and two friends quarreled with the editor of a Stockton newspaper about something written about Terry, and Terry struck the editor with the handle of his Bowie knife. That cost Terry a fine of $300.[3]

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

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

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

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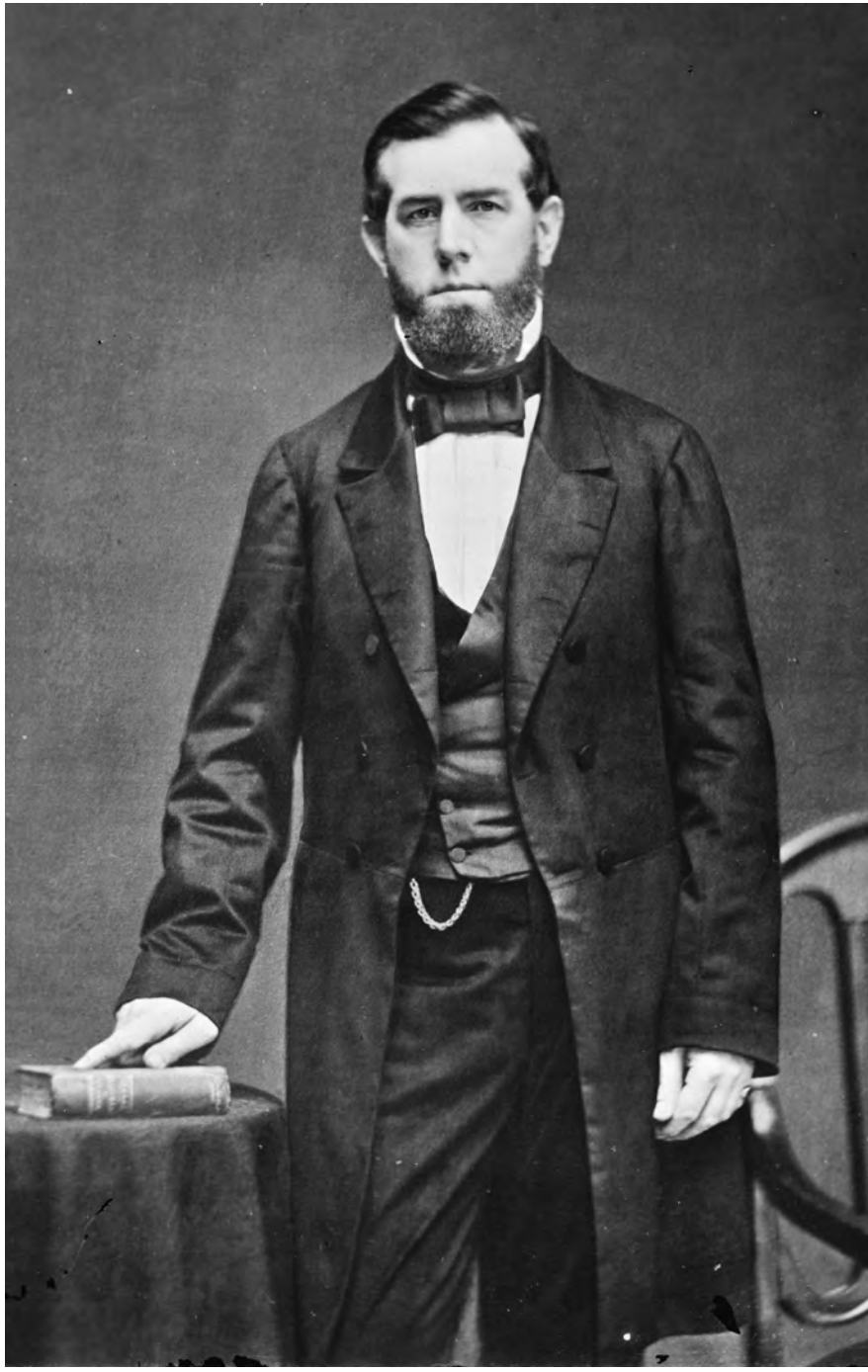
[3] *See* Buchanan at 8–13; Gould at 19–20.

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

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



U.S. Senator David Broderick

law. Terry joined the Court in its first year in Sacramento in 1855. It was in the B.F. Hastings Building on Second and J Streets of what is now Old Sacramento.[6]

B. THE FORMATION OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1856

Upon taking his seat as an associate justice, Terry became embroiled with the San Francisco Committee of Vigilance of 1856. However, this was the second incarnation of the Committee. The first Committee of Vigilance was formed in 1851, as the result of several gangs' setting buildings on fire in San Francisco, which they did for the purpose of looting those buildings. The 1851 Committee, said to be composed primarily of businessmen, tried and hanged four men and banished thirty others, most of them former convicts from Australia. After about thirty days, believing it had done its job, the Committee adjourned but did not disband.[7]

In the mid-1850s, tensions again ran high in San Francisco. A series of market panics and bank failures contributed to the unrest. But there was also a sense among the general public that city government was corrupt, and with nearly 500 murders in San Francisco in 1855, that murderers were not being punished. This sense of crimes' going unpunished was fueled in part by James King of William, who, after his own bank failed, founded the *San Francisco Bulletin*. James King led a crusade against corruption, generally, and, more particularly, against U.S. Senator David Broderick, a Tammany Hall politician from New York, members of the Irish immigrant population, and the Catholic Church.[8]

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[6] *See* J. Edward Johnson, *History of the Supreme Court Justices of California 1850–1900* (San Francisco: Bender–Moss Company, 1963), Vol. I at 43–45, 54; *The California Supreme Court Historical Society Newsletter* (Fall/Winter 2012) at 8–9.

[7] *See* Gould at 11–13; James T. Coleman, "San Francisco Vigilance Committees," *Century Magazine*, 43 (November 1891) at 133–50, reprinted in Doyce B. Nunis Jr., *The San Francisco Vigilance Committee of 1856, Three Views* (Los Angeles: The Los Angeles Westerners, 1971) at 30–31; Alan Valentine, *Vigilante Justice* (New York: Reynal & Company, 1956) at 45–81; Gould at 11–13.

[8] *See* Gould at 35–45; Don Warner, "Anti-Corruption Crusade or 'Businessman's Revolution'? — An Inquiry into the 1856 Vigilance Committee," *California Legal History*, Vol. 6 (2011), 403–41 at 409.

Two incidents precipitated the formation of the 1856 Vigilance Committee. In November 1855, Charles Cora got into an altercation and shot and killed William Richardson, a federal marshal and hero of the Mexican–American war. Cora was an Italian immigrant who was not only a successful gambler but lived openly and notoriously with the beautiful proprietress of one of San Francisco's most luxurious brothels. Cora was tried for murder, but the jury deadlocked. While waiting to be retried, Cora remained in the San Francisco jail for several months, during which his mistress visited each day with a basketful of culinary comforts. In his newspaper, James King demanded the formation of a new Vigilance Committee to redress Richardson's murder. Yet, in spite of James King's call for a new Vigilance Committee, ostensibly because the jury was corrupt, three of the members of the Cora jury would later become Vigilance Executive members, two of whom had previously voted for manslaughter and acquittal at Cora's trial.[9]

A few months later, James King accused James Casey, a San Francisco supervisor, of having previously spent time at Sing Sing prison in New York. Although the charge was true, Casey demanded that James King retract the allegation. When James King refused to print a retraction, Casey confronted James King on the corner of Washington and Montgomery Streets on May 14, 1856, shooting him point blank in the chest. James King died several days later. Casey was immediately arrested and brought to jail — the same jail where Cora was also awaiting trial.[10]

Within two days of King's shooting, the 1856 Committee of Vigilance was formed, and its membership quickly grew to 5,000. The president of the Vigilance Committee was William T. Coleman, who had been a leader of the 1851 Vigilance Committee. Coleman also owned a successful business on California Street and, indeed, the Vigilance Committee was referred to as a "businessman's revolt." The Vigilance Committee secured a base of operation called "Fort Vigilance," but popularly known as "Fort Gunnybags" because of the sand-filled gunnysacks protecting the structure. Fort Vigilance was on Sacramento Street, across from what is now Embarcadero Two. The building contained a well-equipped command post, detention cells with steel bars, and an arsenal of weapons. On the roof was

9 *See* Gould at 35–45; Warner at 410, 436–38.

