ARTICLES

CHIEF JUSTICE DAVID S. TERRY AND THE LANGUAGE OF FEDERALISM

RICHARD H. RAHM*

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

* Richard H. Rahm received his J.D. and Ph.D. from UC Berkeley, his M.Litt. from Oxford University, and his B.A. from UCLA. He is a Shareholder at Littler Mendelson, P.C., residing in its San Francisco office.

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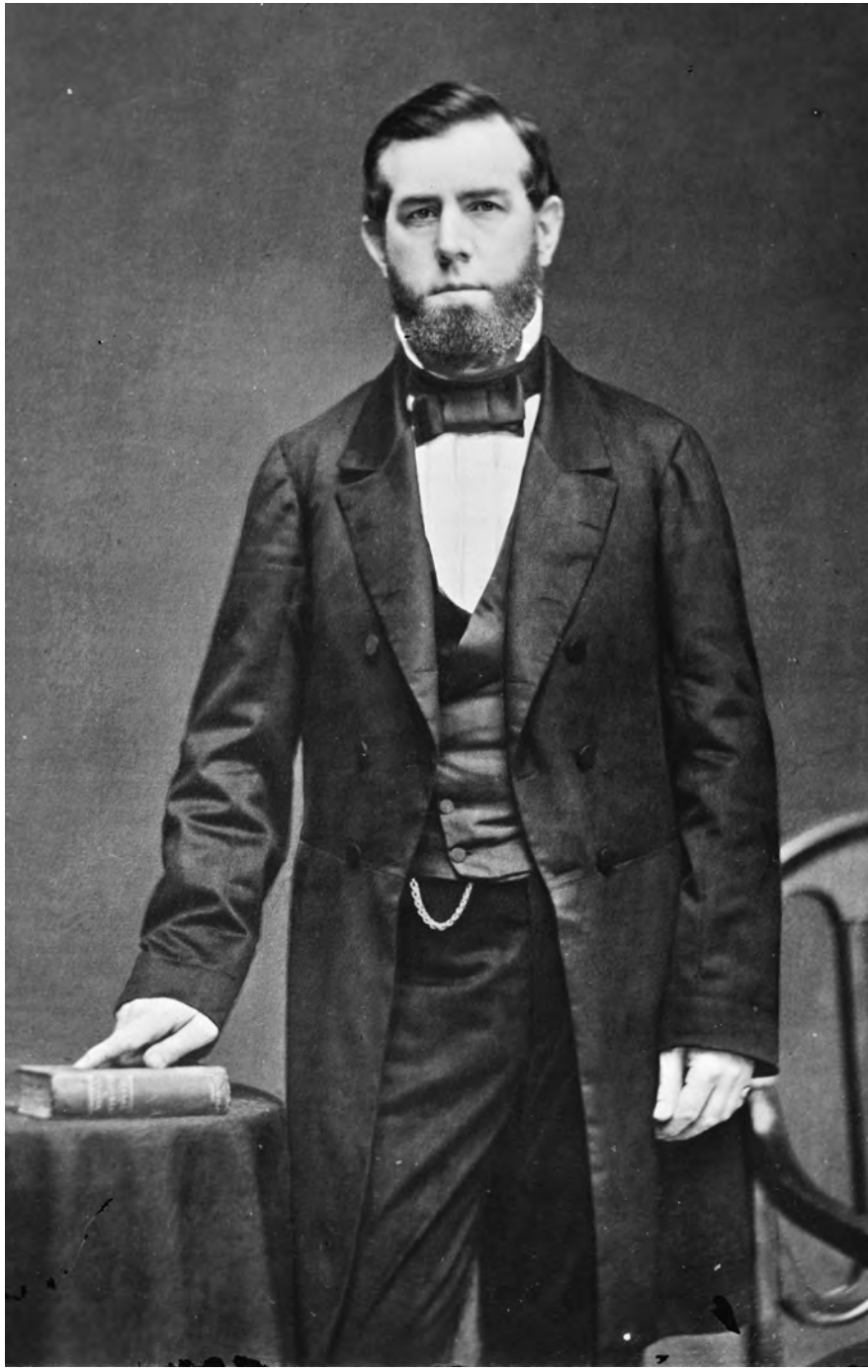
[3] *See* Buchanan at 8–13; Gould at 19–20.

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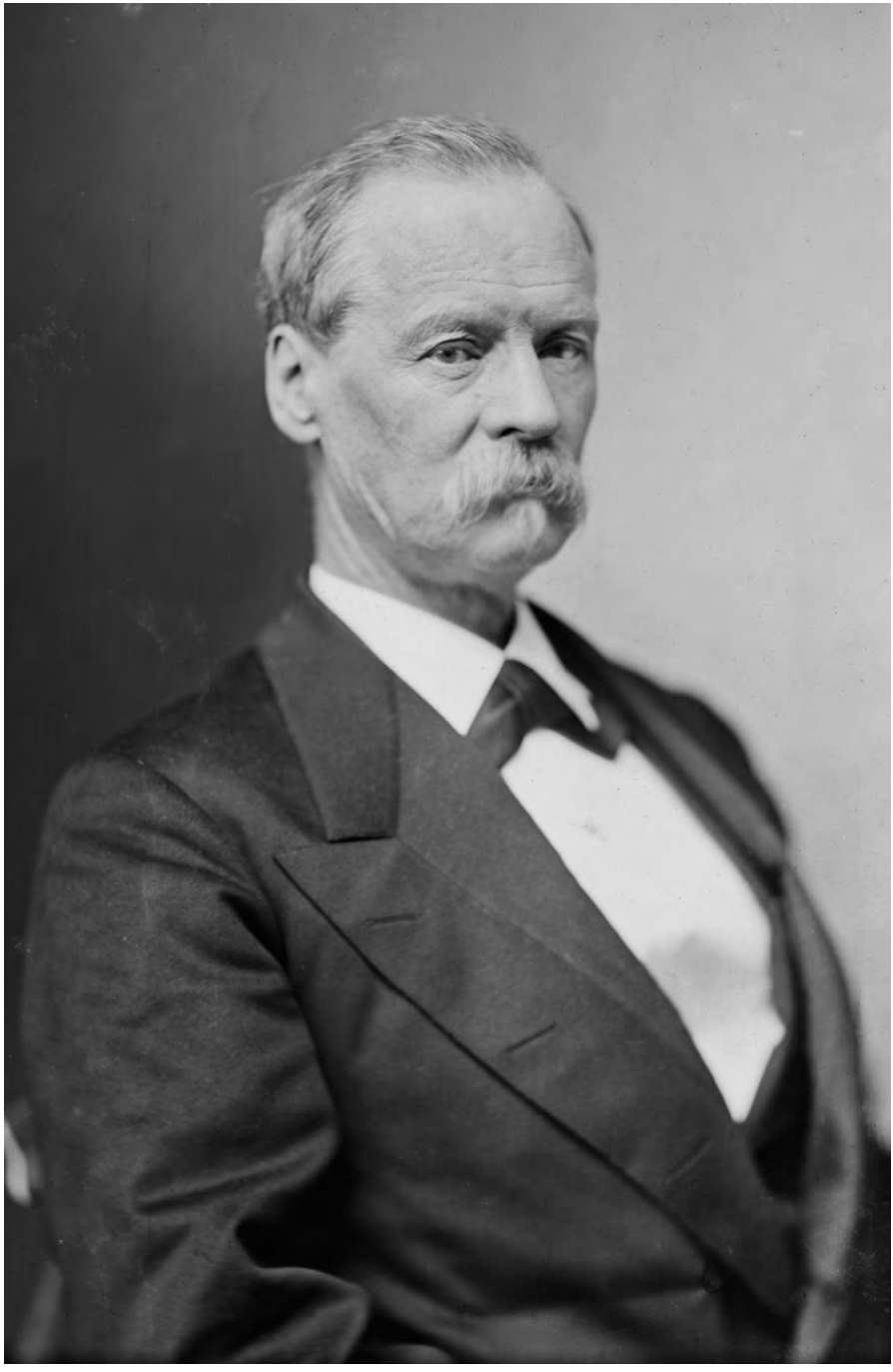
40 *See* The Supreme Court of California, *The Supreme Court of California 2007 Edition* (www.courtinfo.ca.gov/courts/supreme) at 13.

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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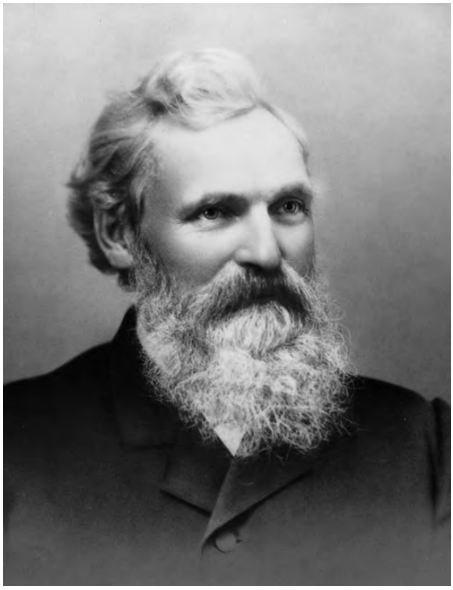
[62] *Sharon*, 79 Cal. at 647–48.

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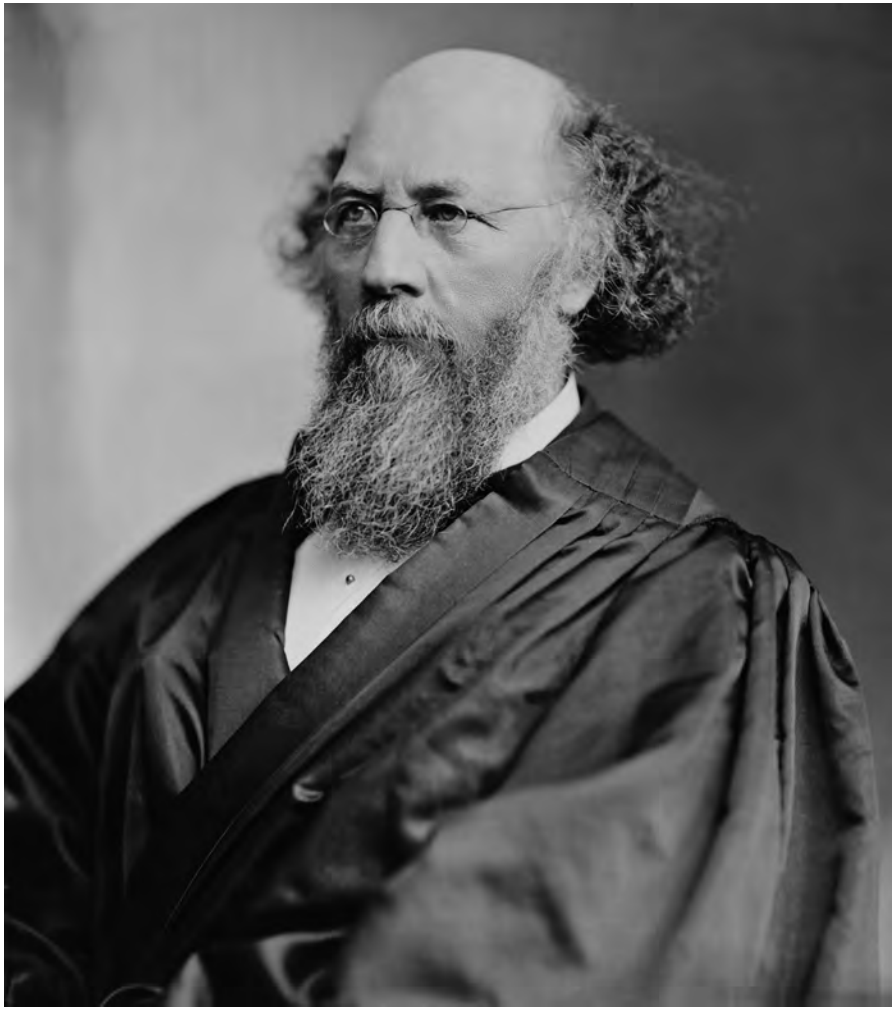
[73] *Sharon v. Terry*, 36 F. 337, 354–55 (Cir. Ct., N.D. Cal. 1888).

[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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> . . . .
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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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> . . . .
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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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> . . . .
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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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FIFTY YEARS OF THE *WASHINGTON–GILBERT* PROVOCATIVE ACT DOCTRINE:

Time for an Early Retirement?

MITCHELL KEITER*

The usual challenge in determining criminal liability is the age-old uncertainty: "Who done it?" But assigning blame may prove controversial even where the facts are undisputed. It may be clear that A directly inflicted the fatal wound, but in response to a wrongful action of B. For example, a bank robber's waving a gun prompts a security guard to shoot — and inadvertently kill a customer. Should the robber or the guard be liable for the homicide? The use of civilian populations in urban warfare as human shields has highlighted the distinction between the direct or actual cause of death (the guard) and the proximate or legal cause (the robber).

Direct causation is neither necessary nor sufficient for homicide liability; proximate causation combines with a guilty mental state (*mens rea*) to produce homicide liability.[1] Whereas direct causation is a question of fact, proximate causation is a policy question, which seeks to assign liability

* Certified Appellate Law Specialist, Keiter Appellate Law, Beverly Hills, California. As a Chambers Attorney at the California Supreme Court, the author participated in the decisions of *People v. Sanchez*, 26 Cal.4th 834 (2001), and *People v. Cervantes*, 26 Cal.4th 860 (2001). The author would like to thank Sheila Tuller Keiter and Blair Hoffman.

[1] People v. Sanchez, 26 Cal.4th 834, 845 (2001). The more culpable the offender's mental state, the higher the degree of homicide.

fairly and justly.[2] When a defendant is charged with homicide for a death directly inflicted by an intermediary, judges and juries must decide if the intermediary's response was a "dependent" or "independent" intervening variable. Intervening variables are independent if they are "unforeseeable," and "an extraordinary and abnormal occurrence."[3] But the intervening variable is dependent if it is a "normal and reasonably foreseeable result of defendant's original act."[4] Jurors may thus agree on what happened but disagree on whom to blame.

Fifty years ago, the California Supreme Court decided two cases that reshaped homicide liability. In *People v. Washington*[5] and *People v. Gilbert*,[6] the Court distinguished between direct proximate causation and indirect proximate causation, holding that only the former supported application of the felony-murder rule, which otherwise held felons strictly liable for all homicides committed during the felony.[7] The decisions immunized defendants from felony-murder liability if a resisting victim or officer directly caused the death, even if the felon was the proximate cause.

In creating this exception to the felony-murder rule, the Supreme Court also created an exception to the exception: murder liability was proper even where an innocent party directly caused death so long as the defendant committed a highly dangerous act (like shooting) that proximately caused the fatal response. Such a "provocative" act would demonstrate implied malice, sufficient to support murder liability without resort to the felony-murder rule.[8] Although *Washington* and *Gilbert* designed

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[2] People v. Cervantes, 26 Cal.4th 860, 872 (2001).

[3] *Id*. at 871.

[4] *Id*.

[5] 62 Cal.2d 777 (1965).

[6] 63 Cal.2d 690 (1965).

[7] Cal. Penal Code, §189; *see* Miguel Méndez, *The California Supreme Court and the Felony Murder Rule: A Sisyphean Challenge*?, 5 Cal. Legal Hist. 241 (2010) (Méndez); Mitchell Keiter, Ireland *at Forty: How to Rescue the Felony-murder Rule's Merger Limitation from Its Midlife Crisis*, 36 W. St. L. Rev. 1, 28 (2008) (Ireland *at Forty*).

[8] See Part IA. In contrast to express malice, which involves a specific intent to kill, implied malice involves an intent to do an act, the natural and probable consequences of which are dangerous to life (the objective component), with conscious disregard of the danger to human life (the subjective component). People v. Knoller, 41 Cal.4th 139, 152–53, 156–57 (2007); see Méndez, *supra* note 7, at 244.

the provocative act doctrine as a substitute for the felony-murder rule to establish malice for homicides committed during section 189 felonies, the doctrine has became the default means for establishing murder liability for all homicides committed by an intermediary, even where there was no section 189 felony.[9]

Yet in the half-century since *Washington* and *Gilbert*, the Supreme Court has disavowed all the premises that produced those decisions, and restored the law to the status quo ante.[10] The Court has recharacterized the purpose of the felony-murder rule, the requisite connection between the felony and the homicide, the definition of implied malice (and whether brandishing a weapon may reflect it), whether an unreasonable response breaks the chain of causation, and, most significantly, whether defendants may be held liable for factors beyond their control. Paradoxically, *Washington–Gilbert*'s reach has expanded as its underpinnings collapsed.

This disavowal of *Washington–Gilbert*'s foundation accorded with a judicial and legislative emphasis on public safety, prompted by an increase in crime in the late 1960s and 1970s. The law is now more inclined to authorize punishment for not only intended harms but also unintended ones, so long as they are reasonably foreseeable. Conduct less culpable than the *Washington* defendant's now supports murder liability in indirectly caused homicides.[11]

But the provocative act doctrine remains, more entrenched than ever. Courts have addressed new factual circumstances by reconfiguring jury instructions (often incorrectly) — or bypassing the doctrine altogether. Although this patchwork development may achieve desired results in individual cases (or not), the law would enjoy greater consistency if courts followed the same formula for intermediary cases that applies in all others: A defendant who proximately causes death is liable for homicide in accordance with his mental state (*mens rea*).[12]

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[9] See Part I.B. The enumerated felonies of section 189 currently include arson, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, rape, and specified sex offenses.

[10] See Part II.

[11] See Part III.

[12] See Part IV.

I. THE DEVELOPMENT OF THE PROVOCATIVE ACT DOCTRINE

For more than a century, homicide liability has required proximate, not direct, causation of death.[13] In *People v. Lewis*,[14] the defendant shot the victim in the intestines, "sending him toward a painful and inevitable death he apparently decided to hasten by slitting his own throat."[15] The victim may have been the direct cause of death, but blame, and thus proximate causation, lay with the defendant: " 'Even if the deceased did die from the effect of the knife wound alone, no doubt the defendant would be responsible . . . [if the fatal] wound was caused by the wound inflicted by the defendant in the natural course of events.' "[16] Liability remained with the defendant even where the victim's death was not inevitable, as in *Lewis*, so long as it was a natural and probable consequence of the defendant's misconduct.[17]

The Supreme Court refined the intermediary causation rule in *People v. Fowler*, where Fowler struck Duree with a club, left him for dead on the roadway, and a motorist then inadvertently drove over the body.[18] The Court reaffirmed the *Lewis*-derived rule that regardless of whether the club or the car inflicted the fatal wound, the defendant proximately caused Duree's death, as it was "the natural and probable result of the defendant's . . . leaving Duree lying helpless and unconscious in a public road, exposed to that danger."[19] Unless the driver intentionally ran over Duree, Fowler was the proximate cause.

Fowler further established that liability was the product of causation and *mens rea*. With proximate causation established, Fowler's liability depended on the mental state with which he struck Duree: If in "self-defense, it would be justifiable. If it was felonious, it would be murder or manslaughter, according to the intent and the kind of malice with which

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13 Cervantes, 26 Cal.4th 860, 869.

14 124 Cal. 551 (1899).

15 Cervantes, 26 Cal.4th 860, 869.

16 *Id.,* quoting Lewis, 124 Cal. 551, 555.

17 People v. Williams, 27 Cal. App. 297, 299 (1915) .

18 178 Cal. 657, 667–69 (1918).

19 Fowler, 178 Cal. 657, 669.

it was inflicted."[20] *Fowler* thus confirmed that murder liability depended on the offender's mental state, not the direct or indirect manner of killing. *Fowler* continues to provide the formula for assigning liability for indirectly caused homicides falling outside the "provocative act" framework.[21]

A. INTERMEDIARY HOMICIDES DURING FELONIES

Indirect proximate causation first supported murder in the felony-murder context in *People v. Harrison*.[22] In robbing a store, Harrison shot at employee Jones, who returned fire and inadvertently killed the store owner.[23] The court of appeal held that Harrison was the proximate cause of death, because it was a "normal human response" for individuals "shot at or threatened by robbers" to return fire, so the death was the "natural, foreseeable result" of the robbery.[24] *Harrison* followed *Fowler* by aligning the defendant's liability with his culpable mental state. Because the homicide occurred during a Penal Code section 189 felony, the offense was first degree murder.[25]

Washington involved similar facts. Attempting to rob a gas station, Ball pointed a gun at Carpenter, who fired his own gun and killed Ball.[26] A jury convicted Ball's accomplice Washington of first degree murder for the indirectly caused homicide.[27] *Washington* differed slightly from *Harrison*, as that case affirmed murder liability regarding "the death of an innocent bystander."[28] Because the *Washington* decedent was neither innocent nor a bystander, the Supreme Court could have preserved *Harrison*'s reasoning while reaching a different result. But the Court refused to consider "the fortuitous circumstance" of whether the decedent was a felon or innocent victim, as it "would make the defendant's criminal liability turn upon the marksmanship of victims and policemen."[29]

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20 *Id.*
21 Cervantes, 26 Cal.4th 860, 872 n.15.
22 176 Cal. App. 2d 330, 332–37 (1959).
23 Harrison, 176 Cal. App. 2d 330, 336.
24 *Id.* at 336, 345 (internal citation omitted).
25 *Id.* at 332.
26 Washington, 62 Cal.2d 777, 779.
27 *Id.*
28 Harrison, 176 Cal. App. 2d 330, 336.
29 Washington, 62 Cal.2d 777, 780.

Washington sought to limit not indirect causation liability but the reach of the felony-murder rule, finding it "should not be extended beyond any rational function that it is designed to serve."[30] The rule could operate to impute malice only where a felon directly inflicted death, as a homicide committed by a resisting victim or officer would not be committed to further the felony.[31] Nonetheless, murder liability was proper for intermediary homicides where (implied) malice could be shown without the felony-murder rule: "Defendants who initiate gun battles may also be found guilty of murder if their victims resist and kill."[32] This actual (rather than imputed) malice depended on the defendant's commission of what would become known as a "provocative act."

In theory, *Washington* rejected using the felony-murder rule to establish the malice element of homicide. But in practice, it also diminished the effect of the felony in proving the causation element. *Washington* endorsed the conclusion that *Harrison*, in assigning causation to the armed robber whose gunfire prompted a lethal response, had taken a "very relaxed view of the necessary causal connection between the defendant's act and the victim's death. . . ."[33] In other words, because the *Harrison* defendant initiated the gun battle, there was (barely) sufficient causation there. By contrast, the *Washington* defendant only "pointed a revolver directly at Carpenter" and did not shoot first, so there was insufficient causation.[34]

Gilbert more fully developed the provocative act doctrine.[35] Both Gilbert and accomplice Weaver entered a bank armed; the former shouted, "'Everybody freeze; this is a holdup.'"[36] After collecting money, Gilbert grabbed a hostage and fatally shot an officer while escaping, while another officer fatally shot Weaver.[37] Without the benefit of the not yet decided *Washington*, the trial court misinstructed the jury. *Gilbert* thus explained the principles of indirect causation liability for the benefit of the retrial. First, the Court emphasized that malice could appear, not through the

30 *Id.* at 783.
31 *Id.* at 781, 783.
32 *Id.* at 782.
33 62 Cal.2d 777, 782 n.2.
34 Washington, 62 Cal.2d 777, 779.
35 Cervantes, 26 Cal.4th 860, 868.
36 Gilbert, 63 Cal.2d 690, 696–97.
37 *Id.* at 697.

operation of the felony-murder rule, but through the commission of a provocative act "likely to cause death."[38] The homicide could thus be attributed to the dangerous act rather than the felony. Proximate causation would remain with the defendant because the responsive shooting was a "reasonable response" to the provocative act.[39]

Although *Washington* specifically limited the felony-murder rule, and expressly endorsed murder liability where the defendant exhibited implied malice, the opinion included dicta noting a deeper problem with intermediary homicide liability.

