I. Articles

Prelude to Civil War: A Snapshot of the California Supreme Court at Work in 1858

Charles W. McCurdy

Vast numbers of people from all over the United States joined the California Gold Rush, and not all of them came to try their luck with pans, shovels, rockers, and sluice boxes. "Of nearly two thousand passengers now between Chagres and Panama," a correspondent for the San Francisco *Alta California* reported on December 29, 1849, "there are about six hundred lawyers, and of them four hundred go out with the expectation of being returned to Congress, or the legislature, at least; seventeen are electioneering for the gubernatorial chair, and twenty-one embryo Senators are already calculating the savings to be made on the mileage allowed by Uncle Sam to Washington and back." Of course the reporter exaggerated for humorous effect. But he had a point. Political adventurers from each of the several states flocked to California in the 1850s, and they came at a time of rising sectional tensions. San Francisco attorney Henry A. Crabb, writing in 1853, observed that California's lawyer-politicians included roughly equal numbers of "Northern men and Southern men, freesoilers and secessionists, puritans and fire-eaters." The result was a form of sectional politics unique to the Golden State. Northerners and southerners back in "the states" screamed at one another across the Mason-Dixon line or, alternatively, counseled moderation and compromise. In California, however, northerners and southerners engaged one another face-to-face and hand-to-hand in political conventions, in legislative caucuses, and even in the weekly conferences of the California Supreme Court.[1]

Southerners had one big advantage in the ensuing clash of sectional loyalties, feelings, and ideologies. California was a Democratic state from the outset, and slaveholders controlled the national party's machinery during the administrations of Franklin Pierce (1853-1857) and James Buchanan (1857-1861). Slave-state natives with proslavery views—their leaders known as the Chivalry faction—garnered virtually all the state's federal patronage jobs; David C. Broderick, leader of the California Democracy's anti-Chivalry wing, described the Port of San Francisco as

a "Virginia poorhouse" in 1853. Nor was the Chivalry's monopoly of federal posts limited to appointive offices. Federal officials wielded so much influence in state nominating conventions that every California congressman elected in the mid-1850s grew up in a slave state. "We never send a man to Congress that speaks, acts, and votes with the North," Charles Washburn, editor of the *Alta California*, complained in 1855. "Does a man here from the North aspire to Congressional honors, he must first lay his belly in the dust and endure all the violent and aggressive measures which the South has ever attempted, or he is at once thrust aside to make way for one of chivalrous birth." Sectional politics also shaped the composition of the California Supreme Court. Until 1861, judicial aspirants stood before the voters on party tickets at general elections; of the seven justices who sat on the high court between 1852 and 1857, all but two came from the South. One of the northerners, Alexander Wells of New York City, had supported John C. Calhoun's bid for the presidency in 1844.[2]

Lawyers and politicians from the free states chafed in the Chivalry harness. Although "[w]e have no slavery here," San Francisco attorney Oscar L. Shafter wrote his Vermont family in 1856, "the State is and ever has been in bonds to the slave power." Violent altercations between northerners and southerners were not uncommon. "[I]f any man could be found who had the temerity to believe [slavery] was a bad system, and his opinion became known," John C. Conness recalled 30 years later, "he was proscribed, clubbed, or shot, according to the pleasure of the ruffians who dominated public opinion there." Conness, a United States senator during the 1860s, spoke from first-hand experience. Chief Justice Hugh C. Murray, a native of Missouri "whose mind was saturated with the teachings of John C. Calhoun," drew a bowie knife and chased him around a San Francisco barroom in 1853; three years later, Murray assaulted a Sacramento abolitionist "with a heavy bludgeon." Sectional animosities also generated duels. Broderick fought one with Caleb Smith, son of a former Virginia governor, in 1852. Congressman Joseph McCorkle, a native of New York, and Senator William M. Gwin, a native of Tennessee, duelled with rifles at 30 paces in 1853. And *Alta California* editor Washburn had an engagement on "the field of honor" with Benjamin F. Washington, a Chivalry wheelhorse from Virginia, in 1854. All escaped serious injury, but the duels merely fanned the flames of sectional discord in California. In July 1854, as the legendary

Broderick-Gwin fight for election to the Senate loomed increasingly near, the Democratic convention culminated with a brawl that nearly destroyed Sacramento's First Baptist Church.[3]

Momentous questions of constitutional interpretation lay just below the surface of California's tumultuous civic life. As sectional ideologies emerged and ramified in the antebellum era, David M. Potter once observed, the phrase *E pluribus unum* became "a riddle as well as a motto." What made it so, of course, was the endless debate on whether the American republic ought to be regarded as a perpetual union, "neither wholly federal nor wholly national," or a league of sovereign states, each of which retained the right to secede at its discretion. The Golden State's pioneer lawyers and politicians had no difficulty reciting the arguments of slave-state theorists and their free-state counterparts. But in California, as in the nation, no consensus materialized. "It is the odious nature of the question," John Quincy Adams remarked in 1831, "that it can be settled only at the cannon's mouth."[4]

Before the shooting started, however, the California Supreme Court had no choice but to adjudicate every case and controversy involving the nature of the union that appeared on its docket. What follows is an intensive study of how the justices performed in one nearly forgotten yet fascinating case, *Warner & Wife v. Steamer Uncle Sam*, decided in 1858.[5]

THE JUSTICES

Stephen Johnson Field, the principal architect of California jurisprudence in the nineteenth century, was the court's newest member in 1858. The son of a New England minister and a graduate of Williams College, Field came to California from New York in the stampede of 1849, settling in Marysville where he served as the village alcalde in 1850 and a Yuba County assemblyman in 1851. During his term in the state legislature he framed the Practice Acts, reorganized the judicial system, and established the jurisdictional basis for the development of far-western mining law. The extraordinary command of legal literature and conscientious attention to detail that he displayed in 1851 prompted one friendly journalist to call his achievements "the work of a mastermind." He brought the same skills to the California Supreme Court; over the course of six years on the state bench, the last four of them as chief justice, he greatly enhanced his reputation as the leading jurist on the Pacific slope.