10 *See* Gould at 35–45; Warner at 410–13.

a firehouse bell that clanged to summon the committee's members to arms when danger threatened.[11]

Governor Johnson came to San Francisco and entered into discussions with Coleman and the Executive Committee of the Vigilance Committee. Governor Johnson and the Executive Committee agreed that the sheriff and the Vigilance Committee could jointly guard the San Francisco jail, which housed both Casey and Cora, and that the governor would ensure that Casey be brought to justice. Two days later, however, the Vigilance Committee informed the governor it was withdrawing its guards from the jail. Twenty-five hundred armed Vigilance Committee members then marched to the jail. With its cannon pointed at the jail, the Committee demanded that the sheriff surrender Casey and Cora, which he did. Casey and Cora were taken to Fort Vigilance where they were tried by the Executive Committee, found guilty and hanged in front of the fort on May 18, 1856 as King's funeral cortege passed by. Over the next few weeks, the Committee sentenced dozens of people to banishment, and it tried and executed two more men accused of murder.[12]

C. TERRY'S "TRIAL" BY THE VIGILANCE COMMITTEE

In opposition to the Vigilance Committee was the loosely organized "Law and Order Party," whose members included, in addition to Governor Johnson, Senator Gwin and Justice Terry, and a number of prominent lawyers and judges. That Governor Johnson, Justice Terry and members of the Chivalry faction were opposed to the Vigilance Committee is not intuitively apparent. The Vigilance Committee was directing a lot of its energy against Senator Broderick, the corruption he symbolized, and the Irish-Americans he led. Moreover, the Committee had hanged James Casey for killing James King, whose newspaper was a sympathizer of the Chivalry faction. Likewise, the Committee would not have expected opposition from the Know-Nothings for hanging Charles Cora, who not only killed a U.S. marshal, but Cora, an immigrant from Italy. Whether the officers of the state were upset because they were being displaced by anyone —

[11] *See* Gould at 47–55; Warner at 413–16; Letter from William Tecumseh Sherman to Major Turner, dated May 18, 1856, reprinted in Nunis at 50–55; Valentine at 96–134.

[12] *See* Gould at 47–55; Warner at 413–16; Nunis at 50–55; Valentine at 96–134.

despite the fact that they may have had similar political leanings — or because they genuinely believed in duly constituted legal proceedings, they immediately set themselves against the Vigilance Committee.[13]

When the Vigilance Committee refused to disband after the hangings, Governor Johnson demanded that General John Ellis Wool, the commander of the federal military garrison at Benicia, release the arms from the federal arsenal to the state militia, commanded by General William Tecumseh Sherman. General Wool refused, stating he needed permission from the president of the United States. Governor Johnson declared San Francisco to be in a state of insurrection, and he appealed to the president, Franklin Pierce, for "arms and ammunition as may be needed for the purpose of suppressing the existing insurrection."[14] In the meantime, Terry wrote a legal opinion for Governor Johnson, which he presented to General Wool, arguing that the California militia was entitled to federal arms in the event of an emergency. General Wool released one hundred guns, which were put on a boat in Benicia to be delivered to San Francisco. However, the Vigilance Committee was informed, and Committee members captured the boat and brought the arms back to Fort Vigilance. Although the Committee "arrested" the men on the boat, one of whom was Reuben Maloney, it released them after questioning.[15]

When Maloney was released, he got drunk and made several public remarks about what he would do to the Vigilance Committee members. The Committee reconsidered its decision to release Maloney, and it sent its sergeant at arms, Sterling A. Hopkins, to re-arrest him. Maloney sought refuge at the temporary headquarters of the Law and Order party set up in the office of his employer, Dr. Richard P. Ashe. Ashe's office was located above the Palmer, Cooke & Co. bank on the corner of Washington and Kearny Streets, across from Portsmouth Square. The San Francisco City Hall, which contained the City's courts, was also located across from Portsmouth

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13 *See* John D. Gordan, III, *Authorized By No Law, The San Francisco Committee of Vigilance of 1856 and the United States Circuit Court for the Districts of California* (Pasadena: Ninth Judicial Circuit Historical Society, 1987) at 14; Gould at 47–49, 55, 57–60.

14 Joseph Ellison, *California and the Nation, 1850–1869, A Study of the Relations of a Frontier Community with the Federal Government* (New York: Da Capo Press, 1969) at 126–27. *See also* Buchanan at 25–26; Gould at 57–60.

15 *See* Gordon at 15–19; Gould at 61–64; Buchanan at 33–36.

Square on Kearny. Besides being Maloney's employer, Dr. Ashe was also a U.S. naval agent, who was responsible for provisioning the navy. Dr. Ashe was also a former Texas Ranger, a former sheriff of Stockton and, more importantly, a good friend of Terry's. Terry happened to be visiting Dr. Ashe at his office before catching his boat back to Sacramento when Hopkins came to arrest Maloney. Dr. Ashe and Justice Terry refused to give Maloney over to Hopkins. Hopkins went back to the Committee at Fort Vigilance and received new orders and reinforcements to bring back Maloney.[16]

Justice Terry, Dr. Ashe, Maloney and three others in the office armed with guns and shotguns, left Dr. Ashe's upstairs office, walked from Washington Street down Kearny Street, and turned left on Jackson Street, heading for the state armory, on the corner of Jackson and what was then Dupont Street (now Grant Street). Hopkins caught up with the Terry party in the middle of the block on Jackson, when Hopkins attempted to "arrest" Maloney. An altercation took place, and Hopkins tried to take Terry's rifle away from him. Someone else's gun went off, and Terry pulled his Bowie knife out of his breast pocket, yelled, "Damn you, if it is a kill, take that," and plunged the knife all the way into Hopkins' neck. Hopkins collapsed and the Terry party continued on to the state armory on the corner of Jackson and Grant. Hopkins' replacements went back to Fort Vigilance and sounded the bell, and within a short time there were approximately 1,500 armed men surrounding the armory. Terry and Maloney agreed to surrender, provided the Vigilance Committee gave them protection from the mob that wanted to lynch them. Terry and Maloney were put into a coach and driven under guard to Fort Vigilance on Sacramento Street.[17]

D. TERRY'S ATTEMPT TO HAVE THE FEDERAL GOVERNMENT FREE HIM FROM THE VIGILANCE COMMITTEE

On June 27, 1856, Justice Terry was indicted on seven counts before the Vigilance Committee, which counts included not only the attack on Hopkins, but several other acts of violence, for some of which he had already

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16 *See* Gordon at 19–21; Gould at 64–65; Buchanan at 35–36.

17 *See* Gordon at 21–22; Gould at 65–69; Buchanan at 36–41; James O'Meara, *The Vigilance Committee of 1850* (San Francisco: James H. Barry, 1887) at 39–40, reprinted in Wagstaff at 97–107.

been tried, found guilty and punished. In his "opening statement," Terry was eloquent in defending his position to the Vigilance Committee:

> You doubtless feel that you are engaged in a praiseworthy undertaking. This question I will not attempt to discuss; for, whilst I cannot reconcile your acts with my ideas of right and justice, candor forces me to confess that the evils you arose to repress were glaring and palpable, and the end you seek to attain is a noble one. The question on which we differ is, as to whether the end justifies the means by which you have sought its accomplishment; and, as this is a question on which men equally pure, upright and honest might differ, a discussion would result in nothing profitable.
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> . . . .
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> . . . The difference between my position and yours is, that, being a Judicial officer, it is my sworn duty to uphold the law in all its parts. You, on the contrary, not occupying the same position or charged with the performance of the same duty, feel that you are authorized, in order to accomplish a praiseworthy end, to violate and set at naught certain provisions of law, while you allow the rest to remain in full force. You, although you may feel assured that you are right, must see that I could not, with any regard to principle or my oath of office, side with you.[18]

Although General Sherman had been appointed head of the state militia, he resigned because the governor could not provide him with any arms or men. The new general of the state militia, Volney E. Howard, demanded that the Vigilance Committee release Terry. Again, as the state militia had practically disbanded, the Vigilance Committee ignored the demand.[19] Governor Johnson wrote to Commander E. B. Boutwell, who commanded a U.S. sloop of war in San Francisco Bay (off of Pier 1), the *U.S.S. John Adams,* asking him to rescue Terry. This was followed by a letter from Justice Terry, himself, to Commander Boutwell making the same request:

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[18] David S. Terry, *Trial of David S. Terry by the Committee of Vigilance, San Francisco* (San Francisco: R.C. Moore, 1856) at 24–25 ("Defence — Statement of David S. Terry").

[19] Gordon at 15–16, 22–23.

> Sir: I desire to inform you that I am a native-born citizen of the United States, and one of the justices of the Supreme Court of the State of California, and that, on the 21st day of June inst. I was seized with force and violence by an armed body of men styling themselves the Vigilance Committee, and was conveyed by them to a fort which they have erected and formidably entrenched with cannon in the heart of the city of San Francisco, and that since that time I have been held a prisoner in close custody, and guarded day and night by large bodies of armed men, ... I desire further to inform you that the said committee is a powerful organization of men, acting in open and armed rebellion against the lawful authorities of this State; that they have resisted by force the execution of the writ of *habeas corpus,* and have publicly declared through their organs that their will was the supreme law of the State.
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> The government of the State has already made ineffectual efforts to quell this rebellion, and the traitors, emboldened by success, have already hung two men and banished a great many others, and some of their members now openly threaten to seize the forts and arsenals of the United States, as well as the ships of war in port, and secede from the Federal Union.
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> . . . .
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> In this emergency I invoke the protection of the flag of my country. I call on your prompt interference with all the powers at your disposal, to protect my life from all impending peril. Let me remind you of the conduct of the noble and gallant Ingraham, when the life and liberty of a man only claiming to be an American Citizen was concerned. From your high character I flatter myself that this appeal will receive your early and favorable consideration.[20]

The letter is interesting insofar as Terry, a member of the southern-sympathizing "Chivalry" faction of San Francisco politics, presumably favored states' rights. Yet, Terry uses the fact that he is a "native-born citizen of the United States" to "invoke the protection of the flag of my country," and accuses his captors of having the ulterior motive of intending to capture ships and forts so they can "secede from the Federal Union." Finally,

[20] Letter from Terry to Boutwell, June 28, 1856, reprinted in Wagstaff at 114–15.