> In every robbery there is a possibility that the victim will resist and kill. The robber has little control over such a killing once the robbery is undertaken . . . .To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response by others that the robber's conduct happened to induce.[40]

This reasoning could apply outside the felony-murder context; for example, Fowler had little control over whether a driver would fatally injure Duree. Although the Supreme Court continued to limit its application of the provocative act doctrine to section 189 felonies, the court of appeal soon followed *Washington*'s dicta to its logical end.

B. INTERMEDIARY HOMICIDES OUTSIDE THE FELONY-MURDER CONTEXT

Washington created an exception to the felony-murder rule, as section 189 would not cover homicides directly caused by innocent intermediaries during felonies, and then an exception to that exception, as even those homicides could support murder liability if there was a "provocative act." But the court of appeal soon construed the provocative act doctrine as the default vehicle for indirect causation liability. In a case where the defendant and his brother were brutally beating a deputy sheriff when another deputy

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[38] *Id.* at 704–05.

[39] *Id.* Although commission of a section 189 felony could not establish the malice element of murder, it could be used to fix the degree as first degree murder in accordance with the statute. *Id.* at 705.

[40] Washington, 62 Cal.2d 777, 781.

fatally shot the brother, the court of appeal observed that the *Washington–Gilbert* "limitation upon the felony-murder doctrine" did not bar murder liability where the elements of the crime of proximate causation and malice "can be established without resort to that doctrine."[41] Citing *Gilbert*, the court affirmed murder liability based on the officer's "reasonable and foreseeable response."[42]

The court of appeal elaborated on this analysis in *In re Aurelio R.*[43] A gang member drove his cohorts into another gang's territory and they shot at rivals, who fired back and killed a passenger.[44] The court of appeal affirmed second degree murder liability, not through *Fowler*'s proximate causation-and-malice framework, but through the *Washington–Gilbert* provocative act framework, even though the felony in which the homicide occurred was not a section 189 felony like robbery but attempted murder.[45] That offense itself reflected express malice, so the court of appeal held there was no need for another provocative act to show malice.[46]

The *Aurelio R.* court apparently believed *Washington–Gilbert* was the only legal tool for holding the defendant liable for the homicide he proximately caused. But the decision disregarded *Fowler* and simply assumed *Washington* and *Gilbert* governed, even though their point was to limit the felony-murder rule.

Two Supreme Court decisions followed, which used the *Fowler* framework rather than *Washington–Gilbert* to affirm intermediary homicide liability in factually unusual cases. The defendant in *People v. Roberts* stabbed a victim (Gardner), who went into hypovolemic shock and in that irrational condition fatally stabbed a third party (Patch).[47] Rival gang-members in *People v. Sanchez* engaged in a shootout, and it was uncertain whose bullet killed a bystander.[48]

In determining "the evidence sufficed to permit the jury to conclude that Patch's death was the natural and probable consequence of defendant's

41 Velasquez, 53 Cal. App. 3d 547, 554, quoting People v. Antick, 15 Cal.3d 79, 87 (1975).
42 *Id.* at 554–55.
43 167 Cal. App. 3d 52 (1985).
44 *In re* Aurelio R., 167 Cal. App. 3d 52, 55–56.
45 *Id.* at 57–58.
46 *Id.* at 60–61.
47 2 Cal.4th 271, 294–95, 316 n.9 (1992).
48 26 Cal.4th 834, 838 (2001).

act,"[49] *Roberts* cited prior cases from both California and elsewhere where the defendant attacked the victim, whose instinctive response to evade the defendant's attack resulted in a fatality. In the "prototypical" case of *Letner v. State*,[50] the defendant shot someone on a boat who dove out to avoid the gunfire and drowned. Whereas *Letner* (like the *Lewis* suicide) involved the death of the targeted victim, other cases involved the targeted victim's directly killing a third party. In *Madison v. State*, the defendant threw a grenade near one person, who reflexively kicked it toward another, who died in the ensuing explosion.[51] And in *Wright v. State*, the defendant shot at a driver, who, while "ducking bullets," fatally drove into a pedestrian.[52] These cases supported *Roberts*' conclusion that a defendant would be the proximate cause of death so long as such harm was reasonably foreseeable, even if the precise manner of death was not the one contemplated.

Roberts signified a return to prior case law. It cited many of the authorities upon which *Harrison* relied (including *Letner* and *Madison*). Although it did not cite *Fowler* directly, it applied its equation of "proximate causation–times–*mens rea* equals liability." It actually went beyond *Fowler* in holding the defendant's proximate causation could combine not only with malice to establish a murder but also with a premeditated and deliberate intent to kill to show murder in the first degree.[53]

The Supreme Court expressly revived the *Fowler* rule in *Sanchez*. As in *Aurelio R.*, the court of appeal had incorrectly deemed the provocative act theory indispensable for assigning liability. The jury had convicted both defendants of first degree murder for the bystander's death in the shootout, but the court of appeal held the law could not support first degree murder liability for both defendants.[54] If the actual shooter was guilty of murder, the other shooter would not be guilty under the provocative act theory, but if the provocateur was guilty of murder, it would relieve the actual shooter of liability.[55]

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49 Roberts, 2 Cal.4th 271, 321.

50 299 S.W. 1049 (Tenn. 1927).

51 130 N.E.2d 35, 38 (Ind. 1955)

52 363 So.2d 617, 618 (Fla. Dist. Ct. App. 1978).

53 Roberts, 2 Cal.4th 271, 320.

54 Sanchez, 26 Cal.4th 834, 839.

55 *Id.*

The Supreme Court rejected the court of appeal's reliance on the provocative act framework and instead used *Fowler*'s formula. Both shooters could be the concurrent, and thus proximate, cause of death, so both defendants could be guilty of murder — in the first degree.[56] Just as the *Fowler* Court did not know whether the defendant or the driver inflicted the fatal wound, so too did the *Sanchez* Court not know which shooter fired the fatal shot. As in *Fowler*, it did not matter. "[I]t is proximate causation, not direct or actual causation, which, together with the requisite mens rea (malice), determines defendant's liability for murder."[57]

Sanchez's companion case *People v. Cervantes* held likewise: "If a defendant proximately causes a homicide through the acts of an intermediary and does so with malice and premeditation, his crime will be murder in the first degree." *Fowler* and *Sanchez* differed in that the intermediary in the former case acted with an apparently innocent mental state, but neither *Sanchez* shooter did. But the proximate causation–times–*mens rea* formula could establish liability in either case.

Quoting the language from *Sanchez* and *Cervantes* in the two preceding paragraphs, the Supreme Court finally authorized provocative act murder liability where the underlying felony was attempted murder in *People v. Concha*.[58] Three assailants chased the intended victim who fought back and killed one of them.[59] The Supreme Court authorized first degree murder convictions for the two surviving assailants if they acted with premeditation and deliberation.[60] Although the Court's prior provocative act cases had involved implied malice rather than express malice, *Concha* recalled that once there was murder liability based on proximate causation and malice, section 189 could fix the degree.[61] If the commission of an enumerated felony could support first degree murder

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56 Section 189 supported first degree murder liability for murders committed with premeditation or by intentionally shooting from a vehicle with an intent to kill. Sanchez, 26 Cal.4th 834, 849.

57 Sanchez, 26 Cal.4th 845, 849.

58 47 Cal.4th 653, 662–63 (2009).

59 Concha, 47 Cal.4th 653, 658.

60 *Id.*

61 *Id.* at 663.

liability through section 189, so too could the element of premeditation and deliberation.[62]

Provocative act murder is not an independent crime, but merely a "shorthand," used for the "subset" of homicides that occur when an intermediary's response causes death.[63] Although the Supreme Court returns to the *Fowler* rule of proximate causation–times–*mens rea* when the provocative act doctrine does not properly describe the crime (as in *Roberts* and *Sanchez*), it has become the default means to determine liability. Yet the Court has already disavowed all the major premises that generated the *Washington–Gilbert* rule.

II. THE RISE AND FALL OF THE *WASHINGTON–GILBERT* FOUNDATION

Washington and *Gilbert* reflected the Court's reservations about finding both the malice and proximate causation elements of murder based on only the defendant's commission of a section 189 felony. The *Washington* majority and the dissent disagreed regarding four premises. The majority held (1) The purpose of the felony-murder rule is to deter negligent or accidental killings, not the commission of the felonies themselves; (2) The rule applies only where the homicide is committed in furtherance of the felony; (3) Pointing a gun at another person does not evince implied malice; and (4) A defendant cannot be held liable for the act of an intermediary over whose responsive conduct he has little control. Finally, *Gilbert* added that a victim who resists must act reasonably for proximate causation, and thus liability, to remain with the felon.[64]

None of these positions is good law today (nor was prior to *Washington* and *Gilbert*). The Court's subsequent case law has vindicated the dissent's points concerning (1) the purpose of the felony-murder rule; (2) the requisite relation between the felony and the homicide; (3) the construction of implied malice; and (4) a defendant's responsibility for harms purportedly beyond his control. Subsequent case law has also abandoned *Gilbert*'s "reasonable response" requirements.

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62 *Id.*

63 People v. Gonzalez, 54 Cal.4th 643, 649 n.2 (2012); Concha, 47 Cal.4th 653, 663.

64 Gilbert, 63 Cal.2d 690, 704–05.

A. THE DEMISE OF THE *WASHINGTON* PREMISES

1. The Additional Purpose of the Felony-Murder Rule

The Court has broadened the purpose of the felony-murder rule since *Washington*. The dissent there observed that felons' potential liability for indirect killings was "one of the most meaningful deterrents to the commission of armed felonies."[65] The majority rejected the argument as a matter of policy; the rule's only purpose was "to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit."[66] Deterring the felonies themselves was not a proper goal.[67]

The Court has since adopted the dissent's position. The rule now serves both to deter felons from killing negligently or accidentally and to deter commission of the underlying felonies.[68] The Court recently recalled its conclusion that "[t]he knowledge that a murder conviction may follow if an offense such as furnishing a controlled substance or tainted alcohol causes death 'should have some effect on the defendant's readiness to do the furnishing.' "[69]

The felony-murder rule's broader purpose supports a broader reach. And the deterrence imperative advocated by the *Washington* dissent also applies to provocative acts committed outside section 189 felonies: "[S]ociety has an interest in deterring people from initiating these deadly confrontations — gang warfare as well as shootouts with the police. More people will be deterred if they know when the smoke clears they will be held accountable for all the dead bodies . . . ."[70]

The law now accepts the imperative of deterring felonies and other provocative acts, as urged in Justice Burke's dissent.

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65 Washington, 62 Cal.2d 777, 785 (Burke, J., dissenting).

66 *Id*. at 781.

67 *Id*.

68 People v. Chun, 45 Cal.4th 1172, 1189 (2009); People v. Robertson, 34 Cal.4th 156, 171 (2004), disapproved on another ground in People v. Chun. Although *Chun* referenced the second degree felony-murder rule, it cited *Washington*, a first degree felony-murder case.

69 Chun, 45 Cal.4th 1172, 1193, citing People v. Mattson, 4 Cal.3d 177, 185 (1971) (internal quotations omitted).

70 *In re* Aurelio R., 167 Cal. App. 3d 52, 60.

2. The Loosening Relation between the Felony and the Homicide

Another change concerns the relation between the felony and the homicide. The *Washington* majority excluded killings by victims or officers from the reach of felony-murder liability. It reasoned that if the intermediary committed a homicide, it did not further the felony. "Indeed, in the present case the killing was committed to thwart the felony."[71] The *Washington* dissent disputed there was any requirement that the killing must take place to commit the felony. "[T]hen what becomes of the rule . . . that an accidental and unintended killing falls within the section? How can it be said that such a killing takes place *to* perpetrate a robbery?"[72]

The Supreme Court began to backtrack from the *Washington* majority's position in *Pizano v. Superior Court,* suggesting that a victim's defensive killing actually was part of the felonious design.[73] *Pizano* distinguished a hypothetical killing by an officer from the robber's malicious act in shooting that prompted it. Although the *killing* was committed to thwart the robbery, "*the act which made the killing a murder attributable to the robber — initiating the gun battle — was committed in the perpetration of the robbery.*"[74] The Supreme Court reiterated this distinction in *People v. Billa*, where one of three coconspirators committing arson of a truck (for insurance fraud purposes) accidentally burned to death.[75] The Court contrasted the *act* of setting the fire, which was committed in the perpetration of the felony, with the *result* of the conspirator's death, which was not.[76]

The Supreme Court expressly referenced *Washington* in describing how it no longer follows its rule. Although the meaning of "to perpetrate" (and its non-application to indirect killings) was central to *Washington*'s rationale, the Court has since broadened the reach of the rule.

> In [*Washington*], the defendant and a cofelon, James Ball, attempted to rob Carpenter, . . . [who killed Ball in self-defense]. . . . [T]his court reversed [defendant's felony-murder conviction] because "the killing [was] not committed . . . in the perpetration or

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71 Washington, 62 Cal.2d 777, 781.

72 *Id.* at 787 (Burke, J., dissenting).

73 21 Cal.3d 128 (1978).

74 Pizano, 21 Cal.3d 128, 139 n.4 (italics in original).

75 31 Cal.4th 1064, 1067 (2003).

76 Billa, 31 Cal.4th 1064, 1071: see also *People v. Mejia*, 211 Cal. App. 4th 586, 614 (2012).

> attempt to perpetrate robbery . . .” This was so, we explained, because the killing was not in furtherance of the robbery. *The view of the felony-murder rule that the killing must somehow advance or facilitate the robbery has, however, been superseded by later cases.* [W]e [have] held there need be only a logical nexus between the felony and the killing.[77]

There is such a logical nexus between robberies and the lethal responses they often cause. Having abandoned the “committed in the perpetration of” requirement that justified requiring direct causation for felony-murder liability, the Court should abandon the direct causation rule itself.

3. The Expansion of Implied Malice

Post-*Washington* law has also undermined the case’s holding regarding implied malice. The Court has broadened its construction of the implied malice necessary to invoke the *Washington–Gilbert* doctrine regarding both facts and law.

First, the Court lowered the threshold needed to show implied malice to encompass the *Washington* facts. *Washington* acknowledged that felons who “initiate gun battles” evince such implied malice.[78] But the majority rejected the dissent’s broader conception of the verb “initiate”: “If a victim . . . seizes an opportunity to shoot first when confronted by robbers with a deadly weapon . . . any ‘gun battle’ *is* initiated by the armed robbers.[79] The majority instead concluded there was no malice because the robber merely “pointed a revolver directly” at the employee.[80]

Again, history has vindicated Justice Burke’s dissent. In a case where the defendant pulled from his waistband a gun, which “fired as it was drawn,”[81] the court of appeal “held that although the act of intentionally *firing* a handgun could support a finding of malice, the act of intentionally *brandishing* a handgun, as a matter of law, could not support such

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[77] People v. Dominguez, 39 Cal.4th 1141, 1162 (2006) (emphasis added), quoting Washington, 62 Cal.2d 777, 781.

[78] Washington, 62 Cal.2d 777, 782.

[79] *Id.* at 785 (Burke, J., dissenting).

[80] *Id.* at 779.

[81] 4 Cal.4th 91, 98–99 (1992).

a finding."[82] Arguably, *brandishing* is even less dangerous than *directly pointing* the weapon at the intended victim. But on review all seven Supreme Court justices held that, depending on the facts, brandishing could reflect implied malice. A fortiori, so may pointing a gun directly at an intended robbery victim. The *Washington* facts would produce a different result if the crime occurred today.

Even more significant legally was *People v. Medina*,[83] which clarified the meaning of "natural and probable consequence," the term that governs both implied malice and proximate causation. Street gang members verbally challenged a rival gang member by asking "Where are you from."[84] After a scuffle, the victim attempted to leave but one of the defendants fatally shot him as he drove away.[85] The Supreme Court affirmed the jury's conclusion that the homicide was a natural and probable consequence of the verbal challenge.[86]

Medina explained that the implied malice element of a "natural and probable consequence" was one that was "reasonably foreseeable,"[87] whereas *Washington* had construed the requisite risk needed to show implied malice as exceeding the "reasonably foreseeable" standard. In *Washington,* implied malice did not appear simply because death/serious injury "was a risk reasonably to be foreseen and that the robbery might therefore be regarded as a proximate cause of the killing;"[88] implied malice required that the act involve "a high degree of probability that it will result in death."[89] Under this former standard, "the defendant or his confederate must know [the provocative] act has a 'high probability' not merely a 'foreseeable possibility' of eliciting a life-threatening response from the third party.[90] The

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[82] Nieto Benitez, 4 Cal.4th 91, 96. *Washington* reversed the conviction rather than remand for a new trial that would apply the new rule.

[83] 46 Cal.4th 913 (2009).

[84] Medina, 46 Cal.4th 913, 916–17.

[85] *Id*.

[86] *Id*. at 920–22.

[87] *Id*. at 920.

[88] Washington, 62 Cal.2d 777, 781.

[89] *Id*. at 782, quoting People v. Thomas, 41 Cal.2d 470, 480 (Traynor, J., concurring) (1953).

[90] *In re* Aurelio R., 167 Cal. App. 3d 52, 57.

reasonable foreseeability needed to show proximate causation was not enough to show implied malice.

But *Medina* equated the likelihood of harm needed to show implied malice with the likelihood of harm needed to establish proximate causation. A conclusion that great bodily injury or death was reasonably foreseeable thereby establishes *both* proximate causation and the objective element of implied malice. A perpetrator who acts with knowledge of the danger and conscious disregard is guilty of second degree murder if he kills under these circumstances; if he is subjectively unaware of the danger, he is guilty of involuntary manslaughter.[91] It is now enough that the killing was a risk reasonably to be foreseen.

4. Defendants May Be Held Liable for Consequences Beyond Their Control

The most fundamental area of disagreement in *Washington* concerned indirect causation. As noted, the majority objected to imposing liability for victims' responses.

> In every robbery there is a possibility that the victim will resist and kill. The robber has *little control* over such a killing once the robbery is undertaken as this case demonstrates. To impose an additional penalty for the killing would discriminate between robbers, not on the basis of any difference in their own conduct, but solely on the basis of the response that the robber's conduct happened to induce.[92]

Justice Burke's dissent disagreed as a matter of fact and law. He observed numerous ways that a defendant could exercise control, such as dropping his weapon, not using it, or surrendering.[93] As a matter of law, he observed the law often imposes liability for consequences beyond the offender's control. "A robber has *no* control over a bullet sent on its way after he pulls the trigger." Some victims will jump out of the way; some will be hit. Some will be saved by paramedics and surgeons; some will not.

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91 People v. Butler, 187 Cal. App. 4th 998, 1008–09 (2010).

92 Washington, 62 Cal.2d 777, 781.

93 *Id.* at 790 (Burke, J., dissenting).

The debate resembles the one faced by the United States Supreme Court regarding victim impact statements in capital trials' penalty proceedings. Just as some but not all robbery victims will resist, and those who do will shoot with varying degrees of accuracy, so too will some but not all relatives testify, and those who do will speak with varying degrees of persuasiveness. In 1987, the high court followed a California decision and precluded the admission of such statements because their use for sentencing purposes discriminated among killers based on factors beyond their control.

> We think it obvious that *a defendant's level of culpability depends* not on fortuitous circumstances such as the composition of the defendant's family, but *on circumstances over which he has control*. . . . [T]he fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of the homicide in the first place.[94]

This decision analyzed sentencing as *Washington* had analyzed liability.

Four years later, the high court reversed course and authorized admission of victim impact statements.[95] The Court held juries could consider evidence concerning not only the offender's subjective blameworthiness but also the crime's objective harm, as the criminal law had long based liability on such harm, even when it was beyond the intent, control or even awareness of the offender.[96]

Post-*Washington* cases also imposed murder liability based on victims' reactions beyond the felon's control. The Supreme Court affirmed a felony-murder conviction where the defendant gave methyl alcohol to a victim who drank it and died.[97] The court of appeal likewise affirmed felony-murder convictions where a victim suffered a fatal heart attack during the

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94 Booth v. Maryland, 482 U.S. 496, 505, n.7 (1987), quoting People v. Levitt, 156 Cal. App. 3d 500, 516–17 (1984) (italics added).

95 Payne v. Tennessee, 501 U.S. 808, 819 (1991).

96 *Id.* at 819; see also at 835–36 (Souter, J., concurring) ("Criminal conduct has traditionally been categorized and penalized differently according to consequences not specifically intended, but determined in part by conditions unknown to a defendant when he acted.").

97 Mattison, 4 Cal.3d 177, 180–81.

robbery.[98] All these defendants were thus guilty of murder "solely on the basis of the response that the [felon]'s conduct happened to induce."[99] The cases thus confirmed the traditional rule that a defendant "takes his victim as he finds him."[100]

The California Supreme Court in *Roberts* extended this rationale beyond cases where the victim's medical reactions led to his own death. *Roberts* followed the logic of the *Washington* dissent rather than that of the *Washington* majority. That the *Roberts* defendant had no control over his victim's going into shock after being stabbed did not preclude liability for the ensuing stabbing.[101] *Roberts* approvingly cited *Wright*,[102] where the defendant was liable for the homicide that occurred when she shot at a driver who then lost control of his vehicle and killed a pedestrian. Some drivers might have been able to retain control of their automobile, whereas others would lack that ability. The shooter's non-control over the driver's subsequent conduct posed no barrier to liability. *Roberts* likewise cited *Fowler*, where the driver was also an innocent instrumentality of death, and proximate causation (and liability) lay with the defendant, who had no control over whether the driver would see the victim and rescue him, or not see him and inflict the fatal blow.

Medina expressly considered the victim's potential response in evaluating the natural and probable consequences of the defendant's conduct. Whether death was a natural and probable consequence (as required to show implied malice) depended on not only the direct risk posed by the defendant's conduct but also the indirect risk inherent in the victim's response. The *Washington* majority had held that malice appeared where defendants "initiate gun battles," as that posed a direct danger to life. But the majority refused to find malice when the robber did not initiate, attributing the gunfire to the victim who fired first. Notwithstanding the foreseeability of death, the Court rejected murder liability for a felon's conduct that *would not have led to death but for the victim's reaction*.

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98 People v. Hernandez,169 Cal. App. 3d 282 (1985); People v. Stamp, 2 Cal. App. 3d 203 (1969).

99 Washington, 62 Cal.2d 777, 781.

100 Stamp, 2 Cal. App. 3d 201, 211.

101 Roberts, 2 Cal.4th 271, 321.

102 363 So.2d 617 (Fla. Dist. Ct. App. 1978).

But *Medina* broadened the requisite natural and probable consequence to encompass not only the offender's act but also the victim's response. "[I]t was or should have been reasonably foreseeable to these gang members that the violence would escalate even further *depending on Barba's response to their challenge*."[103] This followed from *Sanchez*'s holding that proximate cause could lie with the defendant, even though his actions would not have caused death but for his antagonist's response.[104] The Supreme Court expressly connected this logic to the provocative act doctrine: "The danger addressed by the provocative act doctrine is not measured by the violence of the defendant's conduct alone, but also by the likelihood of a violent response."[105]

The evaluation of natural and probable consequences must encompass direct and indirect consequences. A defendant who falsely shouts "Fire!" in a crowded theater endangers life, not directly, through the emission of breath, but indirectly, by creating the probability that a second person will react by fatally trampling a third. So long as the shouter perceives the danger, he acts with malice. The same result must obtain when someone shouts "Robbery!" or "This is a holdup!" The indirect danger to victims is at least as great.