Stephen J. Field (1816-1899)
Courtesy: The Bancroft Library

Field worked on a grand scale. Several of his treatise-like opinions ran to 70 printed pages or more, and he often followed a narrow holding with a series of comprehensive generalizations, thus, as he wrote, "plac[ing] our decision upon grounds which will furnish a rule in controversies of a similar character." Members of the bar and press corps repeatedly extolled his work. By producing opinions "in the style of a scholar," the San Francisco *Times* remarked late in 1859, he not only "[has] settled certain principles that were held in doubt" and "put an end to much unprofitable litigation" but also "elevated our standing abroad." "[M]ore than any other man," Joseph G. Baldwin wrote four years later, "Judge Field has given tone, consistency, and system to our judicature."[6]

Field cultivated such adulation. Shortly after his election to the bench in the Democratic landslide of 1857, he invited a number of friends to his Marysville home. Among them was Thomas Farrish, son of a local merchant and a fellow parishioner at St. Johns Church. "After some conversation," Farrish recalled many years later, Field said:

> "Tom, do you know I am paying the people of California over $40,000 a year for the privilege of serving them upon the supreme bench of the state?" Then he went on to say that the year previous he had received in fees some $47,000. Then he placed his hands over his face and soliloquized as follows: "Ambition! Ambition! Glory!! Glory!!" Then looking up cheerfully, he said "Well, well, I suppose it will teach me economy to live on $6,000 a year!"

Farrish's story, though perhaps apocryphal, accurately reflected Field's state of mind as he began a judicial career that ultimately spanned four decades. And the judgeship had cost him a great deal. Obtaining the Democratic nomination required him to downplay his antislavery pedigree and mend political fences with former Chivalry foes. As James O'Meara later observed, Field was "the only prominent Broderick man on the ticket" in 1857. Yet Broderick, infuriated by Field's calculated enlistment of Chivalry support, never spoke to him again, ending a friendly working relationship that had benefited both of them since 1851. Field also made what the *Democratic State Journal* called "the greate[st] pecuniary sacrifice . . . [ever] by a public officer in this State." In 1857 his income at the California bar was twice the sum his older brother, David Dudley Field, was earning in New York. But the prospect of glory overshadowed everything else. Perhaps never in American history had

a newly commissioned judge been so eager to begin the process of deciding great cases greatly.[7]

Field's many admirers took it for granted that he would dominate the court's other two members. Shortly after Chief Justice Murray died on September 18, 1857, the Sacramento *Spirit of the Age* reported that Justice David S. Terry, a native of Kentucky who had migrated to California via Mississippi and Texas, intended to resign because he was no match for the "eminent" Field. "There are not many jurists in this state who would willingly consent to occupy the position in which circumstances place Judge Terry," the editor declared. Other journalists reprinted the story, and the Marysville *Herald* applauded Terry's "sense of propriety," which, it said, "was strangely wanting" in 1855 "when he allowed himself to be placed in nomination for that exalted position." But the rumor had no foundation in fact. If Terry ever considered leaving the court, it certainly was not for fear of being intimidated. Terry's combativeness matched and may have exceeded that of his new colleague. During the succeeding two years, Field, the quintessential Jacksonian "barnburner," and Terry, a southerner of the Calhoun school, invariably reasoned from diametrically opposed premises and constantly clashed on questions of constitutional interpretation.[8]

The two men were opposites in every conceivable way. Chief Justice Terry was a massive man, standing well over six feet tall and weighing in excess of 220 pounds. "He was a rough fellow," a California lawyer recalled some years later. "[S]itting on the Supreme Court Bench, he would take out his pistol and lay it on the desk, and sit with his heels as high as he knew." James McClatchy even claimed that "Judge Terry lives more in the physical than in the mental." "In his case," the Sacramento editor remarked, "mind does not govern matter, but matter governs mind, and thus while he may be a gallant, he is a dangerous man—for without due consideration he leaps at conclusions, caring not where he may alight." Terry was also uncommonly direct. His opinions averaged about a page in length and responded serially to the arguments of counsel, supplying little or no guidance to the bar in subsequent cases. "Plain and simple in his habits of life, he despised pomp and display," his old friend A. E. Wagstaff wrote in 1892. "He decided the cases that were submitted to him, and did not attempt to write treatises, which should be published at the State's expense, in every decision which he rendered." Above all, Terry regarded African-American slavery as a just

and natural relation between black people and white people. "I was born and reared in a southern state, and believed in the doctrine of the ultra states rights men of the South," he confessed some years later.

> I desired to see the government of this State in the hands of those whose political opinions coincided with my own. . . . I [also] desired to change the Constitution of the state by striking out that clause prohibiting slavery and for several years entertained strong hopes of effecting this object or, failing in that, to divide the state and thus open a portion of California to Southerners and their property.

In time the two men acquired a grudging respect for the strengths of the other. Terry had a "generous nature," Field wrote in 1881, but his "southern prejudices and partisanship often affected his judgment." Terry was characteristically blunt: "Field is an intellectual phenomenon. He can give the most plausible reasons for a wrong decision of any person I ever knew."[9]

Justice Peter H. Burnett, the well-meaning man in the middle, was a good deal older than his colleagues and far more experienced in public life. A staunch unionist from Kentucky, Burnett had served on Oregon's territorial court and as the first governor of California before opening a San Jose law office in 1851. When Justice Solomon Heydenfeldt resigned on Christmas Eve, 1856, Burnett agreed to serve on the California bench until a successor could be elected. Everywhere on the Pacific coast people regarded him as a venerable elder statesman; John Hittell reported that "no man in California has a higher reputation for kindliness and integrity." But he was not a very able lawyer. Burnett repeatedly tried to chart a course between the bastions of principle staked out by his colleagues, and more often than not he ended up at a cul de sac that made no sense at all. Until he resigned shortly after the election of Joseph Baldwin in 1858, however, Burnett voted with Terry every time the court was divided. In 1858 Field dissented six times, more than all members of the court combined during the previous eight years. Four of the dissents occurred in cases that posed questions of constitutional law. One of them was *Warner & Wife v. Steamer Uncle Sam.*[10]

The facts were relatively straightforward. Plaintiffs had libelled the *Uncle Sam* in a Solano County trial court for "malpractice" of a contract to transport Mrs. Anne Warner and an infant son from San Francisco to New York via San Juan del Sur, Nicaragua. The complaint stated that

the vessel had proceeded instead to Panama "on account of some private quarrel" between the captain and the Nicaraguan authorities. At that point Mrs. Warner had been forced to disembark and had been told, falsely, that another steamer had been engaged to pick her up at Aspinwall on the east side of the isthmus. The action had been filed to recover damages not only for breach of contract but also for Mrs. Warner's detention in Panama and the ensuing "trouble and inconvenience, and suffering by sickness, caused by the unwholesome climate."