Terry references the "noble Ingraham" — a captain of an American ship who became something of a hero for threatening to fire on an Austrian ship because it had forcibly taken on board what was thought to be an American citizen (even though it was a Hungarian rebel) — to argue that, as a native-born American, he is entitled to be rescued by the U.S. Navy.[21]

Although Commander Boutwell's own political views much favored states' rights, in response to Terry's letter, Boutwell wrote to the Vigilance Committee the same day. In his June 28, 1856 letter, Boutwell makes clear that the federal government was not afraid to intervene on Terry's behalf.

> Gentlemen: You are either in open rebellion against the laws of your country, and in a state of war, or you are an association of American citizens combined together for the purpose of redressing an evil, real or imaginary, under a suspension of the laws of California. . . . I, as an officer of the United States, request that you will deal with Judge Terry as a prisoner of war, and place him on board my ship. . . . You, gentlemen, I doubt not, are familiar with the case of Kostza. If the action of Captain Ingraham in interfering to save the life of Kostza, who was not an American citizen, met the approbation of his country, how much more necessary it is for me to use the power at my command to save the life of a native-born American citizen, whose only offense is believed to be in his effort to carry out the law, obey the Governor's proclamation, and in defense of his own life. . . .
>
> Gentlemen of the committee, pause and reflect before you condemn to death, in secret, an American citizen who is entitled to a public and impartial trial by a judge and jury recognized by the laws of his country. . . .[22]

The Vigilance Committee forwarded Commander Boutwell's letter to his commanding officer, Captain David G. Farragut, who was the Commandant at Mare Island. Captain Farragut wrote to the Committee on July 1, 1856, and reminded them that article V of the Amended Constitution provides that "No person shall be held to answer for a capital or otherwise

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[21] *See* Ellison at 128.

[22] Letter from Boutwell to the Vigilance Committee, June 28, 1856, reprinted in Wagstaff at 115–16.

infamous crime, unless on presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law." He also quoted to the Committee that article IV of the U.S. Constitution provides that (paraphrasing) "the United States shall guarantee to each State a republican form of government, and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) shall protect each of them against domestic violence." But Captain Farragut concluded by telling the Committee that "you may be assured, gentlemen, that I shall always be ready to pour oil on the troubled waters, rather than do aught to fan the flame of human passions, or add to the chances of the horrors of civil war."[23] Captain Farragut wrote to Commander Boutwell, admonishing Boutwell for the contents of his own letter to the Vigilance Committee.

> Dear Sir: I yesterday received a communication from the Vigilance Committee inclosing a correspondence between yourself and the committee in relation to the release of Judge Terry, and requesting my interposition. Although I agree with you in the opinions therein expressed in relation to constitutional points, I cannot agree that you have any right to interfere in this matter, as I so understood you to think when we parted. The Constitution requires, before an interference on the part of the general government, that the Legislature shall be convened, if possible, and, if it cannot be convened, then upon the application of the executive. Now, I have seen no reason why the legislature could not have been convened long since, yet it has not been done, nor has the Governor taken any step that I know of to call them together.
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> In all cases within my knowledge the Government of the United States has been very careful not to interfere with the domestic troubles of the States, when they were strictly domestic, and no collision was made with the laws of the United States, and they have always been studious in avoiding, as much as possible, a collision with State's rights principles. The commentators, Kent and Story, agree that the fact of the reference to the President of the

[23] *See* Ellison at 129; Letter from Farragut to Vigilance Committee, July 1, 1856, reprinted in Gould at 81–82.

Captain David G. Farragut,
United States Navy

> United States by the legislative and executive of the State is the great guarantee of State's rights.
>
> I feel no disposition to interfere with your command, but, so long as you are in waters of my command, it becomes my duty to restrain you from doing anything to augment the very great excitement in this distracted community until we receive instructions from the government. All the facts of the case have been fully set before the government by both parties, and we must patiently await the result.[24]

Farragut thus makes clear that not only was the kidnapping of a sitting California Supreme Court justice nothing more than a "domestic" trouble that did not violate federal law, but that the federal government must avoid "as much as possible, collision with State's rights principles," insofar as the federal government was "the great guarantee of State's rights."

Governor Johnson's request for federal assistance eventually made its way to President Franklin Pierce, who gave it to Attorney General Caleb Cushing for analysis. Article IV, section 4 of the Constitution, provides that the federal government may interfere within a state "against domestic violence." The act of February 28, 1795, vests in the president power to carry out this provision in the Constitution; it is left to his discretion to decide when interference is necessary. However, in his analysis to the president, Attorney General Cushing interpreted article IV, section 4 narrowly, and held that the federal government could not help the State of California because such a request must come from the Legislature, unless the Legislature cannot make the request. Yet, Governor Johnson provided no explanation as to why the request to the president came from him and not from the Legislature. Attorney General Cushing also noted that Governor Johnson had asked for arms, and not military forces, which was another reason to deny the request. Attorney General Cushing admitted that an emergency might arise when the president might furnish arms alone, but the circumstances in California "did not afford sufficient legal justification for acceding to the actual requests of the governor of the State of California."[25]

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[24] Letter from Farragut to Boutwell, July 1, 1856, reprinted in Wagstaff at 117–18.

[25] *See* Ellison at 132–33.

Upon receipt of the opinion of the attorney general, Secretary of State William L. Marcy wrote to Governor Johnson that he was deeply impressed by the disturbed conditions in San Francisco, and "was prepared, whenever exigency arises demanding and justifying this interposition, to render assistance to suppress insurrection against the government of a State," but that in the present case the president believed there were "insuperable obstacles" to the action desired of the federal authorities. Likewise, Secretary of the Navy Dobbin instructed Commander Mervine, who commanded the Pacific squadron, to exercise the most "extraordinary circumspection and wise discretion" to prevent a collision between the federal officers and the people of California. Similar instructions were also sent from Secretary of War Jefferson Davis to General Wool that the army was not to interfere with the domestic affairs unless it should be necessary to protect government property.[26]

There is evidence that the Executive Committee of the Vigilance Committee did not want to keep Terry in custody but was afraid of the consequences from its members if it released Terry. Captain Farragut and Commander Boutwell were persuaded to meet with members of the Executive Committee to negotiate the release of Terry, but to no avail.[27] Hopkins, however, who had been receiving round-the-clock care by doctors paid by for Terry's friends, finally began to recover on July 15, 1856. Eventually the 36-member Executive Committee prevailed over the 100-member Board of Delegates of the Vigilance Committee (who, after trying Terry, had voted to execute him), and on August 7, the Executive Committee read to Terry its verdict, finding him guilty of the stabbing, and that he should resign from the Supreme Court. Terry was discharged, and at first went to a friend's house. He was later told he should not stay in San Francisco, and he was taken by Commander Boutwell back to Sacramento.[28]

Later that month, the Vigilance Committee of 1856 disbanded itself, and Fort Vigilance was dismantled. The rooms were abandoned — but as a closing scene, a grand review of the military was held near South Park, and the rooms were thrown open to the public and were visited by thousands

[26] *See* Ellison at 134–35.

[27] *See* Wagstaff at 120–30; Gould at 76–77.

[28] *See* Gould at 85–89.

who could view the ropes used to hang Casey and Cora.[29] Thus closed a chapter of American history, just prior to the civil war, where the federal government, from commandant up the chain of command to the president, used the language of states' rights to prevent federal government intervention into the affairs of a state, even when the largest city on the West Coast had been taken over by an extra-judicial entity that claimed the right to try, banish and execute citizens of the United States.

III. FEDERALISM AND TERRY'S ATTEMPT TO OVERCOME FEDERAL JURISDICTION IN THE HILL–SHARON TRIALS IN THE 1880s

A. AFTER KILLING A U.S. SENATOR IN A DUEL, TERRY FOUGHT FOR THE CONFEDERACY, RETURNING TO CALIFORNIA IN 1869

Terry became chief justice of California in 1857. In that year, Stephen J. Field, age 40, and Peter H. Burnett, age 49, became associate justices of the California Supreme Court. In 1858, Joseph G. Baldwin, age 44, replaced Burnett as an associate justice. Terry wrote over two hundred opinions in his four years on the Court, with his opinions averaging about one page in length.[30]

The Know-Nothing party dissolved, and two factions of the Democratic Party, the pro-slavery faction led by former Senator William Gwin, and an anti-slavery faction led by Senator David Broderick, fought for control of California. Terry was not re-nominated for the Supreme Court at the convention but took the opportunity to denounce Broderick, which was reported in the newspaper. Upon reading the report in the newspaper, Broderick was particularly upset, as he had funded articles in the newspapers supporting Justice Terry, and reportedly stated: "I have hitherto spoken of him as an honest man — as the only honest man on the bench of a miserable, corrupt Supreme Court — but now I find I was mistaken. I take it all back. He is just as bad as the others."[31]

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29 *See* O'Meara at 56 (Nunis at 124); Valentine at 170–71.

30 *See* Johnson at 55–56, 62–80.

31 *See* Gould at 115.