Roberts rejected *Washington*'s claim that it is unfair to impose murder liability based on a response beyond the defendant's control. Because victim resistance is a predictable response to violent conduct,[106] the defendant properly bears responsibility for all its natural and probable consequences.

B. THE DEMISE OF *GILBERT*'S REASONABLE RESPONSE REQUIREMENT

Gilbert further reduced the likelihood of felons' murder liability for intermediary homicides, as the case appeared to reject liability unless the victim's response was reasonable. "[T]the victim's self-defensive killing or the police officer's killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for

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103 Medina, 46 Cal.4th 913, 927 (italics added).

104 Sanchez, 26 Cal.4th 834, 846–48, citing People v. Kemp, 150 Cal. App. 2d 654, 659 (1957).

105 Gonzalez, 54 Cal.4th 643, 657.

106 People v. Thomas, 53 Cal.4th 771, 813 (2012).

it is a reasonable response to the dilemma . . . ."[107] The decision hinted that an unreasonable response would be an independent variable.

Not only did *Gilbert* appear to hold the response must be reasonable for the felon to be liable, it also appeared to describe which responses are — and are not — reasonable. Because the *Gilbert* trial preceded *Washington's* rule requiring a provocative act as a basis for malice, the jury was not instructed that it needed to base malice on the shooting rather than just impute it from the robbery. The missing instruction "withdrew from the jury the crucial issue of whether the shooting of Weaver was in response to the shooting of Davis or solely to prevent the robbery." Retrial was thus needed for the jury to find a malicious act, but the quoted sentence appeared to hold that unlike a homicide committed by an officer in response to a felon's shooting, which could support the felon's murder liability, a homicide committed "solely to prevent a robbery" could not.

More than a decade later, the Court minimized the significance of the responder's reasonableness in *Pizano v. Superior Court*.[108] Two men robbed a home and took a resident hostage, and the neighbor, not seeing the hostage, fatally shot him in an attempt to foil the robbery.[109] The defense claimed that the neighbor's motivations in shooting "solely to prevent the robbery" precluded murder liability under *Gilbert*.[110] But the Court accepted the people's argument that "whether a killing was 'in reasonable response' to the malicious conduct should be treated as 'an objective proximate cause determination, and not a subjective response determination.' "[111] *Pizano* thus denied that the response needed to be reasonable for the felon to be liable.[112]

But if *Pizano* retreated from *Gilbert*'s apparent insistence on reasonableness, it confirmed that liability would ordinarily depend on the intermediary's subjective motivation: whether he killed in response to "the felon's additional malicious conduct" or just "the felony itself."[113] Murder

107 Gilbert, 63 Cal.2d 690, 705.
108 21 Cal.3d 128 (1978).
109 *Id.* at 132.
110 *Id.* at 137.
111 *Id.*
112 *Id.* at 138.
113 *Id.*

liability required not just that the defendant commit a malicious act (and proximately cause death), it required that the act — rather than the felony — be the precise proximate cause of death.[114] *Pizano* concluded that the defendant's taking a hostage was the proximate cause of the victim's death even if the intermediary's motive was to prevent a robbery, because the defendant placed that victim in harm's way.[115]

Roberts further undercut any possible "reasonableness" requirement, as the intermediary could not reason at all.[116] What mattered simply was whether the defendant proximately caused the victim's death, i.e. whether death was a natural and probable consequence.

The court of appeal expressly rejected a reasonable response requirement in *People v. Gardner,*[117] where one drug dealer shot a second, which prompted a third to shoot in response.[118] *Gardner* recalled *Lewis*[119] and *Fowler*,[120] and then *Pizano* and *Roberts*, in holding the "reasonable response" requirement was a "shorthand phrase" for the element of proximate causation.[121] *Gardner* did not distinguish between killing to prevent a homicide or to prevent a robbery; the defendant could be liable whenever death was a natural and probable consequence of his act.[122]

The decision in *People v. Schmies*[123] further linked defendant's initial misconduct with the lethal outcome, and reduced the likelihood that an intervening variable would be "independent" and break the causal chain. The defendant fled from a traffic stop, generating a pursuit that ended with a fatal collision between an officer's car and a bystander's.[124] The defendant wished to introduce the Highway Patrol's pursuit policies to show the officer acted unreasonably, but the court found that the officer's

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114 *Id*. at 139.

115 *Id*.

116 Roberts, 2 Cal.4th 271, 321.

117 37 Cal. App. 4th 473 (1996).

118 As in *Sanchez*, 26 Cal.4th 834, it was uncertain who fired the fatal shot. Gardner, 37 Cal. App.4th 473, 475.

119 124 Cal. 551 (1899).

120 178 Cal. 657 (1918). It was the first time in the three decades since *Gilbert* that a published decision analyzed *Fowler* with regard to this issue.

121 Gardner, 37 Cal. App. 4th 473, 476–81.

122 *Id*. at 480–81.

123 44 Cal. App. 4th 38 (1996).

124 *Id*. at 43.

noncompliance would not preclude liability: "[T]o exonerate defendant it is not enough that the officer's conduct must be *unreasonable*; rather it must be sufficiently extraordinary as to be *unforeseeable*."[125]

Schmies thus offered a *Gilbert*-like bank robbery hypothetical that imposed murder liability on the defendant even if the guard's response was unreasonable. Like an officer's overly aggressive chase, a victim's shooting at an armed robber is not "so extraordinary that it was unforeseeable, unpredictable and statistically extremely improbable."[126]

The Supreme Court expressly endorsed the view that breaking the causal chain required not just unreasonableness, but unforeseeability;[127] *Gilbert*'s "reasonable response" was indeed a "shorthand phrase" for "objective proximate cause" or "natural and probable consequence."[128] To break the causal chain and absolve the defendant of liability, the intermediary's response had to be an "extraordinary and abnormal occurrence."[129] Foreseeability was enough to support homicide liability: "If proximate causation is established, the defendant's level of culpability for the homicide in turn will vary in accordance with his criminal intent."[130]

Defendants can no longer evade liability for their conduct's natural and probable consequences by citing intermediaries' unreasonableness. A defendant whose methamphetamine production started a fire proximately caused the deaths of two firefighting pilots who crashed trying to extinguish the fire, even though (1) one pilot's blood-alcohol count exceeded FAA standards; (2) the pilot failed to make required radio contact; (3) the plane was negligently maintained.[131] "The relevant question is whether, when recklessly starting the forest fire, [defendant] Brady could reasonably anticipate that aircraft would be summoned to extinguish the fire and that a fatal collision might result."[132] By contrast, if the pilot intentionally caused the crash (as if Fowler intentionally ran over his victim), that would

125 *Id.* at 52 (italics added).

126 *Id.* at 56.

127 People v. Crew, 31 Cal.4th 822, 847 (2003).

128 Gardner, 37 Cal. App. 4th 473, 479.

129 Cervantes, 26 Cal.4th 860, 871, quoting People v. Armitage, 194 Cal. App. 3d 405, 420 (1987).

130 *Id.* at 872 n.15.

131 People v. Brady, 129 Cal. App. 4th 1314, 1331–32 (2005).

132 *Id.* at 1334.

be so unforeseeable as to relieve the defendant of liability — and impose it on the "intermediary" who directly caused death.[133]

Just as the law no longer holds that unreasonable responses are independent intervening variables, it also no longer deems unreasonable a victim's resistance to a robbery. The law at the time of *Washington* and *Gilbert* held, "Any civilized system of law recognizes the supreme value of human life, and excuses or justifies its taking only in cases of apparent absolute necessity."[134] It was permissible to kill to prevent only felonies that presented a danger of great bodily harm.[135] *Gilbert* could therefore distinguish killings to prevent death from killings to prevent a robbery.

But the Supreme Court soon clarified that although the law forbade killing *to prevent the loss of property*, it permitted killing *to prevent a robbery*. A homeowner could not set up a spring gun to prevent a burglary when the resident was away because there was no risk of physical harm to the absent burglary victim.[136] But forcible and violent crimes like robbery or rape created a presumption that the victims were at risk for death or great harm.[137] If a gun-waving robber demanded money, the clerk could legitimately choose to kill the robber and eliminate the risk to himself rather than desist and possibly increase it. Victims could doubt a robber's promise that they could avoid harm by complying with the robber's demands, and did not need to expose themselves to added danger by giving the robber "the courtesy of the first shot."[138] As the Supreme Court later quoted from a Florida case, "When an opportunity arose to get the 'drop' on the robbers, the proprietor was entitled to act upon it in resistance of the robbery."[139]

Legislation reified this shift. A 1984 law created a presumption that a resident who used force against an unlawful and forcible intruder acted

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133 Cervantes, 26 Cal.4th 860, 874; Sanchez, 26 Cal.4th 834, 869; Brady, 129 Cal. App. 4th 1314, 1334 n.11.

134 People v. Jones, 191 Cal. App. 2d 478, 482 (1961).

135 *Id*. at 481.

136 People v. Ceballos, 12 Cal.3d 470, 478–79 (1974).

137 *Id*. at 475.

138 People v. Reed, 270 Cal. App. 2d 37, 45.

139 Kentucky Fried Chicken v. Superior Court, 14 Cal.4th 814, 825 (1997), quoting Schubowsky v. Hearn Food Store, Inc., 247 So.2d 484 (Fla. Dist. Ct. App. 1971).

under a reasonable fear of imminent peril.[140] As a burglary victim is presumed to have a need for self-defense, a fortiori, so does a robbery victim. The Supreme Court thus relied on post-*Washington* authorities to conclude that robbery victims' "resistance was in the public interest even where it resulted in harm to third parties."[141] Resistance to a violent felony now is not only reasonably foreseeable, it is reasonable.

C. THE REJECTION OF *WASHINGTON–GILBERT*'S PREMISES RESTORED THE STATUS QUO ANTE

Washington and *Gilbert* were historical aberrations. In rejecting murder liability for an armed robber who pointed a gun at his victim and proximately caused death, the Court did more than disapprove *Harrison*; it rejected the prior law on the five major questions described above. The following decades thus merely restored the status quo ante.

Washington held a defendant acts with malice when he "initiates" a gunfight, but pointing a gun at the victim was not enough.[142] In holding otherwise, the Supreme Court did not invent a new position but relied on a 1923 precedent.[143] In each case the defendant brandished a firearm in apparent violation of Penal Code section 417.[144] Even though the defendant did not point the gun at the victim, there was nonetheless evidence from which the jury could have found implied malice.[145] *Washington*'s holding that even pointing a gun at the victim could not establish implied malice was a temporary aberration.

Similarly aberrational was *Washington*'s conclusion that the felony-murder rule applied only if the killing occurred to further the felony.[146] The Supreme Court had earlier rejected a defendant's contention that felony-murder liability attached only when the killing occurred "in pursuance of," "while committing," or "while engaged in" the felony.[147] To the

140 People v. Hardin, 85 Cal. App. 4th 625, 633 (2000).

141 Kentucky Fried Chicken, 14 Cal.4th 824, citing Yingst v. Pratt, 220 N.E.2d 276 (Ind. 1996).

142 Washington, 62 Cal.2d 777, 782.

143 *People v. Hubbard*, 64 Cal. App. 2d 27 (1923).

144 Nieto Benitez, 4 Cal.4th 91, 105; Hubbard, 64 Cal. App. 2d 27, 37.

145 Hubbard, 64 Cal. App. 27, 33, 37.

146 Washington, 62 Cal.2d 777, 781.

147 People v. Chavez, 37 Cal.2d 656, 669 (1951).

contrary, felony-murder liability attached so long as the felony and the homicide were part of a "continuous transaction."[148] The Court's recent "logical nexus" requirement merely restored the prior law.[149]

The *Chavez* decision also indirectly supports the conclusion that the pre-*Washington* felony-murder rule encompassed both contemporary purposes: the deterrence of inadvertent killings during felonies and deterrence of the felonies themselves. The people's evidence showed Chavez killed after committing a burglary and/or rape, whereas Chavez contended he killed intentionally but in a heat of passion.[150] Therefore, when the Court justified a broad application by asserting that the felony-murder rule "was adopted for the protection of the community and its residents,"[151] it was referring to the protection provided, not by deterring inadvertent killings, but by the deterrence of dangerous felonies.

Especially aberrational was *Washington*'s objection to imposing liability on defendants for the conduct of third parties over whom they had little control.[152] Obviously, the *Fowler* defendant had no control over whether the driver ran over Duree's body or avoided it. Accordingly, *Roberts* reflected the prior rule that homicide liability required only proximate causation, not control over the direct cause.[153]

Finally, prior to *Gilbert*, the Supreme Court had required only foreseeability, not reasonableness, in determining whether responsive conduct was a dependent or independent intervening cause. Just one year earlier, the Court observed, "Even assuming that the officers as reasonable and prudent persons should have been aware of the alleged surrender, it was reasonably foreseeable that during the sudden terror created by the defendant's behavior the officers might act imprudently."[154] A responding party's "mere negligence . . . is no defense even though it is the sole cause of death because it is a foreseeable intervening cause."[155]

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148 *Id.* at 670.

149 Dominguez, 39 Cal.4th 1141, 1162.

150 Chavez, 37 Cal.2d 656, 665, 667.

151 *Id.* at 669.

152 Washington, 62 Cal.2d 777, 781.

153 Roberts, 2 Cal.4th 271, 321.

154 People v. Mitchell, 61 Cal.2d 353, 362 (1964).

155 People v. McGee, 31 Cal.2d 229, 240 (1947).

The Supreme Court once again recognizes that (1) the felony-murder rule is designed to deter the commission of felonies; (2) pointing (or even brandishing) a gun may show implied malice; (3) the felony-murder rule covers all homicides where there is a logical nexus between the felony and the homicide; (4) offenders may be liable for harms beyond their control; and (5) unreasonable but foreseeable responses do not break the chain of causation. Ironically, reliance on the provocative act doctrine has expanded as its logical foundations have collapsed.

III. THE SHIFT IN PENAL PRIORITIES

A. THE TENSION BETWEEN SUBJECTIVE CULPABILITY AND OBJECTIVE DANGER IN DETERMINING LIABILITY

The past half-century has seen the erosion of not just the specific premises underpinning *Washington* and *Gilbert* but the philosophical zeitgeist that generated it. The criminal law has long tried to balance two competing priorities. As the Court explained in 1884, criminal punishment could seek to protect "personal security and social order" or to make "an accurate discrimination as to the moral qualities of individual [defendant's] conduct."[156] These aims may conflict regarding punishment for intentional conduct that produces unintended but foreseeable harms. Should the law punish defendants only for their subjectively intended consequences, or also for objectively foreseeable ones?

Each position enjoys support,[157] and the Supreme Court has oscillated between them.[158] Receiving support from the recently published Model Penal Code, the subjectivist model neared its apex in the 1960s. The Court modified doctrines that had enhanced public safety by deterring dangerous behavior, and instead determined liability with an almost exclusive focus on the offender's mental state.[159]

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156 People v. Blake, 65 Cal.275, 277 (1884).

157 Compare Méndez, *supra* note 7, at 245–50 (2010) with Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*, 38 U.S.F. L. Rev. 261, 263–68 (2004).

158 *See* Mitchell Keiter, *How Evolving Social Values Have Shaped (And Reshaped) California Criminal Law*, 4 Cal. Legal Hist. 393 (2009) *(Evolving Values)*.

159 *Id.* at 404–20.

The felony-murder rule was one such doctrine. In the 1950s, the Court endorsed a broad construction, observing, "The statute was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker."[160] But the Court constricted the doctrine in *Washington* by requiring a felon's direct causation.

The Court further limited the doctrine four years later in *People v. Ireland*.[161] Before *Ireland*, a defendant who assaulted the victim with a dangerous weapon in a manner endangering life, and did so without justification or mitigation (e.g. heat of passion), would be guilty of murder if the victim died; the law imposed liability for the foreseeable if unintended consequence of death.[162] The rule deterred the dangerous condition that naturally and probably led to death. But citing *Washington*'s dictum about constraining felony-murder liability, *Ireland* barred reliance on the doctrine to impose murder liability for a fatal assault, as the rule would prevent the jury from considering the defendant's (subjective) diminished capacity defense.[163] The Court further limited the felony-murder rule in *People v. Wilson*,[164] where it barred application of the (first degree) felony-murder rule for the section 189 felony of burglary where it was committed for purpose of assault.

The Court revised other doctrines to limit liability for unintended fatal consequences. Perhaps the best example was the very issue that presented the tension between promoting "personal security" and ensuring "an accurate discrimination" of the offender's moral qualities: voluntary intoxication.[165] The law initially had imposed full accountability on the offender for the consequences of his conduct, notwithstanding his absent rational faculties, which he himself had chosen to abandon.[166] But critics argued the fault lay

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160 Chavez, 37 Cal.2d 656, 669.

161 70 Cal.2d 522 (1969).

162 Jackson v. Superior Court, 62 Cal.2d 521, 526 (1965) cited in Ireland *at Forty, supra* note 7, at 28 (2008).

163 Ireland, 70 Cal.2d 522, 539. Actually, the quoted *Jackson* language appeared to permit the defendant to introduce evidence (like diminished capacity) that would mitigate the homicide to manslaughter.

164 1 Cal.3d 431 (1969).

165 Blake, 65 Cal. 275, 277.

166 "He must be held to have purposely blinded his moral perceptions, and set his will free from the control of reason — to have suppressed the guards and invited the mu-

not with the drinker but the drink, which "robbed you of your mind, your freedom, your very self,"[167] and the Supreme Court expanded the exculpatory effect of extreme intoxication.[168] The debate mirrored the felony-murder debate: did the inebriate (like the felon) deserve murder liability because he intentionally "set in motion a chain of events [where the homicide] was the natural result,"[169] or should he avoid murder liability because, having commenced the crime, he "has little control over" its fatal conclusion?[170]

After crime rose substantially in the decade after *Washington,* the pendulum swung back to a more public safety–oriented philosophy.[171] The public (and the Legislature) abolished the diminished capacity defense.[172] The Court tempered its efforts to rein in the felony-murder rule; in addition to the changes described in Part II, the Court expressly overruled *Wilson* in part on public safety grounds.[173] And the Legislature abolished voluntary intoxication as a defense to implied malice murder.[174] In sum, there was more inclination to punish offenders for the unintended but foreseeable consequences of their intended acts.

B. (MISTER) *WASHINGTON* GOES TO *SMITH:* HOW THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE SUPERSEDED *WASHINGTON*

Furthering this trend was the natural and probable consequences doctrine (NPC), which holds an aider and abettor (or coconspirator) liable for not

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tiny; and should therefore be held responsible as well for the vicious excesses of the will, thus set free, as for the acts done by its prompting." Roberts v. People, 19 Mich. 401 (1870).

167 Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of The Intoxication Defense*, 87 J. Crim. Law & Criminology 482, 490 (1997), quoting Lawrence M. Friedman, Crime and Punishment in American History 148 (1993).

168 A defendant could introduce evidence showing that his intoxication precluded his forming a specific intent to kill, and thereby mitigate his homicide to involuntary manslaughter. People v. Mosher, 1 Cal.3d 379, 391 (1969); People v. Gorshen, 51 Cal.2d 716, 733 (1959).

169 Harrison, 176 Cal. App. 2d 330, 345.

170 Washington, 62 Cal.2d 777, 781.

171 *Evolving Values, supra* note 158, at 420–21.

172 *Id.* at 428.

173 People v. Farley, 46 Cal.4th 1053, 1120 (2009): "Individuals within any type of structure are in greater peril from those entering the structure with the intent to commit an assault, than are individuals in a public location who are the target of an assault."

174 *Evolving Values, supra* note 158, at 425–27.

only the planned crime but also any other committed by the perpetrator that is its natural and probable consequence.[175] The doctrine recognizes the special dangers posed when multiple offenders combine to commit a crime, and thus it developed in conspiracy law as "a protection to society, for a group of evil minds planning and giving support to the commission of a crime is more likely to be a menace to society than where one individual alone sets out to violate the law."[176] Like extreme intoxication, the use of a partner can override an individual's capacity to maintain control over the course of events.[177]

The case that most extensively reviewed the doctrine involved a defendant who sent several armed agents to obtain information from the victim "at any cost."[178] But instead of obtaining information, the agents killed him.[179] Although the homicide frustrated rather than furthered the object of the conspiracy by eliminating the source of information, the defendant was convicted of not only conspiracy to commit an aggravated assault but also first degree murder.[180] Following the policy that "conspirators and aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion," the court of appeal affirmed, because "a homicide result[ing] from a planned interrogation undertaken 'at any cost' by armed men confronting an unwilling source is unquestionably the natural and probable consequence of that plan."[181] In other words, if the defendant had wanted to be judged on his own conduct, he should have interrogated the victim himself. By enlisting others, he ran the risk that they would extend the assault beyond his limited design.

The case cited *Washington*, and both appeared to distinguish the propriety of holding a defendant liable for homicides committed by an

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175 See Kimberly R. Bird, *The Natural and Probable Consequences Doctrine: "Your Acts Are My Acts!,"* 34 W. St. U. L. Rev. 43 (2006).

176 People v. Welch, 89 Cal. App. 18, 22 (1928).

177 "[W]hen an accomplice chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts,' and forfeits her personal identity." Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 Hastings L.J. 91, 111 (1985).

178 *People v. Luparello*, 187 Cal. App. 3d 410, 443 (1986).

179 *Id*. at 419.

180 *Id*. at 419–20.

181 *Id*. at 438, 443.

accomplice with the impropriety of such liability for homicides committed by a (resisting) *victim*. But the distinction is not above question. In both cases, the homicidal conduct may be undesired, unplanned, and contrary to the defendant's purpose (i.e. killing the victim prevented the discovery of information, just as the *Washington* victim's killing a robber impeded the crime). But it is also reasonably foreseeable. If the goal of deterring foreseeable harms supports liability for a defendant when his cofelon departs from the plan and shoots the clerk, why should the defendant not be just as liable when the clerk shoots the cofelon? One answer is that the NPC rule serves to deter criminal combinations, so criminals bear special risks for using partners, and receive tacit "rewards" for acting alone. By contrast, one would think, section 189 felonies cannot be committed without a victim. But the same logic could apply for felons who commit crimes like burglary, arson or train-wrecking when no one is present to reduce the risk of a resistance that endangers bystanders. And the law could similarly reward robbers who commit their crimes under conditions minimizing risks to bystanders. If there is less risk that a victim's resistance will endanger bystanders during times when there are few if any customers than one committed during a bank's peak hours, why should the law shield the robber from liability for the foreseeable consequences of the latter danger?

Medina showed how an accomplice and victim could combine to escalate a dangerous conflict.[182] The defendant challenged the victim about his gang affiliation; when the victim responded, a fight ensued that ended in fatal gunshots.[183] The Supreme Court observed that the natural and probable consequence derived from the *combination* of the initial challenge and the victim's answer:

> Even if the three aggressors did not intend to shoot [the victim] when they verbally challenged him . . . it was . . . reasonably foreseeable . . . that the violence would escalate further depending on [the victim's] response to their challenge. . . . [R]etaliation was likely to occur and . . . escalation of the confrontation to a deadly level was reasonably foreseeable. . . .

182 46 Cal.4th 913.

183 *Id*. at 917.