The complaint contained two remarkable features. Although the action was for breach of contract made by the husband, the wife had been joined as a party so that additional damages might be claimed on what amounted to a tort theory. More important, however, was the fact that the suit had commenced in a state court. Joseph G. Baldwin, counsel for the plaintiffs, stood on chapter six of the Practice Act, which provided that "[a]ll steamers, vessels, and boats shall be liable . . . [for] non-performance or mal-performance of any contract for the transportation of persons or property, made by their respective owners, masters, agents, or consignees." It also provided that the action might be brought *in rem*, that is "directly against steamers, vessels or boats." Baldwin's opponent, a native of upstate New York named Delos Lake, argued that the court ought to strike down the act and dismiss the case for want of jurisdiction. In his judgment, the California statute violated section nine of the Judiciary Act of 1789, wherein Congress provided that federal district courts "shall have exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction."[11]

BACKGROUND FOR DECISION

Several layers of history lay beneath the seemingly obvious conflict between the California law and the Judiciary Act. When Field framed the Practice Act in 1851, chapter six was unquestionably constitutional within its intended scope. Twelve other states, all of them with a brisk commerce on freshwater rivers and lakes, had enacted comparable statutes following the Supreme Court's decision in *The Thomas Jefferson* (1825). There a unanimous Court, speaking through Justice Joseph Story, held that "acknowledged principles of law" limited the exercise of federal admiralty jurisdiction to "waters within the ebb and flow of the tide," the standard demarcation of maritime authority in English jurisprudence. Not

surprisingly, the decision was unpopular among the shippers, suppliers, and sailors whose livelihood depended upon the burgeoning steamboat commerce of the inland rivers and lakes. Where admiralty remedies are available, persons with a legal claim against a vessel have the choice of proceeding *in rem* (by arresting the boat and making it the defendant without regard to the owner) or *in personam* (by personal action against the owner and attachment of his property). At common law plaintiffs have access only to the latter, often inferior form of process. Actions *in rem* are ordinarily quicker and cheaper because owners tend to reside at distant points. Admiralty remedies are also more complete. Ships attached at common law are subject to all existing liens and mortgages; but when a vessel is sold under an admiralty order, it gives title to the buyer against the whole world. Simply to state the relative advantages of admiralty forms and doctrine is to suggest why so many states enacted statutes opening their own courts to *in rem* suits against steamboats, barges, and other craft beginning in the 1830s. As long as *The Thomas Jefferson* remained good law, the authority of state governments to pass such measures was unassailable. The "exclusive" admiralty jurisdiction of federal courts conferred by the Judiciary Act ceased at the tidewater line. Disputes arising on nontidal waters posed questions of local law and might be resolved through whatever forms of action state legislatures deemed appropriate.[12]

None of the water-craft laws expressly limited the *in rem* jurisdiction of state courts to nontidal waters. Language to that effect would have been superfluous in the statutes of landlocked states such as Ohio and Missouri. In Alabama, Florida, Georgia, and Mississippi the state judiciaries apparently regarded the nontidal limitation on their jurisdiction to be implied. Until 1851 there were no reported cases of vessels being libelled in state courts when the dispute arose on the high seas or in tidewater bays. As Alexander Hamilton predicted in *The Federalist*, not even "[t]he most bigoted idolizers of state authority . . . [had any] disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." Nor is there any reason to suspect that Field intended to confer an *in rem* jurisdiction on the California courts larger than that vested in the tribunals of other states. In 1851 Field was a resident of Marysville, the economy of which

depended on river traffic; he understood the demand for access to *in rem* proceedings against river steamers, for he had authorized such an action while serving as the community's alcalde. Yet the first *in rem* proceeding to reach the California Supreme Court involved a collision of two vessels in San Francisco Bay during the fall of 1850. The court's jurisdiction in *Innis v. Steamboat Senator* was not challenged by counsel, and the controversy was decided on the merits without the court so much as acknowledging that the cause of action had occurred within the ebb and flow of the tide.[13]

The behavior of bench and bar in *Innis* apparently hinged on a tacitly shared assumption. Although the Judiciary Act vested federal courts with "exclusive" maritime jurisdiction, it could not be construed as affecting California jurisprudence until Congress had organized a federal court in the state and federal judicial officers had arrived on the scene. San Francisco had been one of the world's busiest ports since 1849, and California alcaldes had instinctively relied on admiralty forms and doctrines to settle maritime disputes prior to the creation of state courts in 1850. Before Ogden Hoffman opened California's first federal court on February 1, 1851, it would have been unreasonable for the state judiciary to renounce a jurisdiction that alcaldes had previously exercised with such breadth. What makes this theory so compelling, however, is the fact that the California bar immediately transferred maritime claims to the federal district court once it opened. Judge Hoffman maintained a crowded admiralty docket from the beginning; not until 1855 did the California Supreme Court hear another *in rem* action when the complaint involved tidewater commerce.[14]

Meanwhile, the constitutional configuration of the admiralty question in California changed for the third time in as many years: during its December 1851 term the Supreme Court of the United States overruled *The Thomas Jefferson*. Speaking for the Court in *The Propeller Genesee Chief v. Fitzhugh*, Chief Justice Roger Taney held that the federal judiciary's maritime jurisdiction extended to all navigable lakes and rivers. "[T]here is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit," he declared: "If it is a public navigable water . . . the reason for the jurisdiction is the same." Taney's major premise was that circumstances had changed since 1825. When the Marshall Court handed down *The Thomas Jefferson*, he

Steamship *Senator* in Sacramento, Winter of 1849
Courtesy: The Bancroft Library

declared, "the commerce on the rivers of the west and on the lakes was in its infancy, and . . . the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided." Although Taney did not say as much, the circumstances that had produced the state watercraft laws had changed too. Once the Court's *Genesee Chief* decision vested federal courts with jurisdiction over controversies arising on freshwater lakes and rivers, the original rationale for the state laws disappeared. Indeed, continued cognizance of *in rem* proceedings by state courts was likely to create vexing collisions between federal district judges exercising jurisdiction under the Judiciary Act and local magistrates claiming jurisdiction over the same vessel under the watercraft laws. Congress had made federal jurisdiction exclusive in 1789 for that very reason. Less than a year after its enactment, then, chapter six of Field's Practice Act had become superfluous and arguably unconstitutional.[15]

The history of the federal judicial power in California took an entirely different turn, however, in 1854. Speaking for himself and Chief Justice Murray in *Johnson v. Gordon*, Justice Solomon Heydenfeldt, a native of South Carolina, held that section twenty-five of the federal Judiciary Act, authorizing the Supreme Court to decide certain kinds of controversies on writ of error to state courts, was "not warranted by the Constitution" of the United States. As a result, Heydenfeldt declared, all state court decisions involving federal questions—construction of the Constitution, or acts of Congress, or treaties of the United States—were necessarily final. California journalists immediately dubbed *Johnson v. Gordon* "the late Nullification decision," and they did so for good reason. The self-styled Old Republicans of Virginia had framed an inchoate argument against the Supreme Court's appellate jurisdiction over state courts during the Age of Jefferson. But the argument, now reflected in Heydenfeldt's *Johnson* opinion, had been perfected by John C. Calhoun.[16]