Broderick's statement was reported to Terry, and Terry eventually challenged Broderick to a duel, which took place at 7:00 A.M. on September 13, 1859 near Lake Merced, before a crowd of between fifty and seventy people. Broderick's shot fell far short of Terry, but Terry's shot wounded Broderick in the chest, killing him two days later. Broderick was celebrated as dying for the anti-slavery cause, and a eulogy was given for him at Portsmouth Square, followed by a two-mile funeral entourage that wound itself through San Francisco. Terry, who had resigned his position as chief justice the day before, was acquitted of any wrongdoing in a trial in Marin County Superior Court in 1860.[32]

However, Terry's acquittal did not solve the problem of his reputation, and he practiced mining litigation for a short time in Washoe County, Nevada. Terry returned to Stockton in 1863, and left for Mexico in 1863 en route to fight for the Confederacy in the Civil War, rejoining the Texas Rangers. Terry was wounded in the shoulder, formed a regiment and was commissioned as a colonel. After the civil war, Terry attempted to grow cotton commercially for a couple of years in Mexico, and then returned to Stockton in 1869, ten years after the duel.[33]

Terry built up a successful law practice, with offices in Fresno, Stockton and San Francisco. He was elected a member of the constitutional convention in California in 1878, where Terry, who was anti-corporate, anti-railroad and anti-Chinese labor, commanded the "Sand Lot" element, which yielded California's second Constitution.[34] Terry also championed the rights of women at the convention, and even helped Clara Shortridge Foltz, who would become California's first woman lawyer, sue Hastings College of the Law when it refused to admit her because she was a woman.[35]

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[32] *See* Gould at 115–35; Quinn at 253–76; Buchanan at 83–110.

[33] *See* Gould at 137–43; Wagstaff at 221–41.

[34] *See* Wagstaff at 242–63; Gould at 147–49.

[35] *See* Barbara Babcock, *Woman Lawyer, The Trials of Clara Foltz* (Stanford: Stanford University Press, 2011) at 46–47. The suit against Hastings was *Foltz v. Hoge*, 54 Cal. 28 (1879).

Sarah Althea Hill

B. THE STATE COURT TRIAL TO DETERMINE WHETHER HILL WAS LEGALLY MARRIED TO SHARON

In 1884, Terry was brought in as trial counsel for Sarah Althea Hill in the William Sharon–Sarah Althea Hill "divorce" trials.[36] The two cases generated ten California Supreme Court decisions,[37] ten Circuit Court decisions,[38] and two U.S. Supreme Court decisions.[39]

A brief note on the organization of the courts at the time of the Hill–Sharon trials: In 1863, the California Constitution was amended to expand the California Supreme Court from three to five justices, and the terms were increased from six to ten years. In September 1878, California had a constitutional convention, and Califor-

[36] *See* Robert H. Kroninger, *Sarah & the Senator* (Berkeley: Howell–North, 1964) at 47.

[37] *See Sharon v. Sharon*, 67 Cal. 185 (1885); *Sharon v. Sharon*, 67 Cal. 185 at 214 (1885); *Sharon v. Sharon*, 67 Cal. 185 at 220 (1885); *Sharon v. Sharon*, 68 Cal. 29 (1885); *Sharon v. Sharon*, 68 Cal. 326 (1885); *Sharon v. Sharon*, 75 Cal. 1 (1888); *Sharon v. Sharon*, 77 Cal. 102 (1888); *Sharon v. Sharon*, 79 Cal. 633 (1889); *Sharon v. Sharon*, 79 Cal. 633 at 701 (1889); *Sharon v. Sharon*, 84 Cal. 424 (1890); *Sharon v. Sharon*, 84 Cal. 433 (1890).

[38] *See Sharon v. Hill*, 20 F. 1 (Cir. Ct. D. Cal. 1884); *Sharon v. Hill*, 22 F. 28 (Cir. Ct. D. Cal. 1884); *Sharon v. Hill*, 23 F. 353 (Cir. Ct. D. Cal. 1885); *Sharon v. Hill*, 24 F. 726 (Cir. Ct. D. Cal. 1885); *Sharon v. Hill*, 26 F. 337 (Cir. Ct. D. Cal. 1885); *Sharon v. Hill*, 26 F. 722 (Cir. Ct. D. Cal. 1885); *Sharon v. Terry*, 36 F. 337 (Cir. Ct. N.D. Cal. 1888); *In re Terry*, 36 F. 419 (Cir. Ct. N.D. Cal. 1888); *In re Terry*, 37 F. 649 (Cir. Ct. N.D. Cal. 1889); *In re Terry*, 39 F. 833 (Cir. Ct. N.D. Cal. 1889).

[39] *See Ex Parte Terry*, 128 U.S. 289 (1888); *Terry v. Sharon*, 131 U.S. 40 (1889).

nia's second constitution, ratified in May 1879, provided for a chief justice and six associate justices, and the terms were increased from ten to twelve years. There was still no court of appeal. During the time of the Hill–Sharon trials, the Superior Court was in the new City Hall then under construction in Civic Center. The Supreme Court was at 121 Post Street, near Kearny Street.[40]

William Sharon was a senator for Nevada (until 1881) who made his wealth from the silver Comstock Lode. He owned the Bank of California, and he owned and lived in the Palace Hotel on Market and New Montgomery Streets. It was one of the largest and most luxurious hotels in the world, and was the center of the city's social life. Sharon also owned the Grand Hotel, which was connected by a covered bridge over New Montgomery Street to the Palace Hotel, commonly referred to as the "Bridge of Sighs." The reference was not to the bridge connecting the Doges Palace in Venice to a prison. Rather, the reference was to the fact that several residents of the Palace Hotel, including Sharon, kept their mistresses at the Grand Hotel, from which they would walk across the enclosed bridge to visit their clients in the Palace Hotel. In 1880, Sharon, then 60 and a widower, kept Hill, then 27, in a room in the Grand Hotel. He paid her $500 a month. After the relationship ended, Hill refused to move out of the Grand Hotel, and Sharon eventually had the carpet pulled up and her door removed from its hinges.[41]

Hill subsequently claimed she had a secret, written contract of marriage with Sharon, and she had Sharon arrested for criminal adultery in September 1883. The contract was in Hill's handwriting with Sharon's signature at the top of the first page, which was lined, and the contract began on what would otherwise be the reverse side of the lined page. It allegedly took place in Sharon's office at the Bank of California, now the Union Bank, on the corner of Sansome and California Streets.[42]

In response, Sharon sued Hill on October 3, 1883 in federal circuit court in San Francisco for a declaration that the marriage contract was a forgery. Federal court jurisdiction was predicated on diversity, although

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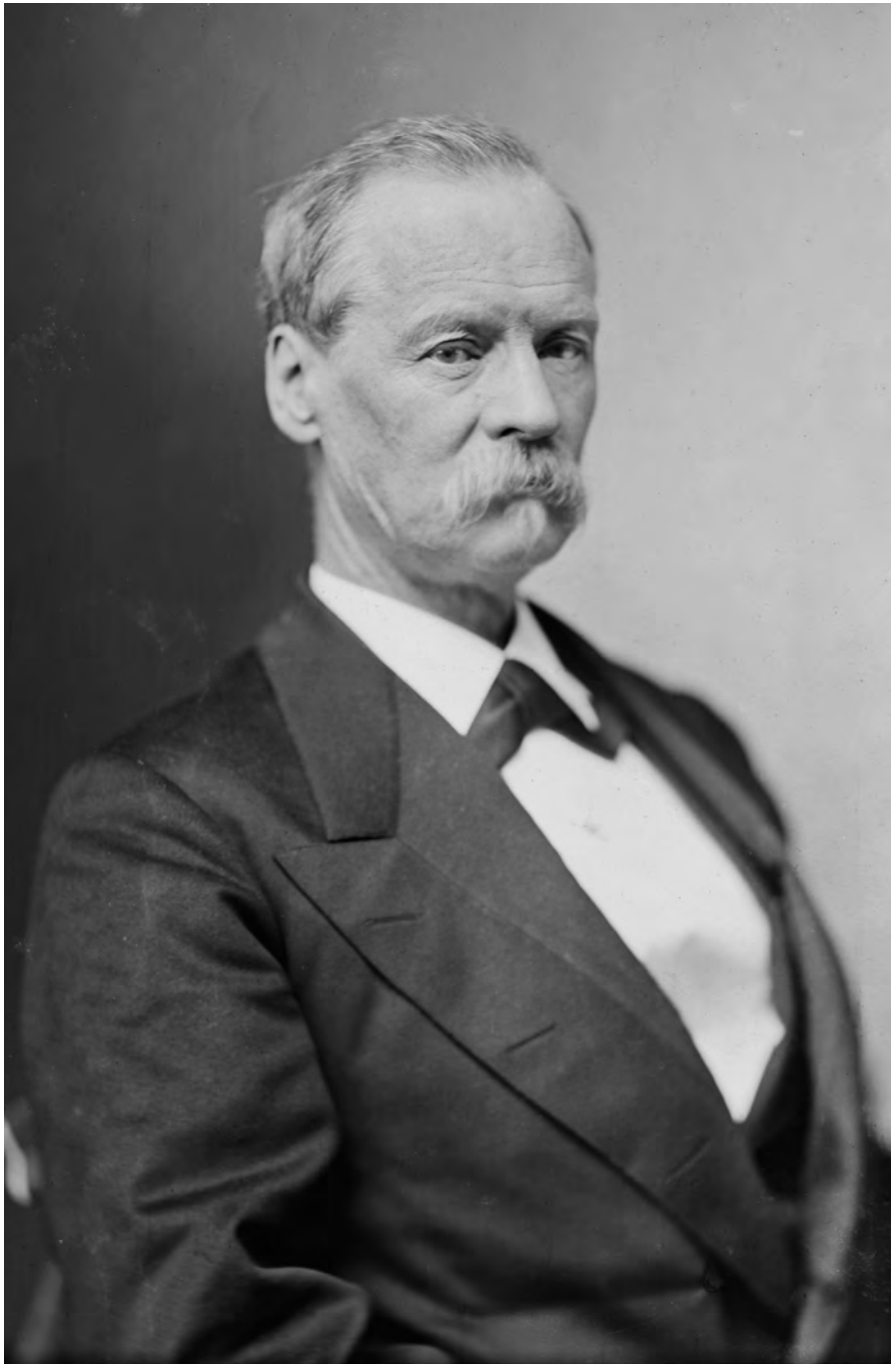
40 *See* The Supreme Court of California, *The Supreme Court of California 2007 Edition* (www.courtinfo.ca.gov/courts/supreme) at 13.