The *Washington* distinction between liability for homicides directly committed by an accomplice and non-liability for homicides directly committed by the victim is not so stark, especially in cases where it is unclear who fired the fatal shot.[184]

The Court's decision in *People v. Smith* further blurred the distinction between cases supporting liability based on an accomplice's escalating the violence and cases opposing liability based on the victim's escalation. The defendant's brother had joined a competing gang, and to leave the gang he needed to be "jumped out" (beaten).[185] Defendant decided to attend (with armed colleagues) to ensure his brother was not hurt too much, but they agreed they would not shoot unless shot at first.[186] The beating escalated to an exchange of gunfire, which killed the defendant's cousin and friend.[187]

The Court held that substantial evidence supported the conclusion that the defendant aided and abetted the crimes of disturbing the peace and assault or battery, of which the fatal shooting was a natural and probable consequence.[188] Although the rival gangs were normally enemies, they combined to stage the jump-out, and the deaths were a natural and probable consequence. This supported the defendant's liability for murder, even if the jury could not identify the actual killer, so long as it concluded that whoever it was acted with malice.[189]

Smith demonstrates how much the law has changed since *Washington*. Both cases involved a defendant who participated in a crime where an antagonist's fire killed the defendant's colleague. Washington's cofelon committed an armed robbery by directly pointing a gun at the victim, but the Court rejected liability because he had "little control" over the victim's response.[190] Smith committed lesser crimes (disturbing the peace and assault or battery) and the evidence did not establish whether he brandished his gun before the rival gang began shooting, after it did, or not at all.[191] And whereas the *Washington* victim's fire was in response to the robber's

184 *See, e.g.,* Sanchez, 26 Cal.4th 834.

185 People v. Smith, 180 Cal. Rptr. 3d 100, 103-05 (2014).

186 *Id.* at 5.

187 *Id.* at 6.

188 *Id.* at 8–9, 17, 19.

189 *Id.* at 19.

190 Washington, 62 Cal.2d 777, 781.

191 Smith, 180 Cal. Rptr. 3d at 105.

pointing the gun at him, the *Smith* evidence did not indicate the rival gang shot in self-defense or with justification. But it was evident that Smith had no more control over his antagonists' shooting than Washington had over the robbery victim's. Nearly a half-century after *Washington*, the California Supreme Court endorsed murder liability "solely on the basis of the response by others that the [criminal]'s conduct happened to induce."[192]

IV. HOW THE PROVOCATIVE ACT DOCTRINE UNDULY RESTRICTS LIABILITY

The Supreme Court has tried to minimize the significance of the provocative act doctrine, explaining that it is not a special form of murder, just a shorthand description for homicides committed through an intermediary. The Court has insisted that categorizing some intermediary killings as "provocative act" homicides does not matter, because all homicides ultimately depend on the proximate causation–times–*mens rea* formula. "[W]hether or not a defendant's unlawful conduct is 'provocative' in the literal sense when it proximately causes an intermediary to kill through a dependent intervening act, a defendant's liability for the homicide will be fixed in accordance with his mens rea."[193] Yet the doctrine's results often diverge from those produced by the *Fowler* formula.

Sometimes this occurs just due to the complicated nature of the doctrine. Trial judges must adjust the instruction(s) to accommodate the specific facts of the case, and with dozens of possible adjustments to make, there will be occasional errors. On other occasions, the instruction does not accommodate an unusual fact pattern, so a defendant may evade liability. The doctrine does not appear to support murder liability for two defendants for the same homicide unless they are accomplices — which is why *Sanchez* could produce two first degree murder convictions only through bypassing the doctrine.[194] Similarly, the prescribed instruction does not currently accommodate the event (as in *Sanchez*) that the direct cause is indeterminate. No instruction addresses the event that an intermediary

192 Washington, 62 Cal.2d 777, 781.

193 Cervantes, 26 Cal.4th 860, 872 n.15.

194 Sanchez, 26 Cal.4th 834, 858 (Werdegar, J., concurring).

directly inflicts a serious injury short of death.[195] Most problematically, although the Court has emphasized that the crime is manslaughter where a defendant causes death through an intermediary without malice,[196] no current instruction offers juries that option, thereby creating an undesirable all-or-nothing choice.[197]

Problems may thus arise where the instructions do not appear to address the specific factual circumstances of a case, and even more problems arise when they do — with instructions that mis-describe the law. Current instructions describe the law based on older holdings and ignore more recent developments.

A. THE ELEMENTS OF A PROVOCATIVE ACT

This reliance on outdated law affects the very definition of a provocative act; current instructions demand a "high probability that the act will provoke a deadly response."[198] The "high probability" language derives from a 1953 concurring opinion defining implied malice, cited in *Washington*.[199] The Supreme Court has since made clear that the implied malice instruction should instead provide the "natural and probable consequence" phrase.[200] Although the court of appeal distinguished the two standards in holding there must be "a high probability — not merely a foreseeable possibility — of eliciting a life-threatening response,"[201] the Supreme Court later explained that the "natural and probable consequence" element of implied malice is satisfied upon a showing of a "reasonable foreseeability": "The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough."[202] But the instruction preserves more the restrictive "high probability" standard rejected by the Supreme Court.

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195 *See* People v. Monk, 56 Cal.2d 280, 296 (1961).

196 Cervantes, 26 Cal.4th 860, 872 n. 15; Fowler, 178 Cal. 657, 669.

197 *See* People v. Barton, 12 Cal.4th 186, 196 (1995).

198 CALCRIM 560, 561.

199 Washington, 62 Cal.2d 777, 782, quoting People v. Thomas, 41 Cal.2d 470, 480 (Traynor, J., concurring) (1953).

200 People v. Knoller, 41 Cal.4th 139, 152 (2007).

201 People v. Briscoe, 92 Cal. App. 4th 568, 582 (2001).

202 Medina, 46 Cal.4th 913, 920.

The instruction offers further potential for confusion as the requirement of a "deadly response" also demands that the high probability of fatality derives from the *response*, even though the risk has often (usually) appeared from the provocateur's direct action. In other words, firing a gun during a robbery is dangerous to human life mostly because it could directly kill, and only secondarily because it might prompt responsive fire.[203] The doctrine thus has been turned upside down; as explained by *Washington* and *Gilbert*, the Court originally measured danger with regard only to its direct consequences, ignoring the risk of a response. Now the instruction does the opposite, excluding any consideration of the act's direct risk. But the danger presented by both the act and the response must be measured to judge whether death was a natural and probable consequence.[204]

B. THE "MERE" COMMISSION OF A FELONY

Another major problem is the requirement that the requisite provocative act "must be an act beyond that necessary simply to commit the crime."[205] Nothing supports this artificial prerequisite. Murder liability requires proximate causation and malice.[206] *Washington* simply barred reliance on the felony-murder rule as automatic proof of malice. In other words, the jury needed to determine whether the natural and probable consequences involved death or great bodily harm because the "mere" commission of a felony was *not automatically malicious*.

But the doctrine now holds that mere commission of a felony is *automatically not malicious*. Rather than invite jury consideration of the facts, the rule may foreclose it. Nothing in law or logic supports the idea that death can never be a natural and probable consequence of the "mere" commission of a crime committed through force or threat of force like robbery, rape or kidnapping.[207]

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[203] Nor is it evident from the instruction that if the response prompts return fire from the provocateur that this "third round" will qualify as the requisite "response" to the provocative act, as it will be responding to the victim's legitimate self-defense.

[204] Medina, 46 Cal.4th 913, 927.

[205] CALCRIM 560. This requirement is absent where the crime itself requires express malice (e.g. attempted murder).

[206] Sanchez, 26 Cal.4th 834, 845.

[207] The requirement is especially problematic because it is unclear what is "necessary" to commit a crime.

The requirement is anachronistic in light of the Supreme Court's concluding that the "reasonable foreseeability" element of proximate causation is coextensive with the "natural and probable consequences" element of implied malice.[208] Therefore, the "life-threatening act" required to show malice "is essentially a shorthand definition that *restates* the proximate cause requirement of provocative act murder."[209] If the harm is reasonably foreseeable, the act is by definition sufficiently "life-threatening" to satisfy the objective element of implied malice. Because an act may be "provocative" due to not only its own level of violence but also the likelihood of a violent response, the "mere" commission of a forcible felony presents a sufficient risk from which a jury may find malice. As current law holds that the victim's violent resistance need not have been a "strong probability" but only a "possible consequence,"[210] *Washington*'s observation that "[i]n every robbery there is a possibility that the victim will resist and kill" is no longer an argument against murder liability for intermediary homicides but one that compels its imposition.

C. THE *ANTICK* EXCEPTION

The third problem flows from the Court's decision in *People v. Antick*.[211] When officers confronted Antick and accomplice Bose after an apparent burglary, Bose committed the provocative act of shooting at an officer, who returned fire and killed Bose.[212] Notwithstanding the general rule that felons are vicariously liable for their accomplices' acts, *Antick* precluded vicarious liability for Antick based on Bose's act.[213] This restriction followed the rule that an accomplice's liability derived from that of the direct perpetrator. Antick's liability would thus derive from Bose's, but Bose could not be liable for his own death. This exception to the provocative act liability (an exception to an exception to an exception) is deficient on several levels.

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208 Medina, 46 Cal.4th 913, 920.

209 Gonzalez, 54 Cal.4th 643, 657 (italics added).

210 Cervantes, 26 Cal.4th 860, 871.

211 15 Cal.3d 79 (1975).

212 Antick, 15 Cal.3d 79, 83.

213 *Id.* at 91.

First, it conflicts with *Washington*'s declaration that it does not matter which person is killed.[214] Had Antick and Bose been joined by another accomplice (conveniently alphabetized as "Caldwell"),[215] but only Bose committed a provocative act, Antick would not be liable for Bose's death as it occurred. But if the officer had killed Caldwell instead of Bose, Antick would be liable for Caldwell's death. In other words (as noted in Part I), Antick's liability would "turn upon the marksmanship of victims and policemen."

Second, current instruction mis-describes the *Antick* exception. It informs juries that an element of the crime is that the provocative act must have been committed by the defendant or a surviving perpetrator, presumably to follow *Antick*.[216] But although *Antick* held that a deceased accomplice may not be liable for his own death, he may be liable for the death of a police officer or other innocent victim. So the defendant may be guilty if the decedent's provocative act proximately caused both his own death and that of a non-accomplice.[217]

More importantly, two cases have cast doubt upon *Antick*'s continuing validity. *Antick* relied on a case where the defendant Ferlin hired an arsonist who accidentally died while setting the fire.[218] That decision rejected felony-murder liability, as the Court denied "that defendant and deceased had a common design that deceased should accidentally kill himself."[219] But as noted above, *Billa* addressed the staged traffic accident by distinguishing the fatal *outcome*, which was not part of the felonious design, from the *acts* leading to death, which were. *Billa* limited *Ferlin* and endorsed liability "where one or more surviving accomplices were present at the scene and active participants in the crime."[220] These conditions appeared to describe the *Antick* facts, so the premises underlying its

214 *See* Washington, 62 Cal.2d 777, 781; the complete text of the citation in note 29 *supra* reads: "A distinction based on the person killed, however, would make the defendant's criminal liability turn upon the marksmanship of victims and policemen. A rule of law cannot reasonably be based on such a fortuitous circumstance."

215 *See* People v. Caldwell, 36 Cal.3d 210 (1984).

216 CALJIC 8.12.

217 People v. Garcia, 69 Cal. App. 4th 1324, 1331 (1999).

218 People v. Ferlin, 203 Cal. 587 (1928).

219 *Id.* at 597.

220 Billa, 31 Cal.4th 1064, 1072.

exception, like the *Washington–Gilbert* foundations described in Part II, might be obsolete.

But the most profound problem with the "*Antick* exception" is that the Supreme Court has rejected the very concept that an accomplice's liability derives from the direct perpetrator's.[221] The Court used the facts of Shakespeare's *Othello* to show how an accomplice may be liable for an offense for which the direct perpetrator is not.[222] Under the facts of the play, accomplice Iago might be liable for murder even though perpetrator Othello might be guilty of only manslaughter (because he acted in a heat of passion). The analysis concerned examples where the perpetrator was not liable for the full crime committed by the aider and abettor due to a personal defense that applied only to the perpetrator, e.g. insanity, heat of passion, duress, imperfect self-defense.[223] But as the Court disapproved "any interpretation of *People v. Antick* . . . that is inconsistent with this opinion," the death and consequent unprosecutability of a deceased provocateur could be another such personal immunity from liability.

D. A COMMON STANDARD FOR ALL INDIRECT CAUSATION HOMICIDES

The Supreme Court has embraced the proximate causation–times–*mens rea* formula of determining liability in homicide cases — including those committed by intermediaries who are not literally provoked.[224] But it continues to authorize a different, and in practice more stringent, test for liability where the intermediary is "literally provoked." Why should there be a different test for "literal" provocation?

It is possible that *Washington*'s real objection to murder liability was not that the consequences were *beyond the robber's control* but that they were *within the victim's control*. Unlike some of the preceding intermediary homicide cases, *Washington* involved what was arguably discretionary resistance. Of courses, the *Fowler* driver (like the *Roberts* defendant) did not exercise any choice at all. And other cases did not involve any real

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221 People v. McCoy, 25 Cal.4th 1111 (2001).

222 *Id.*

223 *Id.* at 1121, citing People v. Taylor, 12 Cal.3d 686, 692 n.6, 697 n.13, disapproved on other grounds in People v. Superior Court (Sparks), 48 Cal.4th 1 (2010).

224 *See* Sanchez, 26 Cal.4th 834; Roberts, 2 Cal.4th 271.

choice. Whereas nearly everyone dying a slow and painful death like the *Lewis* victim could be expected to accelerate the process, nearly everyone being shot at would try to avoid the bullets as in *Letner* (and *Wright*), and nearly everyone near a live grenade could be expected to kick it away as in *Madison*, many if not most robbery victims would *not* pull a gun and begin firing.[225] *Washington*'s recognition that "[i]n every robbery there is a *possibility* that the victim will resist and kill"[226] implicitly found such aggressive resistance by a victim was a minority consequence, and thus outside the "normal" course of events. Unlike the other victims, it could be argued that the robbery would not have inevitably caused death in *Washington*, but for the victim's escalating the conflict by firing the first shot.[227]

But post-*Washington* cases have recognized that it is not unreasonable for a robbery victim to use force when most effective rather than place trust in a felon's peaceful intentions. And even if it were, such unreasonableness is reasonably foreseeable, and therefore does not break the chain of causation. If a felon is liable when his robbery causes the victim to suffer a heart attack, a fortiori, the felon may be liable when the robbery causes the victim to resist.

Proximate causation is proximate causation, whether the case involves "literal provocation" or not. The law should provide uniform instruction for all indirect causation homicides.

IV. CONCLUSION: MEND IT OR END IT?

The paradox of the provocative act doctrine is that its reach has expanded as its rationales have collapsed. Assailants are indeed liable for consequences over which they have no control. They are likewise liable when their victims act unreasonably. And if the natural and probable consequences of an

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225 Unlike the *Madison* intermediary, who kicked the grenade toward another innocent bystander, the robbery victims in *Harrison* and *Washington* aimed at their assailants.

226 Washington, 62 Cal.2d 777, 781.

227 *Washington* was less inclined than *Harrison* to find the victim's response "an impulsive act of avoidance" based on "the sudden terror of the moment," as in *Harrison*. The robbery victim in *Washington* was already on alert for the possibility of a robbery when the robber appeared, and the victim thus had already prepared his weapon. *Id.* at 779.

act are lethal (i.e. death is reasonably foreseeable), it establishes both proximate causation and the objective element of malice. Resistance to violent felonies is reasonably foreseeable, so proximate causation — and liability — rest with the felon.

How should these changes affect the application of the doctrine? As the doctrine was specifically conceived to limit the felony-murder rule,[228] one option would return its restrictive effect to that context exclusively; the Supreme Court did not affirm a provocative act murder outside the felony-murder context until 2009.[229] This could prevent undue reliance on a disfavored doctrine, but not otherwise impede the ordinary application of the proximate causation–times–*mens rea* formula.[230]

Another possible reform could limit the doctrine to those cases where a cofelon (rather than an innocent party) dies. The Court has formally denied a meaningful distinction between cofelons and innocent victims. "One may have less sympathy for an arsonist who dies in the fire he is helping to set than for innocents who die in the same fire, but an accomplice's participation in a felony does not make his life forfeit or compel society to give up all interest in his survival."[231] But this argument does not extend to crimes that provoke a self-defensive response like robbery, rape or kidnapping. These felonies are punishable by substantial prison terms, yet killing to prevent their commission is justifiable homicide, for which no sentence is imposed. In other words, a violent felon does forfeit the protection of the law because he may be killed without penalty. If an officer kills to prevent a violent felony, there is no need for a criminal prosecution. But if he misses and kills an innocent person, there is an unjustifiable homicide demanding prosecution. It matters who dies.

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228 Cervantes, 26 Cal.4th 871, 872 n.15.

229 Concha, 47 Cal.4th 653.

230 On the other hand, the Supreme Court has since moved away from its aggressive efforts to limit the reach of section 189's felony-murder rule. In *People v. Wilson*, 1 Cal.3d 431, 440 (1969), the Supreme Court rejected felony-murder liability for a burglary where the intended felony was an assault (which could not by itself support felony-murder liability). Forty years later, the Court concluded it could not narrow the statutorily prescribed reach of section 189, and disapproved *Wilson* for doing so. People v. Farley, 46 Cal.4th 1053, 1117–20 (2009).

231 Billa, 31 Cal.4th 1071.

But abolition may be preferable to piecemeal tinkering. The doctrine has taken half a century to reach its current state through natural evolution, as it expanded to react to new factual circumstances like *Pizano*'s human shield, *Aurelio R.*'s express malice, and *Concha*'s premeditation. A doctrine established as an exception to an exception, designed to confine the reach of the felony-murder rule, has become the default vehicle for imposing liability for intermediary homicides. And due to its imperfect design and instructional lacunae, the doctrine cannot cover every factual predicate to ensure that the desired formula of proximate causation–times–*mens rea* always obtains. The law prescribes the provocative act doctrine to decide liability, except in those cases like *Roberts* and *Sanchez* where it doesn't fit, and trial courts must then haphazardly return to the proximate causation–times–*mens rea* formula, without any guidance from the Supreme Court. Using that formula in every case — as a first resort — will ensure greater consistency and justice in homicide prosecutions.

Washington described a doctrine that is "unnecessary," "erodes the relation between criminal liability and moral culpability," and "should not be extended beyond any rational function that it is designed to serve."[232] Because the proximate causation–times–*mens rea* formula of *Roberts* and *Sanchez* suffices to impose liability for intermediary homicides commensurate with the offender's *mens rea*, the *Washington–Gilbert* provocative act doctrine is unnecessary. Due to loopholes through which some offenders might escape liability, and the lack of a manslaughter option for cases where either the offender kills indirectly while in a heat of passion (voluntary manslaughter), or where the natural and probable consequences of the provocateur's act are lethal but the defendant does not subjectively realize it (involuntary manslaughter), the doctrine erodes the link between liability and culpability. And because the *Washington–Gilbert* doctrine was conceived to limit the reach of the felony-murder rule, it has been extended beyond any rational function it was designed to serve. Although the quotation from *Washington* referred to the felony-murder rule, the quote now describes that case's own creation.

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232 Washington, 62 Cal.2d 777, 783.

THE JUDICIAL GIVE AND TAKE:

The Right to Equal Educational Opportunity in California

REBECCA M. ABEL*

* Law Clerk, U.S. District Court, Central District of California; J.D., UCLA School of Law, 2012; B.A., Brown University, 2007.

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INTRODUCTION

After the U.S. Supreme Court held that education is not a fundamental right under the Equal Protection Clause of the U.S. Constitution in *San Antonio Independent School District v. Rodriguez*,[1] litigants turned to state Equal Protection Clauses to serve as guarantors of educational equality. In subsequent years, some state courts have expanded the content of state-level equal protection doctrine to include students' fundamental right to equal educational opportunity.[2] Central to this doctrine is that the principle of equal opportunity can and should be applied to areas of life where the state government provides services that are integral to the functioning of a democratic society and the opportunities of its citizens.

The California Supreme Court declared education a fundamental right under the state constitution in its 1976 decision in *Serrano v. Priest*.[3] Since then, there has been a surge of state-level education litigation in California, which has shown no signs of slowing. Despite the mounting caselaw, the contours of California students' right to equal education remains unclear. Although the California Constitution creates an enforceable right to "basic educational equality,"[4] the state courts have not succinctly stated the programs, services, resources, or funding necessary to satisfy this right.

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[1] 411 U.S. 1, 33 (1973).

[2] In a frequently cited article on the use of state constitutions to protect individual rights, Justice Brennan encouraged state courts to provide more expansive protections for substantive individual rights than those provided by the federal constitution. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977) ("Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased. This is surely an important and highly significant development for our constitutional jurisprudence and for our concept of federalism."); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986) [hereinafter Brennan, *The Bill of Rights and the States*] (recognizing that state courts have interpreted state constitutional provisions as providing greater protections than similar provisions, including the Equal Protection Clause, found in the federal constitution).

[3] 18 Cal.3d 728 (1976) (en banc).

[4] *See* Butt v. State of California, 4 Cal.4th 668, 681 (1992) ("[T]he state itself has broad responsibility to ensure basic educational equality under the California Constitution.").

California educates a highly diverse population of over 6.2 million students.[5] In recent years, California students have ranked near the bottom in fourth and eighth grade math and reading scores compared to students in other states.[6] Eighty-one percent of Californians believe educational quality is a problem in California's K–12 public schools.[7] Californians are also very concerned about inequities among students based on income, race, and English proficiency.[8] Given the concerns over the quality and equality of education in California, it is imperative to define the scope of the state's duty to provide an education to students. For almost forty years, students, parents, and advocacy groups have turned to California's courts for guidance on the states' educational obligation, yet the caselaw remains equivocal.[9]

This article reviews the thirty-five year history of California education equal protection litigation in an effort to identify what is contained within and excluded from students' fundamental right. This article seeks to answer the question: What constitutes "basic" educational equality in California's public schools? An in-depth review of the case history reveals that California courts oscillated between granting and taking away benefits which affect students' full enjoyment of their right to a basic education. The vacillation is ongoing. Litigants continue to bring challenges under California's Equal Protection Clause, attempting to push the courts to more concretely define the scope of students' fundamental right to education, with variable success.[10] Many of the recent cases are still at the

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[5] *See* National Center for Education Statistics, U.S. Department of Education, NAEP State Profiles: Summary of NAEP Results for California 1990–2013 (last visited Nov. 30, 2014), http://nces.ed.gov/nationsreportcard/states.

[6] *See id.*

[7] *See* Mark Baldassare, et al., *PPIC Statewide Survey: Californians & Education* 20 (2014), *available at* http://www.ppic.org/content/pubs/survey/S_414MBS.pdf.

[8] *See id.* at 17 (finding that a majority of Californians are concerned about teacher shortages in low-income areas, that low-income students are less likely to be ready for college, and that English language learners score lower than other students on standardized tests).

[9] *See* James E. Ryan, *A Constitutional Right to Preschool?,* 94 Cal. L. Rev. 49, 85 (2006) ("If courts are willing, as they should be, to determine whether state constitutions create a right to equal or adequate educational opportunities, they must be committed to defining the content of those opportunities.").

[10] *See* Vergara v. State of California, No. BC484642 (Cal. Super. Ct. filed May 14, 2012); Campaign for Quality Educ. v. State of California, No. RG10524770 (Cal. Super.

trial level or have settled out of court. In pursuing basic educational equal protection challenges, plaintiffs confront the difficulty of developing a cogent legal strategy which relies on the courts' existing jurisprudence while pushing for a robust interpretation of students' fundamental right.