Working from the premise that sovereignty was indivisible and had resided in the several states from the moment of independence, Calhoun claimed that the union was merely a league of sovereign states. It followed that the people of the several states, as parties to the constitutional compact of 1788, had the ultimate right to define the boundaries of the federal system. "Nullification" was the method, Calhoun proposed, by which the states might renegotiate the compact every time Congress

attempted to exercise powers that had not been expressly delegated by the Constitution. When a state convention nullified a federal law, it put everyone on notice that one party believed the compact's terms had been violated. The other states might clarify the matter in dispute by a constitutional amendment (a process that would give one-fourth of the states plus one a veto), whereupon the state that had nullified the law might choose to remain in the reconstructed league or, if it rejected the amendment, withdraw from the union. Section twenty-five of the Judiciary Act subverted this theory of the federal system; in Calhoun's judgment, it was unconstitutional.[17]

The Supreme Court had ruled otherwise in *Martin v. Hunter's Lessee* (1816). Speaking through Justice Story, the Court not only sustained the statute but declared that Congress "could not, without a violation of its duty, have refused" to enact it. "From the very nature of things," Story asserted, "the absolute right of decision, in the last resort, must rest somewhere." Article III of the Constitution established the Supreme Court as that final arbiter. But "southern rights" theorists rejected the Court's reasoning and refused to regard the question as having been settled. Article III of the Constitution, they pointed out, did not expressly authorize judicial review of state judgments in the Supreme Court. The power conferred in the Judiciary Act and sustained in *Martin* was an implied power at best. Moreover, they argued, Story had been mistaken in suggesting that the Constitution envisioned the Supreme Court as the final arbiter of controversies touching the scope of federal power. For Calhoun and his followers, "the absolute right of decision, in the last resort," lay instead with the parties to the constitutional compact—the people of each state gathered in convention. They conceded that their theory might prove inconvenient in practical application. Since state court decisions on federal questions would be final, different versions of the Constitution might be in force from time to time in each of the several states. But that was consistent with the overall Calhounite constitutional scheme. When clashing interpretations of the Constitution materialized in the several state courts, an authoritative judgment might be rendered through the process of constitutional amendment. Once the people of the sovereign states had thus renegotiated the constitutional compact, the constituent power of each state might decide, as in the case of nullification, whether to remain in the reconstructed league or to secede from it.[18]

Calhoun's constitutional theory had an immense impact on the mind of the South. Even there, however, a substantial minority believed that the response President Andrew Jackson expounded in his Nullification Proclamation (1832) was more compelling. Almost every northerner believed it to be unanswerable. Jackson, too, advanced a theory of the union and its origins; but he and his followers rejected Calhoun's view largely because it would render the American system of government unworkable. "[S]uch a nation," Jackson said, "would be like a bag of sand with both ends open." Since nullification and its corollary involving the federal judicial power comprehended state vetoes of federal law, it would also make a mockery of the Constitution's language in Article VI, proclaiming that "[t]his Constitution, and the laws of the United States made in pursuance thereof . . . shall be the supreme law of the land." Secession was another matter altogether. "Metaphysical subtlety, in pursuit of an impracticable theory," Jackson observed, "could alone have devised one that is calculated to destroy [the union]." Those who claimed a right to secede, he warned, not only "should recollect that perpetuity is stamped upon the [C]onstitution by the blood of our Fathers" but also should understand that secession must be regarded as "an offense against the whole Union."[19]

The nature and sources of the union was still a subject of almost daily debate when Heydenfeldt and Murray astonished Californians by unfurling Calhoun's state sovereignty banner in *Johnson v. Gordon*. The decision became the subject of hostile comment almost instantly. "Our Supreme Court," said the Stockton *Argus* in an incredulous, widely reprinted editorial,

> decides the Constitution and laws of the United States to be unconstitutional, reverses the uniform decisions of the United States Supreme Court, scoffs at the opinions of such men as Marshall, Story, Webster, Kent and all the great legal minds of the nation . . . and rules judicially that the metaphysical abstractions of John C. Calhoun are not only the true theory of Constitutional law, but that they are, *de jure et de facto*, the Constitution *and* laws.

"Even South Carolina," the Sacramento *Union* added, "has never gone so far as our Supreme Court has done. . . . The people should not be left to suffer from the political vagaries of men who happen to occupy high official station." The state legislature agreed. On April 9, 1855, it

enacted a statute designed to enforce the state court's compliance with the very act of Congress that Heydenfeldt and Murray had declared unconstitutional. The statute not only made it a misdemeanor for any clerk or judge to interfere with attempts to file writs of error but also provided that offenders would be peremptorily impeached. "This is as it should be," remarked the *Alta California* when the senate passed the measure by a vote of 25 to five. "[W]e never could entertain the idea that any respectable number of the people of California could ever so far forget their loyalty to the Constitution of the United States, and their attachment to the Union, as to endorse the nullification vagaries of the Supreme Court of California."[20]

But the California statute did not subdue the voices of Heydenfeldt and Murray any more than the Marshall Court had quieted Virginia's Old Republicans or Jackson's Nullification Proclamation had silenced Calhoun. In *Taylor v. Steamer Columbia* (1855), Heydenfeldt and Murray simply shifted the focus of their crusade against the judicial power of the United States. At issue was breach of a maritime contract for a voyage between Portland, Oregon, and San Francisco. In the court below counsel for the steamship company had demurred to the complaint, pointing out that Article III of the Constitution extended the federal judicial power to "all cases of admiralty and maritime jurisdiction" and that section nine of the Judiciary Act provided that the federal district courts "shall have exclusive original jurisdiction" of such controversies. Plaintiff appealed to the California Supreme Court when the local tribunal dismissed the suit for want of jurisdiction. Speaking again through Heydenfeldt, the court reversed the decision below on the ground that section nine of the Judiciary Act was unconstitutional. "[T]he States are original sovereigns with all powers of sovereignty not expressly delegated by the Federal compact," he asserted. "The States are not deprived by the Constitution of the United States, of the power to confer upon their own Courts all Admiralty and Maritime jurisdiction; consequently Congress has no power to make this jurisdiction exclusive to the Federal Courts."[21]

Although *Johnson* and *Taylor* were grounded on the same constitutional theory, the latter decision was less vulnerable to attack than the former. In *Taylor* the court did not merely deny the validity of a federal statute. It also applied chapter six of the Practice Act, a state law duly enacted by the California legislature. Nor was that all. In *Johnson* the

court had refused to follow an interpretation of the Constitution handed down by the U.S. Supreme Court in 1816 and reaffirmed on countless occasions thereafter. When *Taylor* came down, however, the Supreme Court had not yet considered a case explicitly involving the authority of state legislatures to confer admiralty jurisdiction upon their own courts. The state sovereignty doctrine enunciated in *Taylor* upset California's anti-Chivalry lawyers all the same. Some of them could hardly wait to reargue the question once Heydenfeldt had resigned and Murray had died. The opportunity arose when *Warner & Wife v. Steamer Uncle Sam* came to the court in 1858.