41 *See* Gould at 169–78; Kroninger at 112–13; *Sharon v. Hill*, 26 F. 337, 363 (Cir. Ct. D. Cal. 1885).

42 *See* Gould at 198–99; Kroninger at 52–70.



U.S. Senator William Sharon

Sharon had not lived in Nevada for several years even though he was one of Nevada's senators until 1881.[43] A month later, Hill sued Sharon for divorce in San Francisco County Superior Court, alleging adultery and desertion.[44] Mammy Pleasant, an African-American woman who owned several brothels in the city, apparently financed Sarah's litigation in exchange for a percentage of any recovery.[45]

The trial in the state action lasted six months, from March until September, 1884, involving 111 witnesses. The newspapers noted that it became fashionable to attend the trial, and when Hill was cross-examined, there had been counted among the spectators a marquis, a count, an ex-mayor, the police commissioner, a county supervisor, and the president of the board of education, besides the usual number of lawyers and City Hall employees. The City Hall sidewalk and steps were crowded each morning with celebrity seekers, vying for a glimpse of the principals.[46] Closing arguments took weeks to deliver. Terry's final argument lasted five full court days, equal to 225 pages of text, which was published in full in the *San Francisco Examiner.*[47] He referred to Sharon as the "burro of the Palace Hotel," and a "miserable, lecherous, selfish old scoundrel." Terry closed with: "She goes from this courtroom either vindicated as an honest and virtuous wife or branded as an adventuress, a blackmailer, a perjurer and a harlot."[48]

Judge J. F. Sullivan, a relatively young and inexperienced judge, took the matter under submission for three months and delivered a decision on December 24, 1884. Although Sullivan found there was an unprecedented amount of "frightful perjury" by the witnesses, including Hill, he nevertheless found "that William Sharon by virtue of his secret contract of marriage has become and now is the husband of Sarah Althea, that he has been guilty of willfully abandoning his wife," and he awarded alimony in the amount of $2,500 a month, and $55,000 in attorneys' fees.[49] Terry's wife died the same day as the decision in the state court action.[50]

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43 *See* Gould at 189–203.

44 *See* Kroninger at 22–26.

45 *See* Gould at 217; Johnson at 59.

46 *See* Kroninger at 71.

47 *See* Johnson at 59; Gould at 251.

48 *See* Kroninger at 142.

49 *See* Gould at 256, 278; Johnson at 60.

50 *See* Johnson at 60.

C. THE FEDERAL TRIAL TO ENJOIN HILL FROM CLAIMING SHE WAS MARRIED TO SHARON

At the time of the Sharon–Hill federal trial, under the Judiciary Act of 1875, district courts had exclusive jurisdiction to hear admiralty and maritime cases, and most federal crimes. Circuit courts, on the other hand, were trial courts for all matters arising under the Constitution and federal law, and the 1875 Act allowed litigants to remove cases filed in state courts between citizens of different states to the circuit court. Circuit courts could also hear appeals from the district courts. A Supreme Court justice was assigned to each circuit, and that justice would hear cases filed in circuit court with other circuit court judges. During the Hill–Sharon trials, the original Appraiser's Building, built in 1881, housed both the federal district and circuit courts until 1905. It was at Washington and Sansome Streets, where the current Appraiser's Building is located.[51]

Like the state trial, the federal trial also lasted approximately six months, but it did not begin until February 1885, approximately a month after Judge Sullivan's decision in superior court.[52] Sarah's lawyers had previously attempted to have the federal suit dismissed because of the state court action, which the circuit court denied.[53] In going forward with the federal trial, the court designated an "Examiner in Chancery" to hear the evidence and report to the court. On August 11, 1885, the examiner produced 1,731 legal-sized pages of testimony, and Judges Matthew P. Deady and Lorenzo Sawyer (a former chief justice of California), as in the state case, took the matter under submission for three months. During that time, on November 15, 1885, Sharon died.[54] Approximately a month later, on December 26, 1885, the circuit court rendered a 42-page decision by Judge Deady in favor of Sharon, with a 31-page concurrence by Judge Sawyer. Succinctly, Judge Deady found that Hill was Sharon's hired mistress, not his wife; that Hill's claims were rooted in perjury; and her "documentary evidence" was crudely fabricated and forged.[55]

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51 *See* Bruce A. Ragsdale, *Establishing a Federal Judiciary* (Federal Judicial Center, Federal Judicial History Office, 2007) at 4–8; Federal Judicial Center, www.fjc.gov.

52 *See* Gould at 264.

53 *See Sharon v. Hill*, 22 F. 28, 29–30 (Cir. Ct. D. Cal. 1884).

54 *See* Gould at 264–68; Kroninger at 177.

55 *See Sharon v. Hill*, 26 F. 337, 359 (1885).

Because the state court had previously determined Hill was married to Sharon, and since her "husband" had died, Hill considered herself once again to be a single woman. On January 7, 1886 — a couple of weeks after the federal decision — David Terry married Sarah Althea Hill. His only surviving son refused to attend the wedding. Now that Terry was married to Hill, it was not just his client's honor he was defending but his wife's.[56]

D. THE CALIFORNIA SUPREME COURT'S RECOGNITION THAT FEDERAL JURISDICTION SUPPLANTED ITS OWN IN THE SHARON–HILL ACTIONS

Sharon had made three appeals from the superior court action. One appeal concerned Judge Sullivan's denial of Sharon's motion for a new trial, and the other appeal concerned the judgment itself. Regarding the appeal of the judgment, the only question before the Court was whether, as a matter of law, a valid marriage contract could have a provision making the marriage itself secret. The Court was clear that it was not re-examining the evidence of the trial court but, for the appeal, would assume it was true. On January 31, 1888, the California Supreme Court decided Sharon's appeal concerning the judgment. In a 4–3 split decision, the Court affirmed the Superior Court's decision in favor of Hill in a 45-page decision, holding that the Civil Code "does not make it indispensable to the validity of the marriage that the relation between the parties shall be made public."[57] The dissent, by Justices James D. Thorton, John R. Sharpstein, and Thomas B. McFarland, argued that the marriage statute made no sense unless the assumption of marital rights, duties or obligations was public.[58]

Having had the Supreme Court confirm the state court judgment, Sharon's estate petitioned the federal court for "revivor," *i.e.*, to have the judgment revived in the name of Sharon's representatives. On September 3, 1888, the federal circuit court ordered Hill to hand over the original "marriage contract" for cancellation, and it enjoined her from ever asserting its validity.[59]

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56 *See* Gould at 276.

57 *Sharon v. Sharon,* 75 Cal. 1, 37 (1888).

58 *See Sharon*, 75 Cal. at 56–78.

59 *See Sharon v. Terry*, 36 F. 337, 369 (Cir. Ct., N.D. Cal. 1888).

Associate Justice John D. Works, California Supreme Court

The following year, on July 17, 1889, the California Supreme Court finally decided the second appeal, which was Sharon's appeal of the superior court's denial of the motion for a new trial in the divorce case.[60] Here, for the first time, the Court would be examining the evidence of the trial court to determine whether a new trial should have been granted. However, the composition of the Court had significantly changed, with the three dissenters — Justices Thorton, Sharpstein and McFarland — now joined by three new justices who were not a party to the previous decision.[61]

However, before reaching the merits of the appeal, the Supreme Court had to address the elephant in the room — that the federal circuit court had already held the "marriage contract" to be a fraud, and had enjoined Hill from using it for any purpose. Writing for the Court, Justice John D. Works addressed this question:

> The point made and relied upon by the appellant as to this branch of his case is, that the court below and the federal court had equal and concurrent jurisdiction of the subject-matter and of the parties; that the contract declared to be invalid by the federal court is the basis and foundation of the respondent's action now before us, and that the federal court having first taken cognizance of the case, its judgment must prevail over that of the state court, in which the action was commenced at a later day, no matter in which court final decree was first rendered.