This article suggests that plaintiffs seeking to raise the minimum standard of education necessary to satisfy students' fundamental right should pursue claims left open by the gaps in the courts' existing Equal Protection Clause jurisprudence. Part I explores the education clauses of California's constitution. First, this section provides an introduction to the caselaw under California's constitutional education clauses as well as the case history establishing the state as the entity ultimately responsible for California's education system. Second, this background is necessary to understand the rise of California's Equal Protection Clause, and not the constitutional education clauses, as the guarantor of students' basic equity of educational opportunity. Finally, the article explores the rationales behind the courts' embrace of equal protection doctrine, and the rejection of the substantive rights identified in the education clauses, examining the roles of state judicial power, equal protection policies, and the state's education system.

Whereas Part I examines the role of the California Constitution's education clauses, Part II explores the state's Equal Protection Clause. First, this Part identifies the three key cases that expanded students' right to equal educational opportunity in the last forty years. Because the courts lack an analytical structure to evaluate basic educational equality claims, this article proposes a two-part test to use as a tool for analyzing prior caselaw granting education rights under the Equal Protection Clause, and as a framework to more logically structure future claims, hopefully with a greater likelihood of success. Conversely, the next subpart details the history of state caselaw that contracted students' fundamental right to education, thereby excluding rights and services from the protection of strict scrutiny. Finally, in order to demonstrate the utility of the suggested two-part test, the final section uses three recent cases challenging the provision of basic educational equity in California to demonstrate that a coherent and identifiable structure can help ensure the success of an equal

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Ct. filed July 12, 2010); Robles–Wong v. State of California, No. RG10-515768 (Cal. Super. Ct. filed May 20, 2010); Reed v. State of California, No. BC 432420 (Cal. Super Ct. filed Feb. 24, 2010).

protection claim and perhaps expand it to encompass qualitative claims of educational inadequacy.

I. THE EDUCATION CLAUSES

California's constitution, like many other states', includes two provisions that provide the foundation for education litigation. First, every state, including California, has an education clause in its constitution, which obligates the state to create and maintain a public school system.[11] Second, as introduced in Part I.C and discussed in detail in Part II, the state constitution contains provisions that parallel the federal Equal Protection Clause, which can be used to challenge the inequality of education among students.[12]

A. THE EDUCATION CLAUSES OF THE CALIFORNIA CONSTITUTION

Since its ratification in 1849, the California Constitution has included several clauses relating to the state's role in the education system. Specifically, the education provisions of article IX outline two basic principles. First, the people of California recognize the value and importance of an educated citizenry, and have vowed to protect it. Second, the Constitution makes the

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[11] *See* CAL. CONST. art. IX, §§ 1, 5. Every state constitution includes an education clause, although they vary from state to state in form, scope, and responsibility. *See* William E. Thro & R. Craig Wood, Commentary, *The Constitutional Text Matters: Reflections on Recent School Finance Cases,* 251 ED. LAW REP. 510, 510 (2010). The education clauses from each state constitution are collected in an appendix to Allen Hubsch, Note, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343 (1992).

[12] *See* CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ."); *id.* § 7(b) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens . . . ."); *id.* art. IV, § 16(a) ("All laws of a general nature have uniform operation."). For an overview of Equal Protection Clauses in all fifty states, *see* Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 251–60 (1999). For some examples of other states' Equal Protection Clauses that parallel the federal standard, *see* ILL. CONST. art. I, § 2 ("No person shall . . . be denied the equal protection of the laws"); N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof.").

state, and in particular the Legislature, responsible for the creation, financing, and maintenance of the state's education system.

The Constitution states that "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."[13] This section of article IX, section 1 demonstrates the state's textual commitment to a robust educational program, and the Legislature must use "all suitable means" to carry it out.[14] The California Supreme Court declared that this provision indicates that the citizens of California recognize "the advantages and necessities of a universally educated people as a guaranty and means for the preservation of the rights and liberties of the people."[15]

Since 1849, the California Constitution endowed the Legislature with the responsibility of "provid[ing] for a system of common schools" and ensuring that local school districts offer education free of charge.[16] These basic mandates found in article IX, section 5 create California's free public school system and place it under the control of the state legislature. Separate constitutional provisions set out more specific educational requirements, including the Legislature's appointment of the superintendent of public instruction[17] and State Board of Education,[18] who make the

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13 Cal. Const. art. IX, § 1.

14 In her discussion of state education constitutional provisions, Erica Black Grubb categorizes these clauses into four groups. *See* Erica Black Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 Harv. C.R.–C.L.L. Rev. 52, 66–70 (1974). Grubb places California's education provisions in the second to most protective category, in which the textual commitment to education is very strong. *Id.* at 68. She points to the inclusion of the language "all suitable means," as well as the emphasis on the relationship between education and the exercise of basic rights. *Id.* at 68–69.

15 Piper v. Big Pine Sch. Dist. of Inyo Cnty., 193 Cal. 664, 668 (1924). *See also* Ward v. Flood, 48 Cal. 36, 50 (1874) ("[The] advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is, therefore, a right — a legal right — . . . and as such it is protected, and entitled to be protected by all the guaranties by which other legal rights are protected and secured to the possessor").

16 Cal. Const. of 1849 art. IX, § 3; Cal. Const. art. IX, § 5. *See also* N.J. Const. art. VIII, § 4(1) ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools.").

17 Cal. Const. art. IX, § 2.

18 *Id.* § 7.

executive, administrative, and policy decisions for the school system.[19] In addition, the Constitution directs the Legislature to set up the education finance system,[20] the adoption and distribution of free textbooks,[21] the minimum teachers' salary,[22] and the incorporation and organization of local school districts.[23] These specific provisions provide substance and detail to the primary mandate found in section 5. Via the education clauses of the Constitution, California has inextricably intertwined itself with the educational system, making the state responsible for major aspects of public school structure and governance.

B. LITIGATING EDUCATION RIGHTS UNDER CALIFORNIA'S EDUCATION CLAUSES

Because the education clauses include two textual assurances — that education is an essential right of the people and that the state is responsible for the education system — these constitutional provisions have been the subjects of extensive litigation. Plaintiffs have relied on theses clauses to protect and expand their educational rights.[24] Setting aside a handful of limited successes, California courts have not been willing to set out a minimum level of education necessary to satisfy these constitutional provisions. As discussed *infra* in Part I.C, the courts instead have chosen to use the state's equal protection doctrine to define students' educational rights.

A review of a few key cases is useful to understand the courts' reluctance to rely on these clauses to grant a substantive individual right and their eventual turn to the California Equal Protection Clause to uphold

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[19] As agents of the Legislature, the State Board of Education acts as "the governing and policy determining body," CAL. EDUC. CODE § 33301(a)), and the superintendent of public instruction is vested with all executive and administrative functions, *id.* § 33301(b).

[20] CAL. CONST. art. IX, § 6.

[21] *Id.* § 7.5.

[22] *Id.* § 6.

[23] CAL. CONST. art. IX, § 14.

[24] *See* Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991). For a complete analysis of how the wording of a state education clause can affect a challenge to the school funding system, *see* William E. Thro, *The Role of Language of the State Education Clauses in School Finance Litigation,* 79 EDUC. L. REP. 19 (1993).

students' right to education.[25] The remainder of this section discusses litigation advancing adequacy or equality arguments[26] under the two education clauses: (1) article IX, section 5 which requires the Legislature to provide a free system of public schools,[27] and (2) article IX, section 1 which is a description of the goals and purposes of public schools.[28]

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[25] For a review of caselaw under the education articles in states outside of California, *see* Hubsch, *supra* note 11, at 1336–42; *see also* Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 B.Y.U. Educ. & L.J. 1, 15–18 (1997) (reviewing case history from multiple states brought under the education clauses); Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. Rev. 2241, 2257–69 (2003) (summarizing judicial approaches to interpreting state education clauses).

[26] Historically, education litigation has relied on two distinct approaches. First, in equality suits, plaintiffs assert that all children are entitled to equal educational opportunities or resources. The theory is that equality in resources, money, and opportunities will lead to equal education outcomes, and the analysis involves a comparison between schools or districts in order to measure equality among them. Plaintiffs rely on state equality guarantees extrapolated from state education clauses or on equal protection theories in states where education is a fundamental right. *See* Jared S. Buszin, Comment, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 Emory L.J. 1613, 1618 (2013); Alan E. Schoenfeld, Note, *Challenging the Bounds of Education Litigation: Castaneda v. Regents and Daniel v. California*, 10 Mich. J. Race & L. 195, 222–25 (2004); Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. Rev. 399, 405–11 (2000) (summarizing the history of caselaw relying on equity arguments).

Second, in adequacy suits, plaintiffs argue that schools failed to provide a minimally adequate education as required by the state constitution. Central to these cases is inadequate educational quality, measured in terms of inputs such as teacher quality or curricular resources or outputs such as test scores or dropout rates. *See* Kagan, *supra* note 25, at 2248–55 (describing the types of inputs and outputs courts can use to measure adequacy). In adequacy suits, plaintiffs assert that the state set a particular quality standard and the schools failed to measure up. *See* Cochran, *supra*, at 411–17 (summarizing the history of caselaw relying on adequacy arguments). These two approaches — equality and adequacy arguments — are often combined in one lawsuit. *See* William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & Pol. 525, 534–37 (1998); *see generally* Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions' Education Finance Provisions–Adequacy vs. Equality*, 1991 Ann. Surv. Am. L. 609 (1992) (describing the adequacy and equity approaches to education litigation and arguing that courts often intermingle the two approaches, making it difficult to identify the proper standard to apply).

[27] Cal. Const. art. IX, § 5.

[28] *Id.* § 1.

1. The Undefined Promise of a Free System of Common Schools

Several cases have been litigated under section 5 which requires the Legislature to "provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year . . . ."[29] This clause can be further broken down into two constituent parts: the free school clause and the common schools clause.

The key California case under the free schools clause is *Hartzell v. Connell*.[30] Due to budget shortfalls, a local school district began charging students fees to participate in extracurricular activities, including dramatic productions, musical performances, and athletic teams.[31] After reviewing extensive caselaw establishing the broad purposes of education,[32] the California Supreme Court determined that extracurricular activities are an integral component of public education and that schools cannot charge a fee

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[29] *Id*. § 5. The requirement that the school be kept up "at least six months" has been extended by statute to a minimum of 180 days per school year. *See* CAL. EDUC. CODE § 46200.

[30] 35 Cal.3d 899 (1984).

[31] *Id*. at 902. The school district's program also included a fee-waiver program for students with financial need. *Id*. at 904.

The factual scenario presented in *Hartzell* repeated itself in 2010 as a budget crisis ravaged the state, pushing schools to take unconstitutional measures to support its programs. In *Doe v. State of California*, students alleged that school districts across the state charged illegal fees for educational materials. For example, schools required that students pay for Advanced Placement exams, purchase required workbooks and lab manuals, and buy compulsory physical education uniforms. Complaint at 2, No. BC445151 (Cal. Super. Ct. Dec. 9, 2010), *available at* http://www.schoolfunding.info/news/litigation/CA-ACLUcomplaint.pdf. The complaint sought to enforce the free schools clause of the California Constitution and "ensure that public school districts do not require students to pay fees or purchase assigned materials for credit courses." *Id*. at 18. The students dismissed the lawsuit following the enactment of Assembly Bill 1575, 2012 Cal. Legis. Serv. Ch. 776 (West), which made clear that school fees are illegal and set up a statewide complaint system to identify offending schools. *See* Press Release, *ACLU Wins Fight to Protect Constitutional Right to Free Public Education in California*, ACLU OF SOUTHERN CALIFORNIA, Oct. 1, 2012, https://www.aclusocal.org/aclu-wins-fight-to-protect-constitutional-right-to-free-public-education-in-california.

[32] The *Hartzell* Court examined the role played by education in the state's constitutional scheme, determining that education "prepares students for active involvement in political affairs," "prepares individuals to participate in the institutional structures — such as labor unions and business enterprises," and "serves as a unifying social force." 35 Cal.3d at 907–08.

for student participation.[33] The Court interpreted the free schools clause, holding that "[e]ducational opportunities must be provided to all students without regard to their families' ability or willingness to pay fees or request special waivers."[34] Although the Court relied on the free school clause for its ultimate holding,[35] the language of the decision borrows heavily from equal protection doctrine, signaling the Court's embrace of equality principles as opposed to an interpretation of the education clauses.[36]

In early California case history, some Supreme Court decisions hinted at the possibility that the common schools clause could be a basis for litigating students' right to educational opportunity. In 1893 in *Kennedy v. Miller*, the Court interpreted the system of common schools to "import[] a unity of purpose as well as an entirety of operation, and the direction to

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[33] *Id.* at 911–12.

[34] *Id.* at 913. The Court explained that the waiver provision did not cure the constitutional problem because waiver applications resulted in "stigma" and are a "degrading experience" for needy students and families. *Id.* at 912.

See also Cal. Ass'n for Safety Educ. v. Brown, 30 Cal. App. 4th 1264 (1994) (finding that fees charged by a high school for driver training course violated free school guarantee of the California Constitution because driver training was "educational" in character). *But see* Helena F. v. W. Contra Costa Unified Sch. Dist., 49 Cal. App. 4th 1793, 1800 (1996) (holding state's constitutional obligation to provide free education does not encompass duty to provide schools that are geographically convenient to parent, where district's policy was to temporarily place late enrollees in schools outside of their attendance zone); Arcadia Unified Sch. Dist. v. State Dept. of Educ., 2 Cal.4th 251 (1992) (finding that a statute authorizing charges for school-provided transportation did not violate the free school guarantee because transportation is not an educational activity or an essential element of school activity). A further discussion of the *Arcadia* case and its implications for the California Equal Protection clause can be found at notes 179 to 185 and the accompanying text.

[35] However, a lengthy concurrence to *Hartzell* written by Chief Justice Bird advances an additional support for the holding under the equal protection guarantee of the California Constitution. *See* Hartzell v. Connell, 35 Cal.3d 899, 921–28 (1984) (Bird, C.J., concurring). *See infra* note 176 and accompanying text for a full discussion of the concurrence and its implications for students' basic right to an education in California.

[36] The practice of applying equality principles in education clause litigation is widespread. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 Vand. L. Rev. 101, 139 (1995) ("In a number of other states, as several commentators have observed, emphasis on the analysis of state education clauses has increased during the past decade. But even with this shift in the primary textual basis of the suits, many litigants and courts have continued to look for the old equality-based arguments in the new education-based texts.").

the Legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools within the state."[37] The *Kennedy* Court's reading of this clause suggests that the text could be a vehicle for challenging legislative decisions that result in unequal schools, as any resulting inequality could undermine the school system's unity. Further elaboration on the utility and meaning of the clause came thirty years later in *Piper v. Big Pine School District of Inyo County*,[38] in which the Court ordered a school district to admit a Native American girl into its public schools. The Court reasoned that the California Constitution provides all citizens with the right to attend a system of common schools, consisting of a uniform course of study in which pupils advance from one grade to another and are admitted from one school to another pursuant to a system of educational progression.[39] The Court went so far as to declare that the right to attend a system of common schools is an "enforceable right[] vouchsafed to all who have a legal right to attend the public schools."[40] The Court's rationale in *Piper* suggests that the system of common schools clause could have provided a basis for litigants to contest the adequacy of their public schools.

However, the early hopes for the utility of the common schools clause were dashed by the 1970s. In addition to their equal protection arguments, plaintiffs in California's seminal school finance case, *Serrano v. Priest* (*Serrano I*),[41] alleged that the state's school finance system violated the common

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[37] Kennedy v. Miller, 97 Cal. 429, 432 (1893).

[38] 193 Cal. 664 (1924).

[39] *Id.* at 669.

[40] *Id.*

[41] Serrano I, 5 Cal.3d 584 (1971) (en banc). Part I.C discusses *Serrano I* more deeply. However, a cursory review of the facts will be helpful to better understand its use here. In *Serrano I,* plaintiffs claimed the state's public school financing system violated the Constitution because it was primarily based on wealth generated from local property taxes. *Id.* at 589. Students who attended schools in neighborhoods with lower property tax revenues received fewer educational opportunities than students who attended schools in prosperous areas. *Id.* at 599–600. After determining that education is a fundamental right and classification by wealth is suspect, the *Serrano I* Court applied strict scrutiny and struck down the finance system because it "classifies its recipients on the basis of their collective affluence and makes the quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents." *Id.* at 614.

schools clause because the financing method produced separate systems where each district offered a distinct educational program depending on the district's wealth.[42] Although it cited the *Kennedy* and *Piper* decisions, the *Serrano I* Court went on to hold that the common schools provision does not require equal school spending.[43] The Court found that article IX, section 6, which provides for the levying of school district taxes, controlled the school financing system, and to avoid conflicting interpretations, section 5 should not be construed to apply.[44] The *Serrano I* Court's brief discussion of the clause closed it off to future education litigation, limiting the application of the common schools clause to maintaining basic uniformity and progression of grades throughout the state.[45]

Subsequent cases solidify the demise of the common schools clause as a means to pursue students' basic right to education in California. In *Wilson v. State Board of Education*,[46] plaintiffs challenged the Charter Schools Act (the "Act")[47] under several state constitutional provisions. Plaintiffs maintained that the Act violated article IX, section five because it granted charter schools complete control over essential functions of the education system, thereby abdicating the state's responsibility to maintain a system of common schools.[48] The court rejected the argument, reasoning that although the Act delegated educational functions to charter schools, it did not relinquish any power over the system.[49] The court found that the "curriculum and courses of study are not constitutionally prescribed. Rather, they are details left to the Legislature's discretion. Indeed, they do not

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[42] *Id.* at 595.

[43] *Id.* at 595–96.

[44] *Id.* at 596.

[45] *See* Robles–Wong v. State of California, No. RG10-515768 (Cal. Super. Ct. Jan. 14, 2011) (rejecting funding disparity arguments under the education clauses and citing to *Serrano I* for the proposition that these clauses were considered and dismissed as irrelevant by the Supreme Court). It is notable that in *Serrano I* plaintiff used the education clauses to make equity arguments, contending the school finance system produced disparate district outcomes. Whereas in *Robles–Wong,* the litigants relied on the clauses to make adequacy arguments, asserting that all California students are denied an adequate education in violation of these clauses.

[46] 75 Cal. App. 4th 1125 (1999).

[47] Cal. Educ. Code § 47600, et seq.

[48] 75 Cal. App. 4th at 1135.

[49] *Id.*

constitute part of the system but are merely a function of it."[50] The court interpreted the common schools clause as a broad delegation of power to the Legislature to determine the content of education, not an enforcement mechanism for plaintiffs seeking a declaration of minimum educational rights.[51]

2. The Legislature's Broad Discretion to Promote Educational Goals

Similarly, courts refuse to rely on article IX, section 1 as a basis for defining students' substantive educational rights. Arguably, the language of the section, namely that "the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement,"[52] creates a strong textual basis for declaring that California students have the right to receive a basic education.[53] However, California courts have been unwilling to interpret the provision as an affirmative right to a minimum level of education.[54] Instead, courts have interpreted

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[50] *Id.*

[51] A 2006 case in the California Court of Appeal, *Levi v. O'Connell*, 144 Cal. App. 4th 700 (2006), similarly narrowed the applicability and scope of the common schools clause. There, the mother of an extremely gifted 13-year-old college student sought to require the state to pay for her son's state college education. The court dismissed her claim under article IX, section 5, defining the "system of common schools" as encompassing only "a single standard and uniform system of free public K–12 education," not including college or university grades even for exceptionally advanced students. *Id.* at 708.

[52] Cal. Const. art. IX, § 1.

[53] *See* Thro, *supra* note 24, at 53–40; *see generally* Jensen, *supra* note 25 (arguing that state education clauses should be used as a basis for declaring minimum education rights in conformity with the clauses' textual commitment to education and their degree of specificity).

[54] *See, e.g.,* Serrano v. Priest (*Serrano II*), 18 Cal.3d 728, 775 (1976) (en banc) (refusing to rely on article IX, section 1 to uphold the state's school finance system); Long Beach City Sch. Dist. v. Payne, 219 Cal. 598, 606 (1933) (refusing to rely on article IX, section 1 to invalidate a tax statute that imposed a penalty on school districts that had unpaid taxes); Robles–Wong v. State of California, No. RG10-515768 (Cal. Super. Ct. Jan. 14, 2011) (granting a demurrer without leave to amend on claims under article IX, sections 1 and 5, declaring that the provisions do not create a mandatory duty which can be judicially enforced); Williams v. State of California, No. 312236, slip op. at 3 (Cal. Super. Ct. July 10, 2003), *available at* http://www.decentschools.org/court_papers.php (dismissing plaintiffs' cause of action under article IX, section 1 because it found that the provision did not "confer[] a direct right on a litigant to sue for its enforcement" and the "language of the provision is addressed to the Legislature").

this provision as a grant of broad discretion to the Legislature to determine the programs and services that will further the identified goals.[55] This view of section 1 is in conformity with the courts' emphasis on the state, and in particular the Legislature, as the arbiter of the education system.

Despite the courts' prior unwillingness to rely on the education clauses to set forth a quality standard, a pending case before the California Court of Appeal directly presents the issue to the court. In a joint appeal, *Robles–Wong v. State of California*[56] and *Campaign for Quality Education v. State of California*[57] ask the court to decide: "Does the fundamental right to an education under article IX of the California Constitution entitle students to an education of a qualitative level . . . ?"[58] Appellants assert that California's education clauses, like those in twenty-two other states, provide a legal right to challenge the quality of education provided to California students.[59] Appellants propose that courts rely on the academic content standards developed by the state as the means by which to assess whether the qualitative right is fulfilled.[60] The appeal is fully briefed and awaits the court's decision. Based on the discussion above, precedent does not weigh in appellants' favor. Nonetheless, if appellants can convince the court to establish a qualitative standard under the education clauses, it could affect the future of education litigation in California.

3. The Role of the Legislature to Educate All California Children

Even though courts have been disinclined to impute a substantive right to a basic education into the education clauses, they have frequently relied on them for the proposition that the state, and in particular the Legislature, is

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[55] *See* Cal. Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1528 (1992) (interpreting article IX, section 1 as "plac[ing] a similarly broad meaning upon education" and giving the Legislature broad discretion to define required programs and services).

[56] No. A134424 (Cal. Ct. App. appeal docketed Feb. 1, 2012).

[57] No. A134423 (Cal. Ct. App. appeal docketed Feb. 1, 2012).

[58] Corrected Appellants' Opening Brief at 5, Campaign for Quality Educ. v. State of California, No. A134423 (Cal. Ct. App. July 27, 2012), *consolidated with* Robles–Wong v. State of California, No. A134424 (Cal. Ct. App. July 27, 2012). For a detailed discussion of the trial court's decision on the equal protection claim in *Robles–Wong* and *CQE*, *see infra* Part II.C.

[59] *Id.* at 4, 29–30.

[60] *Id.* at 44–45.

the guarantor of education for California's students. The text of the education clauses[61] and the interpretive caselaw demonstrate that the state has authority over the education system and it delegates to the Legislature the task of defining the content of the educational guarantee. As will be discussed in Part I.C, the state and legislative roles prove key to the courts' decision to rely on the Equal Protection Clause as the thrust of the state's education jurisprudence and to the courts' declaration of education as a fundamental right.

A long history of California caselaw supports the proposition that the ultimate responsibility for education and the operation of the public schools lies with the state, rather than local or municipal governments. As early as 1893, the California Supreme Court declared, "education and the management and control of the public schools [are] a matter of state care and supervision."[62] This notion has been repeated and reaffirmed throughout California's history.[63] Courts ground the state's educational duty in the Constitution, specifically article IX, sections 1 and 5.[64] In reaffirming the supremacy of the state in education matters, courts have gone as far as finding the state liable for education violations at the district level. In *Butt v. State of California,*[65] the California Supreme Court upheld the state's duty to ensure that students in one school district received a full school term. After recounting the case history defining the state's preeminent role in the educational system, the *Butt* Court held that the "State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity."[66]

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[61] *See infra* notes 52 to 73 and accompanying text for a discussion of article IX of the California Constitution, which demonstrates a textual commitment of the education system to the state.