CACOPHONY IN THE COURT

The court had several options at its disposal in *Warner & Wife.* Counsel Joseph Baldwin (who himself would succeed Burnett on the high court later in 1858) proffered three options in his brief for the plaintiffs. The first option, of course, was to reaffirm *Taylor v. Steamer Columbia* unreservedly. But Baldwin had little sympathy for the state sovereignty dogmatism of his fellow southerners; consequently he did not press that option very hard. Alternatively, he argued, the court might sustain the holding in *Taylor* while abandoning Heydenfeldt's reasoning. This might be accomplished through a broad construction of the "saving clause" in the Judiciary Act. Section nine of the statute, he pointed out, vested federal courts with "exclusive" jurisdiction of maritime causes yet it also saved "to suitors, in all cases, the rights of a common law remedy where the common law is competent to give it." All agreed that the Warners might bring an action *in personam* on the contract of transportation, Baldwin declared.

> Therefore, the jurisdiction over the subject [of maritime agreements] was not taken away from the State Courts. They had it before [the 1789 Judiciary Act]; they have it now. That is all we want. As to the mode in which the State courts shall exercise their jurisdiction, this is wholly unimportant. We are discussing a question of jurisdiction, not a question of practice. The Constitution and the Acts of Congress deal with things, not forms.

Chapter six of the Practice Act, authorizing litigants to proceed *in rem* against vessels, contemplated "a mere change in remedy, which it was

always competent for the Legislature to make." According to Baldwin, then, the California statute "is within the saving clause of the Act of 1789."

Baldwin's third option amounted to a fallback position. Even if the court strongly believed that the state law was unconstitutional, he contended, it should resist the temptation to say so. The Supreme Court had not yet addressed the question, and section twenty-five of the Judiciary Act confined its appellate jurisdiction to cases in which state laws had been upheld in the face of a right claimed under the Constitution, laws, or treaties of the United States. Since state court decisions adverse to the validity of state legislation could not be carried to Washington on writ of error, they tended to subvert the principle of national uniformity in American federal-question jurisprudence. "It seems to me," Baldwin concluded, "that this Court would at least wait for an authoritative decision of the Supreme Court of the United States before it declared the act of the State Legislature unconstitutional, and reversed its own decision upon so important a matter to its citizens."[22]

Delos Lake's brief for the Pacific Mail Steamship Company was at once more persuasive and less politic. He thought Baldwin's third option missed the very point of the controversy. It was not surprising that the Supreme Court had not yet construed the "exclusive jurisdiction" clause in section nine of the Judiciary Act, he exclaimed. "From the time of the passage of that Act until the decision of the case of *Taylor v. Steamer Columbia*, by our Supreme Court, a period of sixty-five years, the exclusive jurisdiction of the Courts of the United States in admiralty and maritime causes was never disputed by any State court." The only plausible explanation for the absurd doctrine expounded in *Taylor*, Lake contended, was the obsession with defending Calhoun's theory of the Constitution that Heydenfeldt and Murray had displayed in *Johnson v. Gordon*, "the point of departure" for the admiralty ruling. In effect, the two decisions constituted a judicial declaration of secession from national authority. "It is not too late," he said, "to retire from a controversy which we submit was most needlessly commenced."

Lake professed to be equally dumbfounded by Baldwin's construction of the "saving clause." The only thing saved to suitors in state courts, he observed, was "a common law remedy." But the forms of action at common law were by definition *in personam*. The right to proceed *in rem* was peculiar to admiralty and entirely remedial in nature. How,

then, could access to *in rem* forms have been saved to state court litigants by the Judiciary Act? Baldwin's theory, Lake asserted, would enable state legislatures to vest their own courts with jurisdiction over the full range of maritime controversies, effectively nullifying the Judiciary Act's command. Nevertheless, Lake did supply the court with a way to avoid the constitutional question altogether. He strenuously argued that the wife had been improperly joined as a party in the pleadings. The action turned on the contract for transportation made by Mr. Warner, "the consideration for the promise moved from the husband, and the damages for any breach of the promise go to him." When the gist of the action was in contract, conventional rules of practice barred joinder of a second party who could recover for alleged injuries only on a tort theory.[23]

When the court took up *Warner & Wife* in its weekly conference, an extraordinary series of pairings emerged. The material in the opinions provides a fairly reliable picture of how the conference must have gone. Chief Justice Terry stood squarely on *Taylor*. Predictably, he thought section nine of the Judiciary Act was unconstitutional insofar as it conferred "exclusive" jurisdiction of maritime causes on the federal courts. "Jurisdiction in certain cases," including admiralty, "was given by the Federal Constitution to the United States courts," Terry explained in his subsequent opinion. "[B]ut the grant contains no words of exclusion, nor any evidence of an intention to take from the tribunals of the several States the powers which were vested in them." No jurisdiction that the Constitution treated as concurrent could be made exclusive by a mere act of Congress, for "[t]he several States of the Union are sovereign, and endowed with all the attributes and rights of independent States, except such as by the Constitution have been surrendered to the United States, or prohibited to the individual States." Neither Field nor Burnett could assent to such reasoning; moreover, both believed that Baldwin's construction of the "saving clause" had no merit. Yet they could not agree on how to construct a majority opinion. In the end Burnett voted with Terry and wrote a separate opinion. Field dissented.[24]

Field tried to mollify his staunchly unionist colleague so that they could stand together against Terry. In Field's view, chapter six of the Practice Act was unconstitutional. The act never should have been invoked in cases arising on the high seas; its application to causes of action occurring on the Sacramento River system had been superseded by *Genesee Chief*. But Field contended that the decision invalidating the

California statute ought to come from the Supreme Court of the United States. On that matter, at least, he thought Baldwin had made a telling point. The court's clear duty was to frame a measured opinion that would make *Warner & Wife* the subject of a writ of error. Field also had a very definite idea about how best to accomplish that duty. All the situation called for, he counseled in conference, was a brief majority opinion stating that the court felt compelled to keep the state law in force until overruled by the Supreme Court. By thus indicating that an authoritative decision reversing *Taylor* was imminent, he and Burnett could not only disassociate themselves from Terry's state sovereignty views but also encourage Lake to take his persuasive argument to Washington.