60 *See Sharon v. Sharon*, 79 Cal. 633 (1889).

61 *See* Kroninger at 209.

> This presents for our consideration the somewhat novel and important question, whether this court can, upon undisputed evidence of the facts relied upon by the appellant, step aside from the strict line of its appellate jurisdiction to adjudicate upon the effect of these conflicting decrees.
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> . . . .
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> . . . The case, as presented by the record on appeal and the offered evidence, is simply this: Conceding that the subject-matter of the two actions was the same, and that the federal court had jurisdiction in the premises, both of which the respondent denies, here are two courts of concurrent jurisdiction, both of which have assumed and are exercising jurisdiction over the same subject-matter and the same parties. The federal court has first taken jurisdiction, but this fact is not called to the attention of the state court in any legal way, and it proceeds to final judgment. Subsequently, the federal court renders a judgment contrary to and in direct conflict with that of the state court. Does this prove that the judgment of the state court is either void or erroneous? Not so. But as a matter of public policy, one or the other of these conflicting judgments must be held to prevail over the other, whether right or wrong; which one is not for us to say. Both of the judgments may be valid, and as they may have been rendered upon different evidence, it may be that neither of them is erroneous. It is purely and solely a question, therefore, as to which one of them shall prevail over the other, and this is a question that cannot be determined on this appeal.[62]

However, the Supreme Court held it did not need to resolve the federalism issue because, based on the evidence, it found that Sharon and Hill did not assume their marital rights, duties and obligations. Rather, "[t]heir acts and conduct were entirely consistent with the meretricious relation of man and mistress, and almost entirely inconsistent with the relation of husband and wife."[63] The Court thus remanded the action for a new trial in the superior court.

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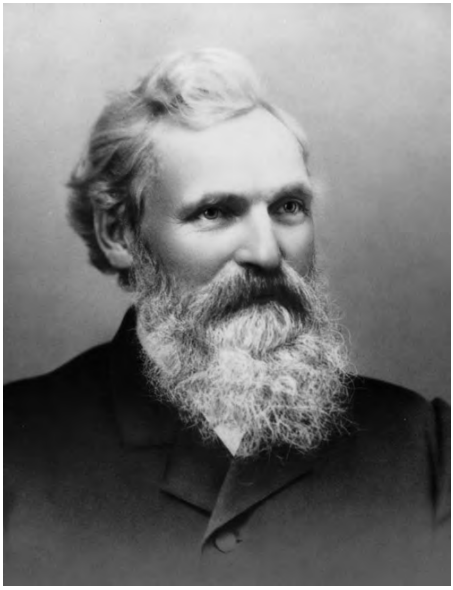
[62] *Sharon*, 79 Cal. at 647–48.

[63] *Sharon*, 79 Cal. at 663–64.



Associate Justice Charles N. Fox, California Supreme Court

Subsequently, Sharon's heirs moved to dismiss the case in the superior court, which was denied and a new trial was set for July 1890. However, before that case could go to trial, the California Supreme Court decided Sharon's third appeal on June 10, 1890, which was the appeal of the trial court's order to pay the accumulated alimony to Hill.[64] Hill's attorney argued that the purpose of the temporary alimony order was to support the spouse through trial, and therefore Sharon had an obligation to pay the accumulated alimony, regardless of the ultimate outcome of the case. Sharon's attorneys argued that, while that might be true, the state courts had to honor the federal injunction, and deny Hill any relief, even including the accumulated alimony payments. The opinion was written by Justice Charles N. Fox, who addressed the issue of federal jurisdiction:

> The record shows that the circuit court of the United States (the court in which such action was brought) acquired jurisdiction of the persons and subject-matter before the commencement of this action. Consequently, no matter when its judgment was rendered, whether before or after the date of the judgment of any other tribunal subsequently acquiring jurisdiction over the same persons and subject-matter, the final judgment in that case became binding and conclusive as to that subject-matter upon all persons, and upon all other courts and tribunals whatsoever.
>
> The judgment of the court below for alimony and costs was essentially based upon this identical contract or instrument; for the court

64 *See Sharon v. Sharon*, 84 Cal. 424 (1890).

> expressly finds that it was the only contract or agreement of marriage between the parties. There could be no marriage without a contract or agreement of the parties. Without marriage there could be no divorce, and without this judgment for divorce, there would have been no judgment for alimony or costs. This judgment in the circuit court was and is the only final judgment on the question of the validity of the contract, upon which this alleged marriage depends. . . .
>
> . . . "The comity which one court owes to another of concurrent jurisdiction should always prevent the one from lending itself as an instrument in permitting a contempt of the process of the other. The one should regard the party attempting to proceed in defiance of the authority of the other as laboring under the same disability to ask for the action of the court as if he was an alien enemy, or under the ban of a decree of outlawry at common law. Such being the opinion we entertain upon this point, we cannot permit the judgment to stand."
>
> To claim alimony and costs under a judgment based upon that alleged marriage contract was to make a claim under and by virtue of that writing in violation of the injunction.[65]

In summary, because the state trial court ignored federal jurisdiction, the state and federal trials continued on their course. After avoiding the question several times, the California Supreme Court, after some personnel changes, finally acceded to the jurisdiction of the federal court over the subject of the "marriage contract."

IV. FEDERALISM AND THE STATE'S ATTEMPT IN 1888–89 TO PROSECUTE THE U.S. MARSHAL WHO KILLED TERRY

A. THE FEDERAL CIRCUIT COURT ALSO DECLARES FEDERAL JURISDICTION TO SUPPLANT THE STATE COURT JUDGMENT

Prior to the California Supreme Court's yielding to federal jurisdiction in the state case in 1890, the federal circuit court opined on the same issue in 1888. The circuit court had already declared Hill's "marriage contract"

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[65] *Sharon*, 84 Cal. at 430–31.

to be a fraud, and it enjoined her from asserting any rights based on it.[66] However, as Sharon died just prior to the decision, the decree abated. Sharon's son-in-law, Francis Newlands, sought to "revive" the decision regarding Sharon's estate. Terry argued against the revivor in June 1888 in the circuit court before Stephen Field, Lorenzo Sawyer, and George Myron Sabin, a federal district judge from Nevada.[67] Newlands had been one of Field's managers in Field's effort to obtain the Democratic nomination for president in 1884. As luck would have it, one month after Terry argued against the revivor, but before a decision had been made, the Terrys were passengers in the same train car in which Judge Sawyer happened to be sitting on August 14, 1888. Sarah insulted Sawyer, and when he ignored her, she grabbed his hair and shook his head from side to side, while David Terry gleefully laughed and encouraged her.[68]

Stephen Field was an associate justice on the California Supreme Court when Terry was chief justice. Terry's term would have ended in 1861 but he resigned as chief justice in September 1859 to fight his duel with Senator Broderick. When Terry resigned, Field replaced him as chief justice. In 1863, Congress added an additional seat to the U.S. Supreme Court. Field's friend, Leland Stanford, who was the wartime governor of California, led a movement to name Field to the new vacancy. Field's brother, David Dudley Field, who was one of Lincoln's most influential advisors, asked Lincoln to appoint his brother to the Supreme Court, which he did. As a Supreme Court justice, Field also served as circuit judge for the Ninth Circuit, which included the judicial districts for California, Nevada and Oregon, in which he held court in Los Angeles, San Francisco, Carson City and Portland.[69]

The circuit court announced it would read its decision on the revivor on September 3, 1888, which would decide whether Sarah would have any claim against the Sharon estate. Both Terrys were sitting at counsel table, normally reserved only for lawyers. Because of the "wooling" incident on the train, additional deputy marshals and San Francisco police officers were in the courtroom. Field read the decision but when it became clear that the revivor would be granted, Sarah jumped up and said: "You

66 *See Sharon*, 26 F. at 378–79.

67 *See Sharon v. Terry*, 36 F. 337 (Cir. Ct. N.D. Cal. 1888).

68 *See* Gould at 278–79.

69 *See* Gould at 151–53.

have been paid for this decision." Judge Field then ordered Sarah to keep her seat, but she continued, saying, "How much did Newlands pay you?" Field ordered Sarah to be removed from the court, but when the marshal attempted to remove her, Terry swung and knocked out one of the marshal's teeth. While subduing the Terrys, Terry's Bowie knife and Sarah's pistol were taken from them. During all of this, Field continued to read the decision.[70] He reconvened the court in the afternoon and sentenced Hill to thirty days in Alameda County jail, and sentenced his former colleague on the California Supreme Court to six months in jail.[71] The sentence was affirmed by the U.S. Supreme Court (with Field abstaining), on November 12, 1888.[72]

In the revivor opinion itself, Judge Field makes clear that the jurisdiction of a federal court, once legally obtained, cannot be ousted by another court:

> Having disposed of the objections to the jurisdiction of the circuit court of the United States in the original suit of *Sharon v. Hill,* we proceed to consider how far the judgment therein is affected, or should have been affected, if at all, by the judgment in the state court. William Sharon, being a citizen of Nevada, had a constitutional right to ask the decision of the federal court upon the case presented by him, and it would be a strange result if the defendant, who was summoned there, could, by any subsequent proceedings elsewhere, oust that court of its jurisdiction and rightful authority to decide the case. The constitution declares that the judicial powers of the United States shall extend to controversies between citizens of different states, — a provision which had its origin in the impression that local attachments and prejudices might injuriously affect the administration of justice in the state courts against the claims of citizens of other states. *Railway Co. v. Whitton,* 13 Wall. 270, 289. So valuable has the right of citizens of other states than the one

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[70] *See* Gould at 281–86; Kroninger at 201–04; Transcript of Record, *Cunningham v. Neagle*, Supreme Court of the United States, filed October 22, 1889 (reprinted by The Making of Modern Law) at 57–59 (affidavit of U.S. Marshal J.C. Franks) ("Transcript of Record").