[62] Kennedy v. Miller, 97 Cal. 429, 431 (1893).

[63] *See, e.g.,* Hall v. City of Taft, 47 Cal.2d 177, 179 (1956); Esberg v. Badaracco, 202 Cal. 110, 115–16 (1927); Whisman v. S.F. Unified Sch. Dist., 86 Cal. App. 3d 782, 789 (1978).

[64] *See* Piper v. Big Pine Sch. Dist. of Inyo Cnty., 193 Cal. 664, 669 (1924) ("The education of the children of the state is an obligation which the state took over to itself by the adoption of the Constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state.").

[65] 4 Cal.4th 668, 680–81 (1992).

[66] *Id.* at 685. *See also* Vergara v. State of California, No. BC484642, at *6 (Cal. Super. Ct. Dec. 13, 2013) (rejecting state defendants' argument that summary judgment

Within the statewide education system, the Legislature's power over the public schools has been variously described as "exclusive," "plenary," "absolute," "entire," and "comprehensive, subject only to constitutional constraints."[67] Article IX, sections 1 and 5 identify the Legislature as the branch responsible for education.[68] In addition, the Constitution grants the Legislature authority over key aspects of public school structure and governance, including apportioning the State School Fund,[69] incorporating and organizing school districts,[70] and prescribing the qualifications of local superintendents.[71] In this manner, the California Constitution confers on the state legislature the duty to define the content of the educational guarantee.[72] Courts have found that this constitutional authority includes broad discretion to determine the organization, management, and support of the public school system, as well as the programs and services necessary to accomplish the constitutional goals.[73]

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is warranted because local school districts control teacher retention and citing *Butt* for the proposition that "public education is uniquely a fundamental concern of the State").

[67] *See* Hall, 47 Cal.2d at 181; Pass Sch. Dist. v. Hollywood City Sch. Dist., 156 Cal. 416, 419 (1909); San Carlos Sch. Dist. v. State Bd. of Educ., 258 Cal. App. 2d 317, 324 (1968); Town of Atherton v. Superior Court, 159 Cal. App. 2d 417, 421 (1958); s*ee also* Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1134–35 (1999) ("There can thus be no doubt that our Constitution vests the Legislature with sweeping and comprehensive powers in relation to our public schools, including broad discretion to determine the types of programs and services which further the purposes of education.") (internal quotations omitted).

[68] *See* Cal. Const. art. IX, § 5 ("The *Legislature shall* provide for a system of common schools . . . .") (emphasis added); *id.* § 1 ("[T]he *Legislature shall* encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.") (emphasis added).

[69] *See id.* § 6.

[70] *See id.* § 14.

[71] *See id.* § 3.1.

[72] The delegation of educational responsibility to the Legislature is not unique to California. *See* Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education As A Federally Protected Right*, 51 Wm. & Mary L. Rev. 1343, 1402 (2010) ("[T]he language of state educational clauses consistently indicates that the responsibility for providing education rests with the state or, more specifically, with the state legislature.").

[73] *See* MacMillan v. Clarke, 184 Cal. 491, 496 (1920); Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1134–35 (1999) ("There can thus be no doubt that our Constitution vests the Legislature with sweeping and comprehensive powers in relation to our public

The structure of California's education system — with the state ultimately responsible for educating all California children and the Legislature specifically managing public school affairs — provided a foundation for the courts to declare education a fundamental right in California and the state Equal Protection Clause as the mechanism to protect this substantive individual right.

C. LITIGATING EDUCATION RIGHTS UNDER THE CALIFORNIA EQUAL PROTECTION CLAUSE

Although state courts closed off the education clauses as a means for litigating education rights, the California Supreme Court embraced claims for equal educational opportunity under the Equal Protection Clause. Prior to the U.S. Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*,[74] California public school children and their parents challenged the constitutionality of California's public school financing system under the Equal Protection Clauses of the state and federal constitutions in *Serrano I*.[75] In striking down the funding scheme, the California Supreme Court determined that the right to an education in California public schools is a fundamental right which cannot be conditioned on wealth.[76]

The Supreme Court set forth a two-part test to hold education fundamental for California students. At step one, the Court examined the importance of education in the state, identifying its significance to the individual and society.[77] Citing federal and state decisions,[78] the Court concluded that

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schools including broad discretion to determine the types of programs and services which further the purposes of education.") (internal citations omitted); Cal. Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1528 (1992) (same).

74 411 U.S. 1, 33 (1973) (finding that education is not a fundamental right under the federal constitution).

75 *Serrano I*, 5 Cal.3d 584 (1971) (en banc).

76 *Id.* at 614. An examination of the case's implications for students' minimal education rights is discussed *infra* in Parts I.3 and II.1.

77 *Id.* at 605.

78 The *Serrano I* Court spends several pages discussing decisions by the United States Supreme Court and the California Supreme Court that "while not legally controlling on the exact issue before us — are persuasive in their accurate factual description of the significance of learning." *Id.* at 605. The cited cases include: *Brown v. Board of Education*, 347 U.S. 483 (1954), for the proposition that education is one of the most important functions of the state and must be made available on equal terms (*Serrano*

education is "a major determinant of an individual's chances for economic and social success in our competitive society" and influences a "child's development as a citizen and his participation in political and community life."[79] In step two, the Court looked for a nexus between the right to an education and other rights guaranteed under the federal and state constitutions.[80] Specifically, the Court compared the right to education with defendants' rights in criminal cases and the right to vote.[81] The Court found that education has a "greater social significance than a free transcript or a court-appointed lawyer" has to a criminal defendant because education affects more people and supports "every other value" in a democracy.[82] Moreover, there is a link between voting and education as they both are integral to full participation in, and the functioning of a democracy.[83] Here, the Court explicitly relied on one of California's education clauses, article IX, section 1, for the proposition that the drafters of the California Constitution recognized education as "essential to the preservation of the rights and liberties of the people" in the same way that voting preserves other basic civil and political rights.[84]

Two years later, in *Rodriguez* the U.S. Supreme Court upheld Texas' public school financing system, which was substantially similar to California's.[85] In reaching its conclusion, the Court held inter alia that education

I, 5 Cal.3d at 606), *San Francisco Unified School District v. Johnson*, 3 Cal.3d 937 (1971), and *Jackson v. Pasadena City School District*, 59 Cal.2d 876 (1963) — two racial integration cases the Court cited to demonstrate the damaging outcomes resulting from an unequal education, including "unequal job opportunities, disparate income, and handicapped ability to participate in . . . our society" (*Serrano I*, 5 Cal.3d at 606 (quoting *Johnson*, 3 Cal.3d at 950); and *Manjares v. Newton*, 64 Cal.2d 365 (1966), and *Piper v. Big Pine School District of Inyo County*, 193 Cal. 644 (1924), cases where public schools excluded minority students, which portended to the Court that "surely the right to an education today means more than access to a classroom." *Serrano I*, 5 Cal.3d at 607.

79 *Serrano I*, 5 Cal.3d at 605.

80 *Id.* at 607.

81 *Id.*

82 *Id.*

83 *Id.* at 608.

84 *Id.* (quoting Cal. Const. art. IX, § 1).

85 San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 6–17 (1973). Just as in *Serrano I,* in *Rodriguez* parents of public school students claimed that Texas' public school financing system denied equal protection because it produced unequal spending between school districts in the state. The districts collected property taxes on the basis

was not a fundamental interest entitled to strict scrutiny under the federal Equal Protection Clause.[86] The Court asked whether the interest was explicitly or implicitly guaranteed or protected by the terms of the federal constitution.[87] Finding that the Constitution did not include an education clause and that the Court could not imply a federal constitutional education right based on its nexus to other rights, the Court concluded that education was not a fundamental right entitled to strict scrutiny.[88]

The *Rodriguez* Court stated several rationales to support its holding. First, the Court found that it lacked the "specialized knowledge and expertise" necessary to solve the difficult questions of educational policy that these cases presented.[89] Second, federalism counseled against "interference with the informed judgments made at the state and local levels."[90] The Court found that the Texas system and education systems generally are primarily matters of local district control, and therefore, the state has limited responsibility for disparities between school districts.[91] Out of respect for federalism and local control over education, the Legislature and by extension local school districts should be afforded great deference in the way it funds and manages education.[92] Finally, the Court classified unequal education as a social or economic ill, similar to unequal housing or welfare, which warrants only rational basis review.[93] All three of the

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of assessed property values which resulted in sizable disparities in the amount of tax resources available to each school district. Although the state provided contributions to districts to reduce the disparity, substantial inequalities remained. *Id.* at 15–16.

86 *Id.* at 33–34.

87 *Id.* at 33.

88 *Id.* at 35. In rejecting the nexus theory, the Court refused to find that "education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote," explicitly rejecting the argument the California Supreme Court found persuasive in *Serrano I*. *Id.*

89 *Id.* at 42.

90 *Id.*

91 *Id.* at 50.

92 *Id.* at 42, 49–51.

93 *Id.* at 32–33. *See* Black, *supra* note 72, at 1396 ("[T]he [*Rodriguez*] Court treated education as a low-level interest that placed no obligations on the State. In effect, the Court treated education as being equivalent to a state-sponsored bus voucher that the State might freely offer or withhold."); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex. L. Rev. 777, 850 (1985) ("The Court was not persuaded that educational activities in general are more essential to the meaningful exercise

Court's rationales supported its overarching precept that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[94]

The reasoning and outcome in *Rodriguez* prompted the defendants in *Serrano I* to challenge the California Supreme Court's decision that education was a fundamental right. When *Serrano v. Priest* (*Serrano II*)[95] returned to the Supreme Court, it reexamined its analysis and holding that California students' have a fundamental right to equal educational opportunity. Finding that *Rodriguez* removed the federal ground for declaring education a fundamental interest, the Court upheld the *Serrano I* decision on the basis that the state grounds were "wholly intact."[96] The *Serrano II* Court made clear that state equal protection doctrine is "possessed of an independent vitality which . . . may demand an analysis different from that which would obtain if only the federal standard were applicable."[97] The Court rejected the test for fundamentality used in *Rodriguez*[98] and reaffirmed the test and reasoning used in *Serrano I*.[99]

In several respects, the *Serrano II* Court rejected the rationales relied on in *Rodriguez*. First, the California Supreme Court rejected being characterized as an amateur in the field of school financing, and instead relied on the trial record, expert opinions, briefing, and amici curiae to equip it with the necessary knowledge.[100] Second, the Court found federalism

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of constitutional rights than are housing and welfare. The Court expressed concern that application of strict scrutiny to all claims involving education could lead to strict scrutiny for other social welfare programs as well.").

94 *Id.* at 30.

95 *Serrano II*, 18 Cal.3d 728 (1976) (en banc).

96 *Id.* at 763.

97 *Id.* at 764.

98 *Id.* at 767. In rejecting the *Rodriguez* approach for declaring a right fundamental, the *Serrano II* Court stated that whether the right is implicitly or explicitly guaranteed by the California Constitution is immaterial to the Court's determination of whether the right is fundamental. *Id.*

99 *Id.* at 767–68. The Court clarified that the test used in *Serrano I* examines whether the right is one of the "individual rights and liberties which lie at the core of our free and representative form of government." *Id.*

100 *Id.* at 767. This explanation appears specious, as the U.S. Supreme Court was equipped with similar documents, facts, and expert testimony, making both the state

concerns inapposite because the state confronted the constitutionality of its own financing scheme.[101] In addition, in California local school districts do not have ultimate control over the education system; instead, education is within the province of the state.[102] Thus, the *Rodriguez* Court's assumption that education matters should be left in the hands of school district leaders is inapplicable to California where the state has the "constitutional power and responsibility for ultimate control" of the schools.[103] Finally, the *Serrano II* Court affirmed the *Serrano I* Court's application of the two-step test that *Rodriguez* rejected, analyzing the "indispensable role which education plays in the modern industrial state" in determining that education is fundamental.[104] As in *Serrano I,* the *Serrano II* Court in part relied on an education clause in the California Constitution, article IX, section 1, to affirm that education is "essential" to Californians.[105] Although California's education clauses do not provide the legal grounds for the Court's declaration of a fundamental right to education,[106] they do provide support for the Court's decision to reach this holding under the California Equal Protection Clause.[107]

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and federal supreme courts equally expert in the field of school funding. The courts' disparate level of comfort with education policy could stem from the fact that state courts hear education cases more frequently than federal courts. Since state entities enact the majority of education statutes and regulations, state courts have more opportunities to grapple with education policy issues and therefore feel more equipped to handle cases in the field. *See* Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & Educ. 93, 93 (1989) ("In the past decade and a half, however, the federal judicial shadow has begun to shorten, and the state courts have begun to be exposed to the light of judicial challenges which represent the forefront of education litigation.").

101 *Serrano II*, 18 Cal.3d at 767.

102 *See supra* Parts I.2.B and C.

103 Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1135 (1999).

104 *Serrano I*, 5 Cal.3d 584, 605 (1971) (en banc).

105 *See Serrano II*, 18 Cal.3d at 767–68, 775 (discussing in part Cal. Const. art. IX, § 1).

106 *See supra* Part I.B.

107 *Cf. Serrano II*, 18 Cal.3d at 678 n.48 ("We do not suggest, of course, that the treatment afforded particular rights and interests by the provisions of our state Constitution is not to be accorded significant consideration in determination of [whether a right is fundamental]. We do suggest that this factor is not to be given conclusive weight."). As discussed in note 98, *Serrano II* refused to adopt the fundamental rights test used in *Rodriguez* which required the Court to examine whether the right was

1. The Equal Protection Clause, Not the Education Clauses, Protects Students' Fundamental Right to Education

California courts have not provided a clear justification for allowing claims to basic educational opportunity under the Equal Protection Clause, as opposed to the education clauses. However, guidance from federal precedent, the pull of equality arguments, and the constitutionally-defined structure of California's education system provide support for California courts' embrace of the Equal Protection Clause as a means to define students' education rights.

If they chose to rely on state education clauses as the main source for education rights, California courts would have to generate constitutional interpretations, doctrine, and principles where none existed before. This places an enormous burden on state judges tasked with defining the meaning of a constitutional clause for the first time. Instead of inventing state constitutional doctrine, state courts can apply established equal protection concepts found in federal constitutional caselaw.[108] In the area of equality litigation specifically, federal law is substantially more developed than state law.[109] State courts are grateful for the guidance and structure provided by federal equal protection doctrine when analyzing education equality claims. Moreover, as a general rule, courts avoid devising new constitutional principles when established principles will dispose of the

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implicitly or explicitly guaranteed by the Constitution. The Court feared that this test could be used to declare every affirmative right mentioned in the California Constitution as fundamental. Therefore, for the *Serrano II* Court, the explicit inclusion of education clauses in the Constitution was persuasive evidence of the right's fundamental status, but it was not sufficient.

[108] *See* Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading As Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. Pitt. L. Rev. 231, 288 (1998) ("[S]tate decisions regarding provisions in the state constitution similar to clauses in the Federal Constitution are often interpreted under the same analytic framework utilized by the Supreme Court."); Robert F. Williams, *Equality Guarantees in State Constitutional Law,* 63 Tex. L. Rev. 1195, 1196–97 (1985); Note, *Developments in the Law: The Interpretation of State Constitutional Rights,* 95 Harv. L. Rev. 1324, 1344–49 (1982).

[109] *See* Molly McUsic, *supra* note 24, at 312 ("Most state courts have little state history or previous case authority to rely on when interpreting their equal protection clauses."); Ratner, *supra* note 93, at 829 n.215; Williams, *supra* note 108, at 1218 ("The [state] courts developed relatively little in the way of equality 'doctrine.'").

case.[110] State courts therefore may shy away from new education clause jurisprudence, knowing that they could reach the outcome under established equal protection principles. Finally, state courts face considerable pressure to harmonize their decisions with federal precedents.[111] Some of this pressure may come from the state judges' and citizens' sense that the federal judiciary is more qualified, thorough, or experienced. Historically, civil rights cases guaranteeing equality were filed in federal court under the U.S. Constitution. Thus, judges and litigants turn to federal, and not state, precedent to interpret the meaning of equality. Recognizing state courts' reliance on federal jurisprudence, a state court judge noted, "We simply cannot reason or argue about what state constitutional law should be without resort to principles of federal constitutional law, for the very vocabulary of constitutional law is a federal vocabulary."[112]

A second explanation for the courts' reliance on equal protection doctrine as opposed to the text found in the state's education clauses is the strong pull equality arguments have on our legal and political sensibilities.[113] Because the Equal Protection Clause has long been used in support of basic civil rights,[114] arguments that conform to the style and structure of equal opportunity resonate with the public. The shared societal belief in equality provides further explanation for the California courts' reliance on the Equal Protection Clause in education cases.

A final justification for the courts' selection of equal protection principles is the constitutionally-defined structure of California's education

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110 *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–49 (1936) (Brandeis, J., concurring).

111 *See* Note, *supra* note 108, at 1460 ("Most education claims . . . are decided by some method that relates state constitutional law to the 'higher' law in our system — the federal Constitution."); Brennan, *The Bill of Rights and the States, supra* note 2, at 551 ("As tempting as it may be to harmonize results under state and national constitutions, our federalism permits state courts to provide greater protection to individual civil rights and liberties if they wish to do so."); *see also* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result,* 35 S.C. L. Rev. 353, 356 (1984).

112 The Honorable Edmund B. Spaeth, Jr., *Toward A New Partnership: The Future Relation Ship of Federal and State Constitutional Law*, 49 U. Pitt. L. Rev. 729, 736 (1988).

113 *See* Enrich, *supra* note 36, at 143.

114 *See* Plyer v. Doe, 457 U.S. 202 (1982); Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

system. The education clauses assign the state legislature and state executive officials plenary authority over the provision and content of education.[115] The separation of powers doctrine, found in article III, section 3, restrains the courts' authority to interfere with the constitutional roles of the executive and Legislature.[116] Given these constitutional constraints, courts hesitate to restrict the state's exclusive ability to determine what constitutes a "system of common schools"[117] or the suitable "promotion of intellectual, scientific, moral, and agricultural improvement."[118] As outlined in the education clauses and the separation of powers clause, courts must respect the discretion committed to the other branches and officials to determine the content and structure of education.[119] This structure forced judges to look elsewhere in the Constitution to protect education rights.

More broadly, courts interpreting the California Constitution have repeated:

> Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in

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115 *See supra* notes 52 to 73 and accompanying text.

116 Cal. Const. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").

117 *Id.* art. IX, § 5.

118 *Id.* § 1.

119 *See, e.g.,* Wilson v. State Bd. of Educ., 75 Cal. App. 4th 1125, 1137 (1999) (holding that the Charter Schools Act was within the Legislature's discretion and deferring to the Legislature's finding that charter schools are part of the public school system under article IX); Cal. Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1533 (1992) (relying on the state's constitutional structure and deferring to the legislative determination that funds granted to early childhood education and child development agencies were within the scope of the constitutional provision requiring moneys be applied "for the support of school districts"). Courts in states with education clauses similar to California's likewise grant legislatures wide discretion to enact education legislation. *See* Hubsch, *supra* note 11, at 1326 ("The single most difficult issue facing advocates of educational entitlement is state judicial deference to the state legislatures' efforts to establish and maintain a state-wide system of education. . . . [S]ome state supreme courts have cited explicit constitutional language, which they interpret as favoring exclusive legislative responsibility for education, as justification for deferring to such legislatures.").

> the Legislature, and that body may exercise any and all legislative powers which are not expressly, or by necessary implication denied to it by the Constitution . . . . Secondly, all intendments favor the exercise of the Legislature's plenary authority: If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.[120]

This understanding of the state constitution undergirds the courts' hesitation to rely on the education clauses to strike down education legislation. The first consequence identified by the courts mirrors the language and interpretation of the education clauses. That is, the Legislature is vested with the entirety of the education powers. The second consequence supports the courts' willingness to grant the Legislature full discretion to act pursuant to the education clauses, and to bar legal challenges to state action under these clauses. Not only is the Legislature vested with full educational authority, but the court also construes all doubt in favor of the legislative enactment. Moreover, the court will not read into the constitutional language any restrictions that are not plainly evident from the text. Therefore, the court must interpret the education clauses — which are phrased as positive grants of legislative authority and do not include any restrictive or limiting language — in the manner most favorable to the Legislature. Should plaintiffs challenge the Legislature's ability to act or its failure to act pursuant to the education clauses, the court will likely uphold the Legislature's decision, as there are no explicit restrictions on the Legislature's education clause powers.[121] Given the text of the education clauses, the separation of powers

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[120] *Hayes*, 5 Cal. App. 4th at 1531–32 (quoting Pac. Legal Found. v. Brown, 29 Cal.3d 168, 180 (1981)) (internal citations omitted). *See also* William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 Va. L. Rev. 1639, 1656–57 (1989) ("[W]hile the federal Constitution is one of limited powers — the federal government can only do those things explicitly or implicitly specified in the document — state constitutions establish limitations on otherwise unlimited power; the states can do anything except that prohibited by the federal or state constitutions.").

[121] In *Arcadia Unified School District v. State Department of Education*, 2 Cal.4th 251 (1992), plaintiffs challenged a statute authorizing school districts to charge fees for

doctrine, and the interpretation of the California Constitution, the education clauses were not a feasible means for the courts to identify students' right to basic educational opportunities.

Unlike the education clauses, the Equal Protection Clause does not limit the courts' ability to override the Legislature's educational determinations. First, the Equal Protection Clause is a restriction and limitation on the Legislature's power, not a positive grant of authority. "A person *may not be* . . . denied equal protection of the laws . . . ."[122] Moreover, California courts reiterate that the Legislature's power over the public school system is "plenary, subject only to constitutional restraints."[123] Since the constitutional restraints noted by the courts are not found in the education clauses, as discussed above, they must find their source in non-education sections, such as the Equal Protection Clause. The historical role of the equal protection doctrine as an external limit on the exercise of legislative power supports this construction.[124] In two key education cases, the California Supreme Court stated that the Equal Protection Clause limits the Legislature's control

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pupil transportation. *Id.* at 259–60. The California Supreme Court upheld the statute under the free schools clause of the California Constitution in part because "it is our duty to uphold [the legislative enactment] unless its unconstitutionality is clear and unquestionable." *Id.* at 265. Thus, the *Arcadia* Court echoed that the education clauses should be resolved in favor of the legislative action. This case also involved challenges under the Equal Protection Clause which is discussed more fully at notes 179 to 185 and accompanying text.

122 Cal. Const. art. I, § 7(a) (emphasis added). The Equal Protection Clause of the California Constitution incorporates several clauses. *See Butt*, 4 Cal.4th at 678 (defining the equal protection guarantee of the California Constitution as including article I, sections 7 (a), (b) and article IV, section 16).

123 *Wilson*, 75 Cal. App. 4th at 1134 (citing Hall v. City of Taft, 47 Cal.2d 177, 180–81 (1956) and *Hayes*, 5 Cal. App. 4th at 1524); *Butt*, 4 Cal.4th at 681.