Burnett resisted Field's approach, in part because he already had devised a solution of his own. During oral argument Burnett had been struck by Lake's claim that *Johnson v. Gordon* marked "the point of departure" for the whole admiralty mess in California. The insight had some merit, but the theory Burnett derived from it bordered on the ridiculous. What the court ought to do in *Warner & Wife*, he told his colleagues in conference, was write a ringing affirmation of federal judicial supremacy under section twenty-five of the Judiciary Act. All the authorities, ranging from *The Federalist* to *Martin v. Hunter's Lessee* and beyond, might be assembled in such a way as to overrule *Johnson* and show that Article III of the Constitution mandated a uniform course of decisions on federal questions. Once that task had been accomplished, Burnett explained, it would no longer matter whether the admiralty jurisdiction of the United States was exclusive or concurrent. If the California court affirmed *Taylor* and held that state courts had concurrent jurisdiction over maritime causes, the Supreme Court could still maintain uniformity—an "invincible necessity" in the federal union—by hearing admiralty causes on writ of error. "The exercise of this original jurisdiction by the State Courts, subject to the supervisory power of the Supreme Court of the United States," Burnett declared in his subsequent opinion, "would seem to be compatible with the harmony and efficiency of the system, and beneficial in its practical effects."[25]

Field must have been in a state of shock by the time Burnett finished stating his views to the conference. In effect, his colleague proposed that the California Supreme Court reconstruct the judicial system established by the Founders. And there was no method to Burnett's madness. He

desperately wanted to defend section twenty-five of the Judiciary Act; at the same time he was prepared to subvert section nine of the same statute. Yet the architects of the federal judicial system had derived both provisions from a single theory of Article III. The Constitution did not expressly provide that the Supreme Court was to be final arbiter of all federal questions. Nor did it expressly state that federal courts should have exclusive jurisdiction of admiralty and maritime causes. Nevertheless, Congress had determined at the outset that both provisions constituted appropriate exercises of its enumerated powers to create courts and allocate "the judicial power of the United States" among them. On what grounds, then, did Burnett propose to hold that Congress had acted within its authority in enacting section twenty-five but not in enacting section nine? It might be true that the former was an "invincible necessity" in a federal system while the latter was not. But that determination was for Congress to make. John Marshall's classic commentary on Congress's implied powers in *McCulloch v. Maryland* (1819) spoke directly to the mode of constitutional construction Burnett recommended in *Warner & Wife*. "To employ the means necessary to an end," Marshall said, "is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable."[26]

Even if Burnett's constitutional theory were sound, the doctrine he espoused in *Warner & Wife* could not possibly have spawned the "beneficial . . . practical effects" he anticipated. His whole approach hinged on the existence of a "supervisory power" in the Supreme Court, without which the admiralty decisions of the several state courts would lack uniformity. But section twenty-five of the Judiciary Act did not authorize the Supreme Court to reach the merits of maritime controversies on writ of error to state courts. Only the question of jurisdiction could be thus decided. Moreover, this glaring deficiency in Burnett's theory was not the result of inadvertent omission on Congress's part. Since maritime causes often involve foreign ships, crews, or cargoes and therefore have foreign policy implications, the framers of the Judiciary Act had excluded state courts entirely from that branch of jurisprudence. If section nine of the statute was unconstitutional, then, the uniformity problem could be rectified only by another act of Congress amending section twenty-five to comport with a decision of the California Supreme Court. Did Burnett really think that Congress would remodel the federal

judicial system in response to such a ruling? The very idea was preposterous, and Field no doubt told him so. Nevertheless, Burnett stood his ground with a pertinacity deserving a better cause.

At that point in the conference, though perhaps before, Field pressed the joinder question. Since the wife's injuries "are alleged by way of special damage" and sounded in tort, he asserted, her case could not be linked with the husband's cause of action, which "is confessedly based upon the provision of the statute . . . render[ing] steamers liable for the non-performance of any contract." Field might have believed that this arguable deficiency in the pleadings was fundamentally important. A more likely explanation for his raising it, however, goes to strategy. Field wanted no part of the views expressed by his colleagues on the question of jurisdiction; he must have been reluctant to have the issue go up to the Supreme Court accompanied by such embarrassing opinions. Yet the constitutional issue might be buried, for the time being at least, if the case were dismissed on the pleading point. Whatever Field's motives, he was outvoted on the joinder question too; he eventually dissented on that ground. But Field added a brief paragraph to his opinion incorporating the kind of statement that he had advocated in conference. "[U]ntil the question of exclusive jurisdiction in the Federal Courts is directly passed upon by the Supreme Court of the United States, and the jurisdiction to the exclusion of all cognizance by the State Courts *is* affirmed," he wrote, "I think we should hesitate to declare the Act of the Legislature unconstitutional."[27]

EPILOGUE

"One of the most conclusive evidences of the incapacity, inefficiency and bias of the Supreme Court," wrote a Sacramento reporter shortly after *Warner & Wife* was decided, "is the fact that Stephen J. Field, a man whose intellectual attainments and conservative principles are only equalled by his probity, is compelled, thus far, to dissent so frequently from the decisions of his coadjutors." Field's own frustration verged on the unbearable in 1858. Yet he soon learned a lesson about the politics of appellate judging that he never forgot. By outlasting one's associates, a dissenting justice might eventually succeed in winning a series of momentous victories. With the election of Baldwin to his seat, Burnett—who was Field's first colleague to depart—left quietly on

October 2, 1858, and even abandoned the law for an appointment as president of the Pacific Bank of San Francisco. Terry's departure, on the other hand, ignited one of the most shocking, transformative events in California history. He wrote his letter of resignation on September 12, 1859, and fought a duel with David Broderick, California's junior United States senator, later the same day. Terry issued the challenge; Broderick chose dueling pistols at 10 paces. Between 60 and 70 witnesses accompanied the principals to the field of honor. Broderick fired first but only Terry's shot was true, and the anti-Chivalry leader died at a friend's home in San Francisco three days later. He had not yet celebrated his fortieth birthday. "They have killed me because I was opposed to a corrupt administration and the extension of slavery," Broderick was said to have uttered near the end. And the words attributed to him, with their overtone of a vast "slave power" conspiracy, reverberated across California for years.[28]

The process of casting Broderick as an antislavery martyr began at his funeral on September 18. Speaking before an immense crowd, Edward D. Baker called the duel "a political necessity, veiled under the guise of a private quarrel." The code of honor, he asserted, was "a delusion and a snare" that served as "a shield, emblazoned with the name of Chivalry, to cover the malignity of murder." Republican stump speakers magnified Baker's charges. Cornelius Cole claimed that the fallen statesman's demise had been "decreed by his enemies months ago and was not unexpected." John Dwinelle not only stated that "Broderick had been hunted to his death because he dared to resist the Slave Power" but linked a new dying declaration to the conspiracy theme: "Let my friends take courage in my example and, if need be, die like me."[29]