[71] *See In re Terry*, 36 F. 419 (Cir. Ct. N.D. Cal. 1888).

[72] *See Ex Parte Terry*, 128 U.S. 289 (1888).

> in which suits are brought against them to have their cases heard in a federal court always been regarded, that, at the very outset of the government, congress provided, and in different acts since has renewed the provision, that when a citizen of another state is sued in a state court, he may, upon proper application, accompanied by an offer of good and sufficient surety for entering copies of the proceedings and his appearance in the federal court, have the case removed to that court, and tried or heard there; and all the acts of congress have declared that it shall be the duty of the state court in such a case to accept the surety, and to proceed no further in the cause. Any subsequent proceedings there are null and void, and will be so treated by the federal courts. . . . The jurisdiction of the federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. This doctrine we hold to be incontrovertible. It is essential to any orderly and decent administration of justice, and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other.[73]

When the sheriff made known his intention to release Terry based on good behavior credits, Judge Sawyer, on February 1, 1889, found reasons to make Terry serve the full six months.[74] Terry tried to sue the U.S. marshal for false imprisonment, which was quashed by another judge. Allegedly at Field's instigation, the U.S. attorney had a federal grand jury indict Terry for assault. Terry moved to dismiss the charge on the basis that the grand jury was coerced. District Judge Ogden Hoffman upheld the indictment.[75]

B. THE SHOOTING OF TERRY AND THE WRIT OF HABEAS CORPUS TRIAL

Because Terry clearly was not penitent, and because word reached Justice Field that Terry had made threats against him, a deputy U.S. marshal, David Neagle, was appointed to accompany Field, then age 73, on his trips to California to sit

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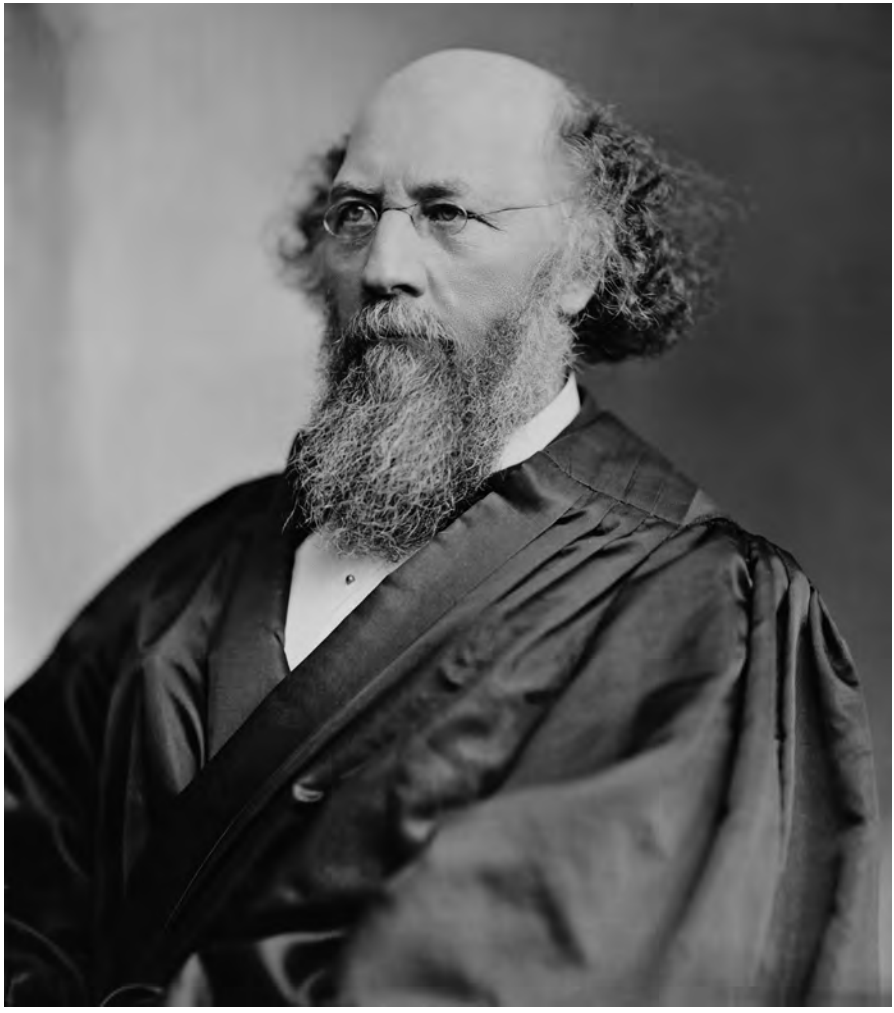
[73] *Sharon v. Terry*, 36 F. 337, 354–55 (Cir. Ct., N.D. Cal. 1888).

[74] *See In re Terry*, 37 F. 649 (Cir. Ct., N.D. Cal. 1889).

[75] *See United States v. Terry*, 39 F. 355 (N.D. Cal. 1889); Kroninger at 205–06.



ASSOCIATE JUSTICE STEPHEN J. FIELD,
U.S. SUPREME COURT

on the circuit court. Marshal Neagle was born on Telegraph Hill in San Francisco and, although he was only 5 feet, 4 inches tall — almost a foot shorter than Terry — he was formerly the marshal of Tombstone, Arizona, during the time that the Wyatts had their gunfight at the O.K. Corral. Neagle was also the primary person who removed Terry's Bowie knife from his hand in the circuit court following the attempt to remove Hill from the courtroom.[76]

[76] *See* Gould at 295–97.

In early August 1889, Field held court in Los Angeles, and then, with Deputy U.S. Marshal Neagle, boarded an overnight train to San Francisco on August 13, to hold circuit court in San Francisco, during which he would hear Terry's appeal of the revivor judgment. The Terrys boarded the train in Fresno. The train stopped at Lathrop (near Stockton) at a hotel for breakfast. While Field and Neagle were eating their breakfast, the Terrys walked in. After spotting Field, Terry went up behind him and punched him twice before Neagle jumped up and shot Terry through the heart, claiming Terry was reaching for his Bowie knife in his breast pocket. Neagle surrendered to a local police officer in Lathrop and was taken to jail in Stockton, where he was charged with murder. Field proceeded to San Francisco where a *Chronicle* reporter found him in his room at the Palace Hotel "as calm as though the killing of a man at breakfast were an everyday occurrence."[77]

Field was by no means indifferent to his bodyguard's fate. He most likely played a role in preparing a petition for a writ of habeas corpus directing the San Joaquin County sheriff to deliver Neagle to the jurisdiction of the federal court in San Francisco. The writ was issued by Circuit Judge Sawyer. A special train had been chartered by Neagle's protectors to take him to San Francisco, which picked him up from the Stockton station at 3:30 A.M.[78] A habeas corpus hearing was held before Circuit Judge Sawyer and District Judge Sabin at the Appraiser's Building, where the circuit court was located, at Sansome and Washington Streets, which lasted two weeks, and where several witnesses testified.[79] A week later, on September 16, 1889, Judge Sawyer read his opinion, in which he carefully framed the jurisdictional issue before the court.

> The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the state of California, and the state, only, can deal with it, *as such, or in that aspect.* It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle, was an "act done . . . in pursuance of a law of the United States," within the powers of the national government, then it *is not,* and *it cannot* be, an offense against

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[77] *See* Kroninger at 216, 213–17; Gould at 209–305; Transcript of Record at 324–43 (testimony of David Neagle).

[78] *See* Gould at 309; Kroninger at 222–23.

[79] *See* Gould at 317–22; Kroninger at 223–29.