124 For a survey of the early history of the Equal Protection and Due Process Clauses as a judicial check on legislative action, *see* Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislatures*, 3 Tex. L. Rev. 1, 23 (1924) ("Due process and equal protection, then, combined were being construed with broad enough scope to prevent all arbitrary legislative and administrative acts, and like certain other implied limits on legislatures, the equal protection principle was made an essential part of the concept of due process of law."). *See also* Sonja Ralston Elder, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 Duke L.J. 755, 766 (2007) ("It is precisely because each branch of government is charged with different duties that the courts' deference to the legislative and executive branches must have limits: without

over education.[125] In both cases, the Court declares that legislative actions authorized by the education clauses are nonetheless subject to constitutional invalidation under the Equal Protection Clause.[126]

2. Declaring Students' Minimum Right to Education under the Equal Protection Clause

In *Serrano I* and *II,* the California Supreme Court settled on the Equal Protection Clause as the means to litigate students' education rights. In subsequent caselaw, California courts have expanded equal protection principles to permit claims alleging both inequity and inadequacy in the public school system.

When the Court finds that a legislative action impinges on a fundamental right, strict scrutiny prohibits a difference in treatment unless it is necessary to achieve a compelling government interest.[127] In *Serrano I*, the Court found that the state's education finance system impinged on students' fundamental right to education because the quality of a child's education differed depending on the wealth of her parents and neighbors.[128]

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such limits, the courts could not fulfill their function as the ultimate protector of the people's rights.").

[125] *See Butt*, 4 Cal.4th at 685 ("The State claims it need only ensure the six-month minimum term guaranteed by the free school clause . . . . Whatever the requirements of the free school guaranty, the equal protection clause precludes the State from maintaining its common school system in a manner that denies the students of one district an education basically equivalent to that provided elsewhere throughout the State."); *Serrano II*, 18 Cal.3d 728, 775 (1976) (en banc) ("[A]rticle IX, section 1 . . . neither mandate[s] nor approve[s] a [finance] system such as that before us, and therefore the only conflict which here appears is that between the requirements of our state equal protection provisions and the proven realities of the present, legislatively created California public school financing system — a conflict which the trial court, by holding that system to be invalid, properly resolved").

[126] *See Serrano II*, 18 Cal.3d at 772–73 ("By its exercise of [its article IX] power, [the Legislature] has created a system whereby disparities in assessed valuation per ADA among the various school districts result in disparities in the educational opportunity available to the students within such districts. . . . It is that action, which we reiterate is the product of Legislative determinations, that we today hold to be in violation of our state provisions guaranteeing equal protection of the laws.").

[127] *See id*. at 761; *see also* Hardy v. Stumpf, 21 Cal.3d 1, 7 (1978) ("[W]hen state action . . . abridges some fundamental right, such action becomes subject to strict judicial scrutiny and the state must show a compelling state interest in justification.").

[128] *See Serrano I*, 5 Cal.3d 584, 614 (1971) (en banc).

In other words, the education offered to students in a low-income district, such as Baldwin Park, was unequal to the education provided to students in, for example Beverly Hills, where property values were high.[129] Applying strict scrutiny to the unequal system, the Court found the funding scheme was not necessary to achieve any compelling state interest.[130]

Twenty years later in *Butt v. State of California*,[131] the Court revisited the constitutional standard set forth in *Serrano I* and *II* and expanded its protection of students in cases implicating a fundamental right to education. In *Butt*, a school district intended to close six weeks early due to fiscal mismanagement and insufficient funding.[132] The California Supreme Court stated the closure would deny the district's students their right to "basic educational equality" and ordered the state to ensure the schools remained open for the remainder of the prescribed school year.[133] In this manner, the Court expanded on the traditional analysis employed in equal protection cases, namely, comparing similar groups of students to determine whether one or more were denied educational opportunities available to others.[134] The Court supplemented this equality inquiry with an adequacy standard. In order to identify whether a class of students was denied an educational opportunity, the Court asked whether the "quality of the [educational] program, viewed as a whole, falls fundamentally below prevailing statewide standards."[135] If an identifiable group receives an educational program which fails to meet this adequacy standard, the Court applies strict scrutiny to the action.[136] In declaring that all students are entitled to "basic educational equality," the *Butt* Court established a minimum level of educational

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129 *Id.* at 594–95.

130 *Id.* at 610–11.

131 4 Cal.4th 668 (1992).

132 *Id.* at 673.

133 *Id.* at 704.

134 *See* Cooley v. Superior Court, 29 Cal.4th 228, 253 (2002) ("The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.") (internal citations omitted).

135 *Id.* at 686–87.

136 *See id.* at 692 ("Because education is a fundamental interest in California, denials of basic educational equality on the basis of district residence are subject to strict scrutiny.").

quality which the state is obligated to provide all California students on equal protection grounds.[137]

Uniquely, the California courts have used the state's Equal Protection Clause to establish a baseline, or minimum standard for educational quality in the state.[138] Traditionally, the Equal Protection Clause was only a vehicle for educational equality arguments, including, for example, claims of disparate resources or funding among schools or districts throughout the state. The California Supreme Court expanded equal protection doctrine declaring that California students deserve a basic level of education and the state is responsible for providing it. The California courts thus transformed the state's fundamental right to education under the Equal Protection Clause, construing it not only as a basis for equality arguments but also as a basis for adequacy arguments.[139] According to the Court, all California students deserve an education which does not fall fundamentally below statewide standards.[140] However, California courts have not set forth any criteria to identify "prevailing statewide standards" or established any guidelines for

137 *Id.* at 692 ("[T]he State is obliged to intervene when a local district's fiscal problems would otherwise deny its students basic educational equality, unless the State can demonstrate a compelling reason for failing to do so.").

138 *But see* Serrano v. Priest (*Serrano III*), 20 Cal.3d 25, 36, n.6 (1977) ("The equal protection-of-the-laws provisions of the California Constitution mandate nothing less than that all such persons shall be treated alike. If such uniformity of treatment were to result in all children being provided a low-quality educational program, or even a clearly *inadequate* educational program, the California Constitution would be satisfied.") *Serrano III* ruled on plaintiffs' claim for attorneys' fee; therefore, this footnote is arguably dicta. Nevertheless, *Butt*, 4 Cal.4th 686 (1992), impliedly overrules this footnote in *Serrano III* by incorporating adequacy language into its holding.

139 *See* Enrich, *supra* note 36, at 114 (In *Butt*, "[t]he court strained to avoid casting the issue in adequacy terms, relying instead on students' rights to "'basic' educational equality," even where the result was to provide a spendthrift school district with a disproportionate share of state funds. Still, the case serves as a reminder that solutions focused on equalization do not resolve, and may in fact exacerbate, concerns about adequacy."). For a similar conflation of adequacy and equality arguments by the New Jersey Supreme Court, *see Robinson v. Cahill*, 62 N.J. 473 (1973), where the court characterized its constitutional education requirement in terms of equality, and then declared a qualitative standard: "A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command." *Id.* at 513.

140 *See Butt*, 4 Cal.4th at 687.

examining students' "basic educational equity."[141] The goal of the remainder of this article is to explore the courts' varied holdings on "basic educational equality" under the state's Equal Protection Clause and to suggest arguments which may push the court to raise the minimum bar.

II. THE EQUAL PROTECTION CLAUSE

A. THE COURTS GIVE: EXPANDING STUDENTS' RIGHTS UNDER CALIFORNIA'S EQUAL PROTECTION CLAUSE

There are three precedential cases which upheld claims to enforce students' right to basic educational equity. The three courts addressed whether an allegedly inadequate educational program or service should be incorporated into California's right to basic educational equity. Although their factual scenarios differ, the courts' analyses can similarly be broken down into a two-part test.[142] First, the court factually compares the students who purportedly lack a given resource with students whose educational program includes said resource.[143] The court asks whether the allocation of the resource to the district or school falls fundamentally below the distribution made to its peers.[144] The courts' analysis under the first part can involve numeric or statistical comparisons: for example, the amount of money districts spend on education. Second, the court examines whether a deficiency in the given resource results in inferior educational quality

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[141] *See* Thro, *supra* note 26, at 544 (arguing that if the court establishes that education is a fundamental right, "then the analysis must proceed to determining the nature of that standard or right").

[142] This test is not explicitly identified by the courts. Instead, it is the author's interpretation of the caselaw viewed through modern cases and looking backward. This test is an attempt to harmonize the reasoning from the precedent in order to provide litigants with a cogent means of understanding the court's past jurisprudence and uniformly applying it to upcoming and potential cases.

[143] *See Butt*, 4 Cal.4th at 686 ("A finding of constitutional disparity depends on the individual facts.").

[144] *Id.* at 685 ("[T]he equal protection clause precludes the State from maintaining its common school system in a manner that denies the student of one district an education basically equivalent to that provided elsewhere throughout the state."). In a straightforward example, the court may ask whether a school's average number of instructional minutes per day falls fundamentally below the number of minutes spent by all other schools in the district.

outcomes. In essence, the court looks for a link between the unequal distribution of the resource and unequal educational attainment.[145] If the court answers both parts of the test affirmatively, then it applies strict scrutiny to the state action and will likely find that the students' fundamental right to education has been infringed and strike down the statute or action.

In the *Serrano* cases, the California Supreme Court found that the state's education finance system deprived students of equal educational opportunities in violation of their fundamental right to education.[146] First, the Court compared the results of the state funding formula in districts with large and small local tax bases, examining the monetary disparities in per-pupil expenditures.[147] The Court found that "districts with small tax bases simply cannot levy taxes at a rate sufficient to produce the revenue that more affluent districts reap with minimal tax efforts."[148] Thus, some students had access to schools with substantial monetary resources, while other students did not. Second, the Court equated the revenue disparity between school districts with an equivalent differential in educational quality.[149] The Court held that the state financial aid distribution formula was unconstitutional because it made the quality of a child's education dependent upon the resources of her school district, where students in

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145 Building on the example in note 144, the court can ask whether the reduction in instructional minutes results in insufficient preparation for state exams, ineligibility for promotion to the succeeding grade, or an inability to cover key educational material.

146 *See Serrano II*, 18 Cal.3d 728, 765–66 (1976) (en banc); *Serrano I*, 5 Cal.3d 584, 614 (1971) (en banc).

147 *See Serrano I*, 5 Cal.3d at 594–95. The Court described that under the funding formula Baldwin Park Unified School District expended $577.49 to educate each student, while Beverly Hills Unified School District paid out $1,231.72 per pupil. *Id.*

148 *Id.* at 598.

149 *See Serrano II*, 18 Cal.3d at 747 ("Substantial disparities in expenditures per pupil among school districts cause and perpetuate substantial disparities in the quality and extent of availability of educational opportunities."); *Serrano I*, 3 Cal.3d at 600–01 ("[P]oorer districts are financially unable to raise their taxes high enough to match the educational offerings of wealthier districts."); *see also id.* at 601 n.16. *But see* Buszin, *supra* note 26, at 1630 ("Evidence indicates that equalizing finances between districts in California did not equalize educational outcomes among students across districts in the wake of the Serrano school finance decisions.").

wealthy districts could obtain a higher quality of education compared to their peers in lower-income districts.[150]

In *Butt,* the Court held the state responsible for ensuring that a school district had the necessary funds to complete the final six weeks of the school term.[151] The Court found that the local district's "unplanned truncation" of the school year fell fundamentally below prevailing statewide standards and denied students basic equality of educational opportunities.[152] The Court first compared the length of the contested school year in the Richmond Unified Schools to the duration at most other schools.[153] The Court found that nearly every other school district in California held classes on at least 175 days, while Richmond would lose approximately one-fifth of that time.[154] Based on teachers' declarations, the Court linked this disparity in instructional days to "extreme and unprecedented disparities in educational service and progress," thereby impeding academic promotion, high school graduation, and college entrance.[155] Because plaintiffs would lose an unprecedented amount of instruction time compared to their statewide peers, the Court found that the district's program fell fundamentally below prevailing statewide standards and that the state had the ultimate responsibility to ensure that plaintiffs' school did not violate their constitutional right to receive a basic equality of educational opportunity.[156]

Under a broad but plausible reading of *Butt,* the case stands for the proposition that students' basic right to education necessarily includes the opportunity to receive relatively equal instruction time. Alternatively, *Butt* may provide students with an equal protection claim against the state when a state or local action causes an unplanned and substantial reduction

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150 *See Serrano II,* 18 Cal.3d at 748 (finding that students in high-wealth districts had access to a "higher quality staff, program expansion and variety, beneficial teacher-pupil ratios and class sizes, modern equipment and materials, and high-quality buildings"); *id.* ("[D]ifferences in dollars do produce differences in pupil achievement.").

151 *See Butt*, 4 Cal 4th at 692.

152 *Id.* at 686.

153 *Id.* at 686–87.

154 *Id.* at 687 n.14.

155 *Id.* at 687. The teachers' declarations evidenced that the unplanned closure would prevent teachers from completing necessary instruction and grading required for, for example, success on the SATs, eligibility for advanced-level courses, promotion to the succeeding grade, and awarding of high school diplomas. *Id.* at 687 n.14.

156 *Id.* at 692.

in educational services. The latter interpretation of *Butt* provides litigants with a forceful basis to challenge state actions which impinge on students' basic right to educational equity.

Most recently, in *O'Connell v. Superior Court,*[157] the California Court of Appeal addressed students' fundamental right to education under the Equal Protection Clause. Plaintiffs moved to enjoin the state from denying diplomas to public high school students who were otherwise eligible to graduate, but had not passed the California High School Exit Exam ("CAHSEE").[158] The court noted that over 40,000 students in the class of 2006, more than nine percent had not passed the CAHSEE. Non-passage was even higher among vulnerable subgroups.[159] The students claimed that the disparity in passage rates was due to the state's failure to provide non-passing students with the educational resources necessary to enable them to do well on the exam.[160] Affirming the trial court's conclusion that plaintiffs established a likelihood of success on their equal educational opportunity claim, the appeals court accepted the lower court's finding that the resources available to students in schools serving English learners and economically needy neighborhoods were unequal to the resources available to students in non-disadvantaged schools.[161] Due to the schools' scarcity of resources, non-passing students did not have an equal opportunity to learn the tested material.[162] In an unusually broad pronouncement of the content of students' basic education right, the appeals court accepted the trial court's implicit conclusion that the "right of equal access to education includes the right to receive equal and adequate instruction regarding all specific high school graduation requirements imposed by the state, including passing both portions of the CAHSEE."[163]

Serrano I and *II*, *Butt*, and *O'Connell* are successful challenges to state actions which failed to provide students with basic educational equity. In

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157 141 Cal. App. 4th 1452 (2006).

158 *Id.* at 1457.

159 *Id.* at 1460 n.5. Among the noted subgroups, Hispanics had a 15 percent non-passage rate, African Americans were at 17 percent, economically disadvantaged students were at 14 percent, and 23 percent of English language learners failed the exam. *Id.*

160 *Id.* at 1464.

161 *Id.* at 1465.

162 *Id.*

163 *Id.*

these cases, the courts apply an implicit two-part test to examine whether the state's laws or policies compromise students' fundamental right to equality of the educational experience. Litigants can adapt this test and the positive precedent to novel education claims under the Equal Protection Clause.

B. THE COURTS TAKE AWAY: ELIMINATING STUDENTS' RIGHTS FROM CALIFORNIA'S EQUAL PROTECTION CLAUSE

After the state court declared education a fundamental right protected by the Equal Protection Clause, litigants petitioned the courts to recognize several concomitant benefits which are integral to enjoying the right granted in *Serrano* and similarly require the application of strict scrutiny. In one case after another, the California courts struck down these attempts, thereby limiting students' education rights to a strict conception of only those resources, programs, and services which are inherently incorporated in the educational character of primary and secondary schooling.

In the *Serrano I* opinion, the Court hints at its unwillingness to expand the Equal Protection Clause to include any benefits beyond education. The state asked the Court to follow the District of Massachusetts which held that Boston did not violate the Equal Protection Clause when it failed to provide federal subsidized lunches at all of its schools.[164] The Court found the Massachusetts decision inapplicable because it did not concern the right to an education.[165] "Availability of an inexpensive school lunch can hardly be considered of such constitutional significance."[166] Thus, free and reduced school lunches, even for low-income and needy students, are not included in California's fundamental right to education.

In 1981 in *Gurfinkel v. Los Angeles Community College District*,[167] the court addressed whether the fundamental right identified in *Serrano*

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164 *Serrano I*, 5 Cal.3d 584, 598 n.13 (1971) (en banc).

165 *Id.*

166 *Id.*

167 121 Cal. App. 3d 1 (1981). In *Gurfinkel*, plaintiff entered the United States from France and subsequently married a California resident. *Id.* at 4. Plaintiff registered to attend classes at a community college and was required to pay greater student tuition

encompassed college and/or community college education.[168] The court found that the state's equal protection doctrine did not encompass a fundamental right to higher education, relying on the fact that college is not compulsory and extends into adulthood.[169] Without much explanation, the court excised a student's right to higher education from the fundamental right to public school education.[170]

A few years later in *Steffes v. California Interscholastic Federation,*[171] a high school student claimed that an athletics rule that rendered the student ineligible to play varsity sports for one year after his transfer to a new school was unconstitutional.[172] The student argued strict scrutiny should apply because it implicated the fundamental right to a public school education, which includes the right to participate in interscholastic athletics.[173] The court found otherwise, declaring that participation in athletic activities is not encompassed in students' fundamental right to education and upholding the rule under rational basis review.[174] To reach its holding, the court relied on the majority opinion in *Hartzell v. Connell*,[175] which had the opportunity but chose not to "address the question whether extracurricular activities are encompassed within the *Serrano* concept of education

because she was classified as a nonresident. *Id.* Plaintiff challenged the nonresident tuition statutes arguing they placed an unconstitutional burden on her fundamental right to a community college education. *Id.*

168 *Id.* at 5.

169 *Id.* at 6.

170 The *Gurfinkel* court suggested that it might recognize a fundamental right to higher education if the plaintiff provided evidence to support it or if the Legislature defined it. *Id.* at 6 n.3. The court found plaintiff's evidence insufficient because she did not provide any proof that a college education was necessary to function in society or to compete in the job market. *Id.* The court felt that the "ascertainment of such data could well be the subject of a legislative fact-finding hearing." *Id. See* Schoenfeld, *supra* note 26, at 208–10 (arguing that an application of the *Serrano* criteria to higher education in California's contemporary political economy would likely result in the court's finding that it was a fundamental right or at least a very important one).

171 176 Cal. App. 3d 739 (1986).

172 *Id.* at 743.

173 *Id.* at 746.

174 *Id.* at 748.

175 35 Cal.3d 899 (1984).

as a fundamental right."[176] Instead, the *Hartzell* Court struck down the district's imposition of extracurricular fees under the free schools clause.[177] Since *Hartzell* did not conclude that extracurricular activities are encompassed within the fundamental right, the *Steffes* court refused to declare that participation in athletic activities was entitled to the highest degree of constitutional protection.[178]

Finally, in *Arcadia Unified School District v. State Department of Education,*[179] the California Supreme Court upheld a statute that allowed a school district to charge parents for the transportation of their students to school. Plaintiffs argued that the statute violated California's Equal Protection Clause because it classified families on the basis of wealth and burdened the students' exercise of their fundamental right to education.[180] The Court disagreed holding that the transportation fees did not discriminate against the poor because the statute, on its face, did not prevent any child from attending school due to his or her inability to pay.[181]

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176 *Steffes*, 176 Cal. App. 3d at 746–47 (discussing *Hartzell*, 35 Cal.3d 899). A detailed concurrence by Chief Justice Bird, who also authored the majority opinion, argued that the fees imposed by the district affected students' fundamental interest in education. *Hartzell*, 35 Cal.3d at 921 (Bird, C.J., concurring). Justice Bird described that the fundamentality of a given activity is not dependent upon "the formalities of credit, grading, or diplomas." *Id.* at 922. Rather, participation in extracurricular activities confers benefits on the individual and society, including the development of leadership and citizenship, preparedness for future employment, and growth of teamwork and cooperation. *Id.* at 923. Justice Bird also found that the imposition of the fee classified on the basis of wealth. *Id.* at 924–26. The structure and form of Justice Bird's opinion opens up the possibility that courts may be willing to include subsidiary benefits within a students' fundamental right to an education.

177 *Steffes*, 176 Cal. App. 3d at 747 (quoting *Hartzell*, 35 Cal.3d at 911). *See supra* notes 30 to 36 and accompanying text for a fuller discussion of the *Hartzell* court's analysis under the free schools clause.

178 *See Steffes*, 176 Cal. App. 3d at 748; *see also* Jones v. Cal. Interscholastic Fed'n, 197 Cal. App. 3d 751 (1988) (upholding under rational basis review an athletic rule that precluded a student repeating a grade from participating in the varsity football program). *Cf.* Ryan v. Cal. Interscholastic Fed'n-San Diego Section, 94 Cal. App. 4th 1048 (2001) (extending the holding in *Steffes* and finding that under the state due process clause a plaintiff who was excluded from interscholastic athletics failed to identify the deprivation of a statutorily conferred benefit or interest).

179 2 Cal.4th 251 (1992).

180 *Id.* at 266.

181 *Id.*

The statute included a categorical exemption from the charges for indigent parents.[182] If plaintiffs could identify children who were unable to attend school because they could not afford to pay the fees, the Court left open the possibility of an as-applied challenge.[183] The dictum in *Arcadia* begs the question: Would the failure to provide any school transportation violate the Equal Protection Clause of the California Constitution if children are deprived of the ability to attend school?[184] *Arcadia* upholds the right to charge for transportation, but it does not definitively exclude transportation from a students' fundamental right to education, particularly if the provided transportation or lack thereof effectively excludes a student from receiving an education. Nevertheless, *Arcadia's* holding bars claims for free transportation under a student's right to basic educational equity.[185]

The cases exclude education-related rights from students' fundamental right to equal access to education. Basic educational equality does not include school lunch, higher education, athletic activities, or free transportation. Litigants must therefore use the gaps in existing caselaw to push courts to recognize resources that are essential for students to benefit from basic educational equity. The final section of this article explores some of these gaps using three recent California cases which provide insight into litigation strategies which build on the test outlined in Part II.A.

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182 *Id.* at 255 n.4.

183 *Id.* at 266. For an early California case in which the Court required a school district to provide bus service to eight remote students, *see Manjares v. Newton*, 64 Cal.2d 365 (1966). The Court concluded that the board's refusal to provide transportation to these students was an abuse of discretion because it completely deprived the students of their right to attend school. *Id.* at 374. The Court described that no other children in the district were similarly situated, and therefore the board placed an unjustifiable burden on plaintiffs' education. *Id.* The holding and reasoning in *Manjares* analogizes to the as-applied challenge offered by the *Arcadia* court.

184 *See Arcadia*, 2 Cal.4th at 264 n.11. Based on California precedent, the answer is likely yes. *See Manjares v. Newton*, 64 Cal.2d 365 (1966) (summarized at note 183); Piper v. Big Pine Sch. Dist. of Inyo Cnty., 193 Cal. 644 (1924) (exclusion of an Indian girl from local school district violated her right to attend school).

185 The plaintiffs in *Arcadia* also brought a claim under the free schools clause. *See Arcadia*, 2 Cal.4th at 259–60. The Court rejected the claim that students are entitled to free transportation under *Hartzell* because transportation is not an "activity [that] is educational in character." *Id.* at 262.

C. WHERE DO WE GO FROM HERE? ADAPTING THE POSITIVE PRECEDENT TO NEW CLAIMS FOR BASIC EDUCATIONAL EQUITY

In May 2010, two sets of plaintiffs filed actions in California Superior Court alleging that the state's education finance system violated California equal protection doctrine by failing to "provide all California school children equal access to the State's prescribed educational program and an equal educational opportunity to become proficient in the State's academic standards."[186] The court heard the two actions, *Robles–Wong v. State of California* and C*ampaign for Quality Education v. State of California* (*CQE*), together and after a series of amended pleadings, the court ruled on the state's demurrers on July 26, 2011.[187]

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[186] Robles–Wong v. State of California, No. RG10-515768, at *54 ¶ 7 (Cal. Super. Ct. May 20, 2010). The companion case which alleges similar causes of action albeit on slightly different facts is *Campaign for Quality Education v. State of California*, No. RG10524770, at ¶ 218 (Cal. Super. Ct. August 4, 2010) (alleging that the state's funding system fails to ensure that plaintiffs have "an equal opportunity to obtain an education that prepares them to learn the content standards and for civic, economic, and social success").