By the fall of 1860, "bleeding Broderick" had long since become a conventional image in the Republican appeal to California voters. It was also very powerful. Abraham Lincoln carried the Golden State by what he colorfully termed "the closest political bookkeeping I know of." Democratic electors loyal to Stephen A. Douglas, headed by veteran Broderick lieutenant John Conness, finished second. John C. Breckinridge came in third despite endorsements by Senators William Gwin and Milton Latham, Governor John Weller, and virtually all the federal officeholders. Yet, a year earlier, in the election of 1859, held just five days before the duel, the Chivalry ticket had rolled up 60 percent of the vote. Leland Stanford, the Republican candidate for governor, had been

named on fewer than 10 percent of the ballots. As an antislavery martyr, Broderick accomplished something in 1860 that he had never achieved as an active politician: the rout of the Chivalry.[30]

The fateful duel also ushered in a new era of California judicial history. When the court reconvened on October 3, 1859, Field took the center seat that Terry had deserted so suddenly. Joseph Baldwin flanked him on the right, Warner W. Cope on the left. While the state's politicians mobilized for the 1860 presidential campaign and then for the ensuing civil war, Field and his associates methodically reconstructed California jurisprudence. More than a dozen decisions handed down in the Murray and Terry eras were overruled; the Field Court severely qualified, or simply ignored, scores of other precedents. "In following the movements of our Supreme Court, we are forcibly reminded of . . . the thimble and the pea [i.e., the shell game]," the San Francisco *Bulletin* lamented in 1860. "On some of our most important questions, that tribunal has shifted position and changed its rulings so radically that none but those of the keenest vision can keep track of its quick transactions." But the new doctrinal formulations stood the test of time. John Norton Pomeroy exaggerated only slightly when, in 1881, he declared that Field had built the reputation of the California Supreme Court "in the estimation of the profession" to the point where it stood "second to no other State tribunal." Baldwin and Cope were very able men, and each wrote several significant opinions. "Yet it is admitted by all," Pomeroy added, that "in the fundamental principles adopted by the Court, in the doctrines which it announced, in the whole system which it constructed for the adjustment of the great questions . . . [it adjudicated], Field's controlling influence was apparent; his creative force impressed itself upon his associates, guided their decisions, shaped and determined their work." Richard Henry Dana, Jr., said essentially the same thing after a California sojourn in 1860. "The bench is honest, learned, and independent, and for the first time, has public confidence," he reported, "Chief Justice Field is the chief power."[31]

In the spring of 1863, while Burnett was making a mark on the San Francisco banking community and Terry was fighting at Vicksburg in the Confederate gray, Abraham Lincoln appointed Field to the Supreme Court of the United States. His opinion for the Court in *The Moses Taylor* (1867), one of his first, gave him enormous satisfaction. There the Court struck down the California statute authorizing *in rem* proceedings against

vessels and held that the "common law remedy" saved to suitors comprehended *in personam* proceedings only. "The Judiciary Act of 1789," Field proclaimed for a unanimous Court, "is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts. . . . The constitutionality of these provisions cannot be seriously questioned."[32] Field did not acknowledge that, much to his consternation, the opposite rule had actually prevailed in California during the 1850s. He spoke, instead, as if *The Moses Taylor* merely declared what always had been the just, true, and natural theory of the federal judicial power. One suspects that Terry, back in the Golden State after the defeat of the Confederacy, read Field's opinion rather differently. The landmark Supreme Court decision, like the Thirteenth Amendment and the Reconstruction Act of 1867, underscored the truism that military victors make the rules, whether right or wrong.

NOTES

[1]San Francisco *Alta California*, December 29, 1849; Henry A. Crabb to John Wilson, June 12, 1853, Wilson Papers, Bancroft Library, University of California, Berkeley. See also Doris M. Wright, "The Making of Cosmopolitan California: An Analysis of Immigration, 1848-1870," *California Historical Society Quarterly*, 19:323-43 (1940).

[2]James O'Meara, *Broderick and Gwin* (San Francisco, 1881), 43; San Francisco *Alta California*, March 10, 1855. See also Roy F. Nichols, *The Democratic Machine, 1850-1854* (New York, 1923); David E. Meerse, "James Buchanan, the Patronage, and the Northern Democratic Party, 1857-1858" (PhD. diss., University of Illinois, 1969); David A. Williams, *David C. Broderick: A Political Portrait* (San Marino, 1969); J. Edward Johnson, *History of the Supreme Court Justices of California: Volume I, 1850-1900* (San Francisco, 1963), 43-64.

[3]Oscar Shafter to "Dear Father," September 19, 1856, in *Life and Letters of Oscar Lovell Shafter*, ed. Flora Haines Loughead (San Francisco, 1915), 186; John Conness, *Some of the Men and Measures of the War and Reconstruction Period* (Boston, 1882), 8; Edgar W. Camp, "Hugh C. Murray: California's Youngest Chief Justice," *California Historical Society Quarterly*, 40:369 (1941); San Francisco *Alta California*, January 21, 1853; Cornelius Cole, *Memoirs* (Glendale, 1908), 117-18. The duels are described in O'Meara, *Broderick and Gwin*, 30-32, 40-41; Oscar T. Shuck, *History of the Bench and Bar of California* (Los Angeles, 1901), 412. On the 1854 Democratic convention, see Williams, *Broderick*, 92-100.

[4]David M. Potter, *The Impending Crisis, 1848-1861* (New York, 1976), 479; Kenneth M. Stampp, *The Imperiled Union: Essays on the Background of the Civil War* (New York, 1980), 36 (quoting Adams).

[5]*Warner & Wife v. Steamer Uncle Sam*, 9 Cal. 697 (1858).

[6]Sacramento *Transcript*, March 15, 1851; *Teschemacher v. Thompson*, 18 Cal. 11, 21-21 (1861); San Francisco *Times*, November 18, 1859; Joseph G. Baldwin, "The Career of Judge Field on the Supreme Bench of California," Sacramento *Union*, May 6, 1863. See also William Wirt Blume, "Adoption in California of Field Code of Civil Procedure: A Chapter in American Legal History," *Hastings Law Journal*, 17:701-25 (1966); William Wirt Blume, "California Courts in Historical Perspective, Part One," *ibid.*, 22 (1970), 123-51; Charles W. McCurdy, "Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America," *Law and Society Review*, 10:235-66 (1976).

[7]Thomas Edwin Farrish, *The Gold Hunters of California* (Chicago, 1904), 60; O'Meara, *Broderick and Gwin*, 207; Sacramento *Democratic State Journal*, October 15, 1857. See also Stephen J. Field, *Personal Reminiscences of Early Days in California*, ed. Wallace D. Farnham (New York, 1968), 70-71; Carl Brent Swisher, *Stephen J. Field: Craftsman of the Law* (Washington, D.C., 1930), 68-72.