Judge Lorenzo Sawyer, U.S. Circuit Court for the Ninth Circuit

the laws of the state of California, no matter what the statute of the state may be, the laws of the United States being the supreme law of the land. A state law, which contravenes a valid law of the United States, is, in the nature of things, necessarily void — a nullity. It must give place to the "supreme law of the land." In legal contemplation, there can no more be two valid laws, which are in conflict, operating upon the same subject-matter, at the same time, than, in physics, two bodies can occupy the same space at the same time. But, as we have seen by the authorities cited, it is the exclusive province of the judiciary of the United States, to, ultimately, and, conclusively, determine any question of right, civil or criminal, arising under the laws of the United States. It is, therefore, the prerogative of the national courts to, conclusively, construe the national statutes, and determine, whether the homicide in question, was the result of an "act done in pursuance of a law of the United States," and, when that question has been determined in the affirmative, the petitioner must be discharged, and the state has nothing more to do with the matter. All we claim, is, the right to determine the question, was the homicide the result of "an act done in pursuance of a law of the United States?" and if so, discharge the petitioner. As incidental to, and involved in, that question, it is necessary to inquire, whether the act of the petitioner, was performed under such circumstances as to justify it. If it was, then, he was in the line of his duty. If not, then, he acted

> outside his duty. We do not make the inquiry, at all, for the purpose of determining, whether the act was an offense, or justifiable under the statutes of the state. We do not assume to consider the case, in that aspect, at all. We simply determine, whether it was an act, performed in pursuance of a law of the United States. Nor do we act, in this matter, because we have the slightest doubt, as to the impartiality of the state courts, and their ability, and disposition, to, ultimately, do exact justice to the petitioner. We have not the slightest doubt, or apprehension in that particular; but, there is a principle involved. The question, is, has the petitioner *a right* to have his acts adjudged, and, if found to have been performed in the strict line of his authority, and duty, a *further right,* to be protected, by that sovereignty, whose servant he is, and whose laws he was executing? If he has that right, then, there is no encroachment upon the state jurisdiction, and this court must, necessarily, entertain his petition, and determine his rights under it, and under the laws of the United States. It has no discretion. It cannot decline to hear him without an utter disregard of one of the most important duties imposed upon it by the constitution, and laws of the United States. What the state tribunals might, or might not, do, in this particular instance, is not a matter for a moment's consideration.[80]

In determining whether Neagle acted "in pursuance of a law of the United States" when he killed Terry, Judge Sawyer asked two questions. First, was Neagle acting under a federal law and, second, if he was, did he shoot Terry in pursuance of that law. But there was no federal law that specifically authorized a U.S. marshal to protect a judge outside of the courtroom, and, so the sheriff of San Joaquin County argued, because Terry was not killed in a courthouse, California had jurisdiction over the matter. Judge Sawyer rejected this "geographical" notion of jurisdiction and, instead, found that the federal law in question can be implied in the power of the sovereign.

> The power to keep the peace is a police power, and the United States have the power to keep the peace in matters affecting their sovereignty. There can be no doubt, then, that the jurisdiction

[80] *In re Neagle*, 39 F. 833, 843–44 (Cir. Ct., N.D. Cal. 1889).

> of the United States is not affected, by reason of the place, — the locality, — where the homicide occurred.
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> . . . . If the executive department of the government cannot protect one of these judges, while in the discharge of his duty, from assassination, by dissatisfied suitors, on account of his judicial action, then it cannot protect any of them, and all the members of the court may be killed, and the court, itself, exterminated, and the laws of the nation by reason thereof, remain unadministered, and unexecuted.[81]

The second inquiry was whether the "the killing was necessary." After recounting the events leading to Terry's death, Judge Sawyer had no trouble in finding that the homicide was justifiable, rebuking an "eastern law journal" that had come to a different conclusion.

> [I]t is not for scholarly gentlemen of humane and peaceful instincts — gentlemen, who, in all probability, never in their lives, saw a desperate man of stalwart frame and great strength in murderous action — it is not for them sitting securely in their libraries, 3,000 miles away, looking backward over the scene, to determine the exact point of time, when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. . . . The homicide was, in our opinion, clearly justifiable in law, and in the forum of sound, practical common sense, — commendable. Let him be discharged.[82]

When Judge Sawyer concluded reading his opinion from the bench, Justice Field sprang to his feet to shake hands with Neagle and presented him with a gold watch engraved with the inscription: "Stephen J. Field to David Neagle, as a token of appreciation of his courage and fidelity to duty under circumstances of great peril at Lathrop, Cal. on the fourteenth day of August, 1889."[83]

The San Joaquin County sheriff, supported by the California attorney general, appealed to the U.S. Supreme Court, challenging Judge Sawyer's

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[81] *In re Neagle*, 39 F. at 848, 859.

[82] *In re Neagle*, 39 F. at 864.

[83] *See* Gould at 322.

decision that California had no power to prosecute federal employees committing state crimes while acting within the scope of their federal duties. The Supreme Court deemed the matter significantly weighty to allow two full days of argument, on March 4 and 5, 1890. Field recommended that Joseph H. Choate, considered the leading advocate of the time, represent the United States, which he did without fee. California Attorney General G. A. Johnson appeared for the state.[84] The Court delivered its opinion on April 14, 1890, with Justice Samuel Freeman Miller writing for the majority in a 6–2 decision (Field abstained), and concluded that article II, section 3 of the Constitution, directing that the president "shall take care that the laws be faithfully executed," gave him ample implied power to authorize federal marshals to protect federal judges.[85]

Although the issue before the Court was, at least in part, purely an issue of law, the Court went into exhaustive detail to document its opinion that, but for Marshal Neagle's intervention, Justice Field would be a dead man. The Court discussed the Sharon–Hill lawsuits; the findings of the federal court against Hill as to fraud, perjury and forgery; the hair-pulling incident by Hill against Judge Sawyer; the events in the circuit court leading to the six-month contempt sentence of Terry; and the threats Terry made against Field, concluding it was "a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field."

> [I]t is urged against the relief sought by this writ of habeas corpus, that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the imprisonment of

84 *See* Gould at 327.

85 *See In re Neagle,* 135 U.S. 1, 63–64 (1890).

Associate Justice Samuel Freeman Miller,
U.S. Supreme Court

> the party is in violation of the Constitution and laws of the United States is clear by its express language.
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> . . . . To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offence, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them.
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> The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.[86]

By relying on the implied constitutional powers, Justice Miller's opinion is one of the broadest statements of the power of the federal government to immunize its officers in the performance of their duties. The dissent, led

[86] *In re Neagle*, 135 U.S. at 69–70, 75–76.

Associate Justice Lucius Quintus Cincinnatus Lamar, U.S. Supreme Court

by Associate Justice Lucius Quintus Cincinnatus Lamar, focused on the dangers of granting immunity to federal officials whose authority is only *implied* by the Constitution:

> The gravamen of this case is in the assertion that Neagle slew Terry in pursuance of a law of the United States. He who claims to have committed a homicide by authority must show the authority. . . . The right claimed must be traced to legislation of Congress; else it cannot exist.
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> . . . . If the act of Terry had resulted in the death of Mr. Justice Field, would the murder of him have been a crime against the United States? Would the government of the United States, with all the supreme powers of which we have heard so much in this discussion, have been competent, in the present condition of its statutes, to prosecute in its own tribunals the murder of its own Supreme Court justice, or even to inquire into the heinous offence through its own tribunals? If yes, then the slaying of Terry by the appellee, in the necessary prevention of such act, was authorized by the law of the United States, and he should be discharged; and that, independently of any official character, the situation being the same in the case of any citizen. But if no, how stands the matter then? The killing of Terry was not by authority of the United States, no matter by whom done; and the only authority relied on for vindication must be that of the State, and the slayer should be remanded to the state courts to be tried. The question then recurs, Would it have been a crime against the United States? There can be but one answer. Murder is not an offence against the United States, except when committed on the high seas or in some port or harbor without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the national government has exclusive jurisdiction. It is well settled that such crime must be defined by statute, and no such statute has yet been pointed out. The United States government being thus powerless to try and punish a man charged with murder, we are not prepared to affirm that it is omnipotent to discharge from trial and give immunity from any liability to trial where he is accused

of murder, unless an express statute of Congress is produced permitting such discharge.

We are not unmindful of the fact that in the foregoing remarks we have not discussed the bearings of this decision upon the autonomy of the States, in divesting them of what was once regarded as their exclusive jurisdiction over crimes committed within their own territory, against their own laws, and in enabling a federal judge or court, by an order in a *habeas corpus* proceeding, to deprive a State of its power to maintain its own public order, or to protect the security of society and the lives of its own citizens, whenever the amenability to its courts of a federal officer or employé or agent is sought to be enforced. We have not entered upon that question, because, as arising here, its suggestion is sufficient, and its consideration might involve the extent to which legislation in that direction may constitutionally go, which could only be properly determined when directly presented, by the record in a case before the court of adjudication.[87]

V. CONCLUSION

So what can we say about the concept of federalism in the thirty-plus years between the time Terry was a justice of the California Supreme Court and the time the U.S. Supreme Court ruled that California had no right to try the person who killed Terry? In 1856, the federal government rejected state and local officials' requests for help when the Vigilance Committee armed itself (in part, with U. S. Army rifles taken by force from the state militia) and took over San Francisco. In effect, the federal government stood by, in the face of an armed rebellion in the West's largest city, using the language of states' rights to justify its non-intervention.

The federal government's refusal to intervene, however, took place five years before the Civil War began. The Sharon–Hill trials and *In re Neagle* decisions took place more than twenty years after the end of the Civil War. In the Sharon–Hill appeals we see jurisdictional wrangling between the state and federal courts, with the federal courts finally winning that battle.

[87] *In re Neagle*, 135 U.S. at 89, 98–99.

In re Neagle, on the other hand, is the counterpoint to the federal government's refusal to help suppress the Vigilance Committee, with a federal court so assertive vis-à-vis state jurisdiction, that it released deputy marshal Neagle from being subject to any state proceedings over the killing of David Terry because it determined that Neagle had acted in the course and scope of his federal duties — never mind that neither the circuit court nor the Supreme Court could point to any federal statute that would trump California's right to try Neagle. While Terry never directly opined on federalism, his life and death reflected the changes in that concept.

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