[187] The procedural history of the cases is lengthy. A selected chronology of the cases helps sequence the issues discussed herein:

Robles–Wong and *CQE* filed actions in summer 2010, pleading several causes of action under the education clauses, article IV, section 8(a) implicating the duty to set apart monies to support the school system, and, at issue here, California's Equal Protection Clause. *See* Robles–Wong v. State of California, No. RG10-515768, at 53–54 ¶¶ 1–9 (Cal. Super. Ct. May 20, 2010); Campaign for Quality Educ. v. State of California, No. RG10524770, at ¶¶ 197–209 (Cal. Super. Ct. July 12, 2010). After minor amendments to the complaints, the Superior Court issued two orders on January 14, 2011 dismissing all causes of action, but granting leave to amend the equal protection claims. *See* Robles–Wong v. State of California, No. RG10-515768 (Cal. Super. Ct. Jan. 14, 2011); Campaign for Quality Educ. v. State of California, No. RG10524770 (Cal. Super. Ct. Jan. 14, 2011). Both plaintiffs groups filed amended complaints on March 16, 2011, which stated one cause of action under California's Equal Protection Clause. *See* Robles–Wong v. State of California, No. RG10-515768 (Cal. Super. Ct. Mar. 16, 2011); Campaign for Quality Educ. v. State of California, No. RG10524770 (Cal. Super. Ct. Mar. 16, 2011). On July 26, 2011, the court again dismissed plaintiffs' equal protection claims with leave to amend. *See* Robles–Wong v. State of California, No. RG10-515768, 2011 WL 3322890 (Cal. Super. Ct. July 26, 2011); Campaign for Quality Educ. v. State of California, No. RG10524770 (Cal. Super. Ct. Aug. 2, 2011) (incorporating the *Robles–Wong* order in full). This article deals with the most recent set of pleadings and the subsequent court orders dismissing the equal protection claims [continued next page].

Relying on California's Equal Protection Clause, plaintiffs in *Robles–Wong* and *CQE* contend that California's school funding system renders schools unable to provide all of their students with an "adequate and equal opportunity" to learn the state-mandated academic content standards and to obtain a meaningful education that prepares them for participation in the economic, social and civic life of our society.[188] The conflation of equality and adequacy standards was successful in *Butt*; however, in these cases, the trial court was reticent to rely on *Butt* to declare a broad adequacy standard using equal protection principles. This article suggests that the court's inability to harmonize plaintiffs' argument with the two-part test defined above caused the dismissal of the claims. The court's repeated dismissals of plaintiffs' equal protection claims with leave to amend buttresses the notion that the court needed plaintiffs to restructure their theory of the case in conformity with a familiar analysis and rationale.[189]

First, the trial court could not factually compare students with and without sufficient funding or educational resources to determine whether plaintiffs' schools fell fundamentally below what most other students

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Plaintiffs in both cases declined to amend their complaints and instead filed a joint appeal on January 25, 2012. *See* Corrected Appellants' Opening Brief at 26, Campaign for Quality Educ. v. State of California, No. A134423 (Cal. Ct. App. July 27, 2012), *consolidated with* Robles–Wong v. State of California, No. A134424 (Cal. Ct. App. July 27, 2012). The appeal seeks review of the lower court's determination solely as to plaintiffs' causes of action under the education clauses. *See id.* at 26–27; *see also supra* notes 56–60 and accompanying text.

188 *See* Campaign for Quality Educ. v. State of California, No. RG10524770, ¶ 126 (Cal. Super. Ct. Mar. 16, 2011); *see also* Robles–Wong v. State of California, 2011 WL 3322890, at 3 (because the document, as reproduced by Westlaw, is not internally paginated, the article cites the page numbers available on the printable version of the document). *CQE*'s Second Amended Complaint specifically identifies inadequate resources which render the school system unconstitutional, including insufficient and undertrained staff, inadequate instructional programs, inadequate data systems and teacher quality, lack of access to preschool. *See* Campaign for Quality Educ. v. State of California, No. RG10524770, ¶¶ 127–44 (Cal. Super. Ct. Mar. 16, 2011).

189 *See supra* note 187 discussing the procedural history of the cases; *see also* John Fensterwald, *Robles–Wong Lawyers Reframe Case*, Thoughts on Pub. Educ. (Mar. 17, 2011), http://toped.svefoundation.org/2011/03/17/robles-wong-lawyers-reframe-case (noting that the trial judge "left open the opportunity for the plaintiffs to take a different, though narrower, tack and make the case that all students must have an equal opportunity to master the standards that the state has deemed to be basic elements of a sound education").

received.[190] The court rebuked plaintiffs for failing to plead facts showing the resources which are "actually provided" in plaintiffs' school and in other schools across the state.[191] Instead, plaintiffs supplied evidence comparing the funding and resources California public schools currently provide with that provided in the past.[192] Since prevailing statewide standards can change over time, the court found these facts failed to state an equal protection claim. Plaintiffs also attempted to compare the resources California students actually receive, with those needed to master academic standards.[193] Because the latter calculation was theoretical and unquantifiable, the court could not engage in a direct comparison.

In *Butt*, on which the *Robles–Wong* court primarily relies, the court of appeal held that a district's failure to meet prevailing statewide standards could only be determined by examining the individual facts.[194] Plaintiffs tried to sidestep this factual determination by arguing that the prevailing statewide standard may be established by legislation alone. Plaintiffs argued that by adopting statewide academic standards, requiring that schools teach to these standards, and demanding students' proficiency in these standards, the Legislature established a measurable prevailing standard to assess basic educational equity.[195] The court rejected this argument, insisting that the prevailing statewide standard be based on a factual showing of the level of education actually provided to most students in the state.[196] Outside of *Butt*, the court's understanding of the prevailing statewide standards test originates in the education clauses. As discussed in Part I.B, California's interpretation of the education clauses gives the Legislature broad discretion to determine the content of education in

190 *See Robles–Wong*, 2011 WL 3322890, at 4 ("The question, then, is whether plaintiffs have pleaded facts showing that plaintiff districts and students in plaintiff districts are receiving fewer educational resources compared to most other students and/or students in most other districts. They have not, in several respects.").

191 *See id.*

192 *See id.* at 5 (explaining that the pleadings allege that California schools suffered reductions in resources compared to what they previously enjoyed).

193 *See id.* at 3–4.

194 Butt v. State of California, 4 Cal.4th 668, 686 (1992) ("A finding of constitutional disparity depends on the individual facts.").

195 *See Robles–Wong*, 2011 WL 3322890, at 6 n.3.

196 *Id.* at 4.

the state, including statewide standards. Part of this broad discretion includes the Legislature's ability to change its chosen standards to conform to changing social, economic, or political pressures.[197] However, constitutional standards are not so flexible. If courts linked legislatively-created education standards to the constitutional prevailing statewide standard, then the constitutional standard becomes a moving target, changing with the whims of the Legislature. Not only is this standard judicially unmanageable, but it also creates a surge in education litigation, as plaintiffs can plead new claims with each statutory change.[198] Thus, the court was reasonably reticent to accept plaintiffs' claim linking the state content standards to the prevailing statewide standards. Because the court was unable to apply part one of the test, it could not find that the facts plausibly alleged that students' fundamental right was impinged.

The *Robles–Wong* court also found insufficient facts to allege a violation of the second part of the test. Drawing all inferences in favor of plaintiffs, the court could not identify whether the alleged deficiency in funding and resources resulted in inferior education outcomes.[199] The pleadings provided statistics comparing California students' performance with students in other states. As the court noted, this comparison is useless under the California Equal Protection Clause.[200] The complaints also supplied swaths of statistics showing that millions of California students, specifically minority, poor, and language learners, fail to achieve proficiency on

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197 *See* Cal. Teachers Ass'n v. Hayes, 5 Cal. App. 4th 1513, 1528 (1992) ("[U]nder our Constitution the Legislature is given broad discretion in determining the types of programs and services which further the purposes of education."); *Butt*, 4 Cal.4th at 688 ("The Constitution has always vested 'plenary' power over education not in the districts, but in the State, through its Legislature, which may create, dissolve, combine, modify, and regulate local districts at pleasure.").

198 *See, e.g.*, Lilliam Mongeau, *Common Core Standards Bring Dramatic Changes to Elementary School Math*, EdSource (Jan. 20, 2014), http://edsource.org/2014/common-core-standards-bring-dramatic-changes-to-elementary-school-math-2/63665#.VH_P8DHF9yw ("The new standards, adopted in California and 44 other states, have ushered in a whole new set of academic standards for math, with significant changes in the early grades . . . .").

199 *See Robles–Wong*, 2011 WL 3322890, at 5.

200 *Id.*

state standardized tests and fail to graduate from high school.[201] However, the pleadings failed to link poor student performance with resource deficiencies, including low per-pupil spending.[202] Plaintiffs allege that millions of California students lack basic skills and that California schools have subpar and erratic student spending, but they do not allege a connection between underfunded schools and unprepared students.[203] Without a causal or at least corollary link between the resource and an outcome, the court cannot find an equal protection violation.[204]

In sum, the court was unable to identify facts in the complaints which could plausibly satisfy either part of the test proposed by this article. The court summarizes plaintiffs' failure on both parts: "The Amended Complaints, if true, establish neither that plaintiffs' educational opportunity is inferior to the opportunity enjoyed by most other California students, nor that, as a result, students in plaintiffs' districts perform worse on the CST/CAHSEE standards than most other California students."[205]

By comparison, in *Reed v. State of California*,[206] plaintiffs' claims neatly tracked the two-part test, resulting in the trial court's grant of a preliminary injunction that paved the way for a successful settlement.[207] Teacher layoffs in 2009 heavily affected the three middle schools attended

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201 *See* Campaign for Quality Educ. v. State of California, No. RG10524770, ¶¶ 80–94 (Cal. Super. Ct. Mar. 16, 2011).

202 *See id.* ¶¶ 111–13.

203 Arguably, such a connection does not exist. *See* Buszin, *supra* note 26, at 1630 & nn.120–21 ("[E]conomists have found that increases in per-pupil expenditures have not led to better academic achievement over the course of three decades.").

204 Instead of comparing resources to outcomes, at the trial level and on appeal, plaintiffs argue that the allocation of funds to districts lacks rationality or coherence and fails to align with the state's academic content standards. *See* Corrected Appellants' Opening Brief at 2, Campaign for Quality Educ. v. State of California, No. A134423 (Cal. Ct. App. July 27, 2012), *consolidated with* Robles–Wong v. State of California, No. A134424 (Cal. Ct. App. July 27, 2012). However, an irrational funding system does not necessarily violate equal protection. Rather, the funding system must include a classification that affects two or more similarly situation groups in an unequal manner. *See* Cooley v. Superior Court, 29 Cal.4th 228, 253 (2009). Because the pleadings fail to show the effect of the funding scheme on any group or groups of students, the claim must fail.

205 *See Robles–Wong*, 2011 WL 3322890, at 5.

206 No. BC432420 (Cal. Super. Ct. filed Feb. 24, 2010).

207 Reed v. State of California, No. BC-432420 (Cal Super. Ct. May 13, 2010).

by the *Reed* plaintiffs.[208] Plaintiffs claimed that the dramatic reduction in the schools' educators violated their right to basic educational equity, as the teaching force in other schools in the district remained relatively unscathed.[209] *Reed* plaintiffs brought a class action suit to enjoin the school district from laying off teachers at the three middle schools.[210]

First, the trial court pointed to numerous statistics demonstrating that plaintiffs lacked a full teaching staff, while other district schools experienced limited or no change in the number of full-time teachers. Of the teaching staffs at plaintiffs' three middle schools, 60, 48, and 46 percent received layoff notices, while the districtwide layoff average was only 17.9 percent.[211] In addition, the court notes that at the start of the school year the three schools had eighteen, twenty-six, and sixteen vacant teaching positions, while other district middle schools had no or few vacancies.[212] Finally, to highlight the disparity still further, the number of educators assigned to teach courses for which they were untrained was rising at plaintiffs' schools, while dropping at other district middle schools.[213] The data clearly demonstrates that plaintiffs' middle schools fell below prevailing district standards in terms of number of layoffs, vacancies, and misassigned teachers. Plaintiffs' schools lacked teachers, while most comparable schools were replete with teachers.

Next, the court went into detail describing the dire education outcomes that resulted from the inadequate teaching force at plaintiffs' schools. Purely in terms of standardized tests, plaintiffs' middle schools ranked in the bottom ten percent of all schools statewide.[214] More to the point, the court qualitatively described the inferior educational opportunities available to students at the affected schools, demonstrating a direct relationship between high teacher turnover and substandard educational opportunities.[215] Quoting from plaintiffs' declarations, the trial court indicates that in classes where substitutes took the place of full-time teachers, "little or

208 *Id.* at 1.
209 *Id.*
210 *Id.* at 7–8.
211 *Id.* at 3.
212 *Id.*
213 *Id.* at 4.
214 *Id.* at 2.
215 Id. at 4.

no instruction took place," substitutes "failed to test the students" or "gave tests but never graded them," and "showed movies during class."[216] The cumulative effects of continuous substitute teachers resulted in students' missing large units of instruction in core academic subjects, severe academic disruption, and adverse social and psychological effects.[217] Using plaintiff's detailed factual record embodied in the complaint and amended declarations, the trial court was easily able to identify a clear link between the lack of a full-time teaching staff and detrimental effects on students' learning and achievement. The court found "a distinct relationship between high teacher turnover and the quality of educational opportunities afforded" and concluded that the unequal distribution of layoffs deprived students faced with an unstable teaching staff of their fundamental right to education.[218]

Once the court identified sufficient evidence to show "a real and appreciable impact on plaintiff's fundamental right to equal educational opportunity," it proceeded to apply strict scrutiny.[219] The lower court found that the district's asserted interest in laying off teachers in accordance with the seniority system was not compelling.[220] The court found that teachers do not have a vested interest in the application of a layoff system that results in equal protection violations.[221] Thus, the court granted plaintiffs' motion for a preliminary injunction and enjoined future layoffs at the three middle schools.[222]

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216 *Id.* at 5.

217 *Id.* at 5–6.

218 *Id.* at 4.

219 *Id.* at 6–7.

220 *Id.* at 7. Through their union, teachers bargained for the application of the last in, first out policy ("LIFO"), which resulted in strict seniority-based layoff. LIFO was also incorporated into the state Education Code. *See* Cal. Educ. Code § 44955.

221 Reed v. State of California, No. BC-432420, at 7 (Cal Super. Ct. May 13, 2010).

222 *Id.* at 9–10. Subsequent to the issuance of the preliminary injunction, the parties entered into a consent decree to prevent teacher layoffs at forty-five district schools. *See* Press Release, *Judge Approves Landmark Settlement in Reed v. State of California*, ACLU of Southern California, Jan. 21, 2011, *available at* http://www.aclu-sc.org/releases/view/103060. The trial court approved the consent decree and entered judgment. *See* Reed v. United Teachers Los Angeles, 208 Cal. App. 4th 322, 328 (2012), *review denied* (Oct. 24, 2012). The Los Angeles teachers' union, United Teachers Los Angeles ("UTLA"), objected to the consent decree at the trial level and appealed the judgment.

At first glance, it is possible to conclude that the failure of *Robles–Wong* and the success of *Reed* have less to do with the framework provided by the two-part test and more to do with the inclusion of adequacy elements in *Robles–Wong*, and their exclusion from *Reed*. However, a closer look at *Reed* reveals that it also included adequacy claims that, as in *Butt*, were upheld by the court. In *Butt*, the issue of adequacy arose when the Court held that a school year with 145 school days fell fundamentally below the standard 175-day school year, which the parties agreed was adequate.[223] The adequacy question was simple: Was a 145-day school year basically equivalent to a 175-day term? The answer was equally simple: No. The *Butt* Court further addressed the adequacy question in reasoning that the minimum standard of education required that schools operate without "extensive educational disruption."[224]

The adequacy question also arose in *Reed*. The resource compared in *Reed* was teachers, and the question was whether an inexperienced or substitute teacher was equivalent to a full-time, senior teacher.[225] The court's answer was also: No. To reach that answer, the court had to do more than count missing instructional days. As in *Butt*, the *Reed* court examined the "educational disruption" caused by teacher turnover and an influx of

See id. The court of appeal sided with UTLA, holding that since the consent decree potentially abrogated union members' seniority rights, out of respect for due process, the union was entitled to a decision on the merits. *Id.* at 329–30. The appeals court remanded the action to the trial court for further proceedings. *Id.* at 338. Thereafter, in April 2014, all parties, including UTLA, reached a second settlement agreement. Reed v. State of California, No. BC-432420 (Cal Super. Ct. May 9, 2014), *available at* http://achieve.lausd.net/cms/lib08/CA01000043/Centricity/domain/381/reed%20v.%20lausd%20et%20al/Reed%20-%20Final%20Settlement%20and%20Release%20of%20all%20Claims.pdf. The revised settlement applies to thirty-seven schools and provides them with additional administrators, counselors, instructional coaches, mentor teachers, professional development, and principal retention and recruitment bonuses. *Id.* at 3–8. The settlement permits the district to "maintain staffing stability and continuity of instruction" at the settlement schools in the event of future teacher layoffs, but it does not require the district to comply. *Id.* at 9. Thus, the settlement is less protective of students' fundamental right to education than the preliminary injunction issued by the trial court.

223 *See* Butt v. State of California, 4 Cal.4th 668, 688 n.14 (1992).

224 *Id.* at 687.

225 *Reed*, No. BC-432420, at 3–6 (Cal Super. Ct. May 13, 2010).

untrained and short-term teachers.[226] The court found that the instruction provided by plaintiffs' teachers was appalling and teacher turnover harmed educational continuity and teacher–student relationships.[227] From this evidence, the court concluded that a student's basic right to educational equity includes the right to be taught by a "stable, consistent teacher corps."[228] Since the merits of the case never reached an appellate court, *Reed* provides no precedential value. Nevertheless, litigants can embrace the structure employed by the court in order to incorporate adequacy principles into California's equal protection education jurisprudence.

In another plaintiffs' victory, the superior court in *Vergara v. State of California*[229] recently struck down five California statutes as unconstitutional under the state Equal Protection Clause. Plaintiffs challenged statutes which guarantee teachers tenure after two years, require a lengthy and expensive process to dismiss teachers, and lay off teachers in order of seniority.[230] Plaintiffs claimed these statutes result in "grossly ineffective teachers obtaining and retaining permanent employment, and that these teachers are disproportionately situated in schools serving predominately low-income and minority students."[231]

After an eight-week bench trial, the court issued a game-changing opinion which relies heavily on the two-part test to explicitly incorporate adequacy standards into the equal protection doctrine.[232] First, the court identified the resource at issue — grossly ineffective teachers — and compared students assigned such teachers and those who are not.[233] The undisputed evidence showed that at minimum one to three percent of California teachers are grossly ineffective, equaling between 2,750 and 8,250

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226 *See id.*

227 *See id.*

228 *Id.* at 5.

229 No. BC484642 (Cal. Super. Ct. judgment entered Aug. 27, 2014), *available at* http://studentsmatter.org/wp-content/uploads/2014/08/SM_Final-Judgment_08.28.14.pdf.

230 *Id.* at 3.

231 *Id.*

232 *Id.* at 2 ("[T]his Court is directly faced with issues that compel it to apply [equal protection] principles to the quality of the educational experience.").

233 *Id.* at 8; *see* Vergara v. State of California, No. BC484642, at 7 (Cal. Super. Ct. Dec. 13, 2013), *available at* http://studentsmatter.org/wp-content/uploads/2013/12/MSJ-Tentative.pdf.

educators.[234] Thus, students taught by a grossly ineffective teacher are a discrete minority allocated a resource which falls fundamentally below the vast majority of their peers who receive an effective (or at least not grossly ineffective) teacher. Unlike in prior cases, where plaintiffs defined the resource neutrally (school days, teacher turnover, funding), the *Vergara* plaintiffs framed the resource as a detriment which necessarily harmed their education. Once the court accepted this premise, it simplified the analysis in part two of the test. Unlike in some earlier cases, the parties agreed that "grossly ineffective teachers substantially undermine the ability of that child to succeed in school."[235] Thus, the parties conceded the link between the resource and inferior educational outcomes. Finding that the inferior educational outcomes caused by grossly ineffective teachers constituted a denial of students' fundamental right to education, the court highlighted the lost learning opportunities for students with incompetent teachers and the cost to students' lifetime earnings.[236]

In sum, the court found that "the employment of grossly ineffective teachers [] results in an equal protection violation in every instance that a student is assigned such a teacher."[237] The court went on to analyze whether there was a causal link between the challenged statutes and the employment of grossly ineffective teachers.[238] Concluding that such a link existed, the court applied strict scrutiny to each statute and found them unconstitutional under the Equal Protection Clause of the California Constitution.[239]

Vergara marks another step toward the inclusion of quality-based standards into California's equal protection analysis. The *Vergara* court accepted the argument that failed in *Robles–Wong*. Relying on the education clauses, *Vergara* explicitly added an adequacy component to the standard outlined in *Butt:* "[T]he Constitution of California is the ultimate guarantor of a *meaningful, basically equal educational opportunity* being afforded to the students of this state."[240] The import of this notable shift in

234 *Vergara*, No. BC484642, at 8 (Cal. Super. Ct. Aug. 27, 2014).
235 *Id*. at 7.
236 *Id*.
237 Vergara v. State of California, No. BC484642, at 7 (Cal. Super. Ct. Dec. 13, 2013).
238 *Vergara*, No. BC484642, at 3 (Cal. Super. Ct. Aug. 27, 2014).
239 *Id*. at 9–14.
240 *Id*. at 7 (emphasis added).

analytical focus remains unclear, as defendants appealed the lower court's decision on August 29, 2014.[241]

A comparison of plaintiffs' litigation strategies in *Reed, Robles–Wong*, and *Vergara* demonstrates that courts are willing to uphold new claims under students' fundamental right to education. However, those claims are more likely to be successful if the pleading, form, and underlying factual basis conform to the two-part test implicitly used by the *Serrano, Butt,* and *O'Connell* courts. Moreover, if litigants plead in conformity with the two-part test, providing sufficient factual evidence to support both prongs, the court may be willing to uphold adequacy arguments within the framework of the equal protection doctrine.

CONCLUSION

Although California courts overlook the education clauses in cases involving students' qualitative rights to education, they have not relinquished their role as a check on the state's actions or inactions involving the public schools. The Equal Protection Clause has assumed prominence in California's case history and continues to define and refine students' fundamental right to an education. While the cases appear disconnected and inconsistent, this article suggests that an application of a two-part test, which examines (1) whether plaintiffs substantially lack an education resource as compared to their peers and (2) whether this resource deficiency results in inferior education outcomes, may provide some clarity in identifying whether students' fundamental right has been infringed. The structure and predictability of the two-part test may provide a blueprint for future litigators to use when making claims under students' right to basic educational equity. The most recent cases in this area expose the possibility that equal protection jurisprudence, employing the two-part test in particular, is flexible enough to incorporate qualitative claims and to set a minimum educational standard for California students.

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241 Vergara v. State of California, No. B258589 (Cal. Ct. App. appeal docketed Sept. 4, 2014).