[8]Sacramento *Spirit of the Age*, reprinted with commentary in the Marysville *Herald*, September 30, 1857. See also A. Russell Buchanan, *David S. Terry of California: Duelling Judge* (San Marino, 1956). Field had been elected to Murray's seat, effective in January of 1858; but he agreed to serve out the rest of Murray's unexpired term as well, thus his tenure began on October 17, 1857. The term "barnburner," an epithet minted by their "hunker" enemies within the New York Democracy, referred to New York Democrats opposed to the extension of slavery into the territories acquired from Mexico during the 1840s. David Dudley Field had been a prominent "barnburner" leader; Stephen Field, who ran the law office while his brother attended conventions and delivered speeches, remained a very interested spectator until his departure for California. See Daun van Ee, *David Dudley Field and the Reconstruction of the Law* (New York, 1986), 113-29.

[9]Charles V. Gillespie Statement (Mss. in Bancroft Library), 10; [James McClatchy], "Terry's Big Blunder," *Los Angeles Times*, August 18, 1882 (reprinted from the *Sacramento Bee*); A. E. Wagstaff, *The Life of David S. Terry* (San Francisco, 1892), 139, 147, 294; Charles R. Boden, "David Terry's Justification," as quoted in Buchanan, *Terry of California*, 93; Field to John Norton Pomeroy, June 21, 1881, Pomeroy Papers, Bancroft Library; Field, *Personal Reminiscences of Early Days in California*, 101.

[10]John S. Hittell, *A History of the City of San Francisco and Incidentally of the State of California* (San Francisco, 1876), 271; William E. Franklin, "The Political Career of Peter H. Burnett" (PhD. diss., Stanford University, 1954).

Field's other dissents included *Ex parte Archy*, 9 Cal. 147 (1858) (rights of slaveholders in California under the privileges and immunities clause of Article IV, section 2) (Field did not participate but recorded an unofficial dissent in the Sacramento *Union*, February 18, 1858); *Boggs v. Merced Mining Co.*, 14 Cal. 279 (1858 & 1859) (rights of miners on patented Mexican claim) (vacated after reargument during the July 1858 term and reversed following another reargument in the January 1859 term); *Ex parte Newman*, 9 Cal. 502 (1858) (competence of legislature to enact Sunday-closing laws); *Fairbanks v. Dawson*, 9 Cal. 90 (1858) (construction of statute of limitations); *Belloc v. Rogers*, 9 Cal. 124 (1858) (rights of mortgagors).

[11]California, *Statutes*, Second Session (1851), 51; United States, *Statutes at Large*, I, 73 (1789).

[12]The Thomas Jefferson, 10 Wheat. 428 (U.S. 1825). For a convenient digest of the state water-craft laws, see "The Limits of the Exclusive Jurisdiction of Admiralty in the United States," *American Law Review*, 3:604n (1869). On the constitutional context, see Harry N. Scheiber, "The Transportation Revolution and American Law: Constitutionalism and Public Policy," in Indiana Historical Society, *Transportation and the Early Nation* (Indianapolis, 1982), 1-29.

[13]Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn., 1961), 538; *Innis v. Steamboat Senator*, 1 Cal. 443 (1851); *Bennett v. Steamboat Linda* (1850), Register of Suits Before the First Alcalde of Marysville (Yuba County Clerk's Office, Marysville), 12-13.

[14]On Hoffman's arrival and his docket, see Christian G. Fritz, "Judicial Style in California's Federal Admiralty Court: Ogden Hoffman and the First Ten Years, 1851-1861," *Southern California Quarterly*, 64:1-25 (1982). During the 1851-1854 period the California Supreme Court did hear a number of cases involving maritime disputes in which plaintiffs had proceeded *in personam*. For a valuable treatment of the case law that overlooks the procedural distinctions emphasized here, see Gordon M. Bakken, "Admiralty Law in Nineteenth-Century California," *ibid.*, 58:499-514 (1976).

[15]*The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 454, 456 (U.S. 1851). See also Carl Brent Swisher, *The Taney Period, 1836-64* (Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Vol. V) (New York, 1974), 426-56.

[16]*Johnson v. Gordon*, 4 Cal. 368, 369 (1854); San Francisco *Alta California*, October 16, 1854.

[17]Calhoun's clearest statement of the theory came in the Fort Hill Address, July 26, 1831, in *The Papers of John C. Calhoun*, ed. Clyde N. Wilson (Columbia, S.C., 1978), XI, 413-40. See also Boyd Clifton Rist, "The Jeffersonian Crisis Revived: Virginia, the Court, and the Appellate Jurisdiction Controversy" (PhD. diss., University of Virginia, 1985); William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York, 1965), 159-73.

[18]*Martin v. Hunter's Lessee*, 1 Wheat. 304, 328, 345 (U.S. 1816); John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, ed. Richard K. Cralle (Columbia, S.C., 1851), 317-40, 383-84. Many of these constitutional issues had received a full and eloquent airing in the polemics by John Marshall and Spencer Roane of Virginia, conveniently collected in Gerald Gunther, ed., *John Marshall's Defense of McCulloch v. Maryland* (Stanford, 1969).

[19]James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents* (Washington, D.C., 1905), II, 640-56; Jackson to Joel R. Poinsett, December 2, 1832, in *Correspondence of Andrew Jackson*, ed. John Spencer Basssett (Washington, D.C., 1926-35), IV, 493-94; Jackson to Martin Van Buren,

December 25, 1832, in *Correspondence*, 506. See also Richard P. Longaker, "Andrew Jackson and the Judiciary," *Political Science Quarterly*, 71:341-364 (1956); Kenneth Stampp, "The Concept of a Perpetual Union," *Journal of American History*, 65:5-33 (1978).

[20]Stockton *Argus*, quoted in Sacramento *Union*, March 10, 1855; *Union*, March 14, 1855; San Francisco *Alta California*, March 17, 1855; California, *Statutes*, Sixth Session (1855), 80. For a broad historical perspective, see Charles Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act," *American Law Review*, 47:1-34, 161-89 (1913).

[21]*Taylor v. Steamer Columbia*, 5 Cal. 268, 273-74 (1855). See also *White v. Steam-Tug Mary Ann*, 6 Cal. 462 (1856).

[22]*Warner & Wife v. Steamer Uncle Sam* (arg.), 9 Cal. 697, 707-10 (1858). For an exceptionally clear and concise discussion of the "saving clause," see Grant Gilmore and Charles Black, *The Law of Admiralty* (Brooklyn, 1957), 33-35. On the limited scope of Supreme Court jurisdiction under section twenty-five of the Judiciary Act prior to 1914, see Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York, 1927), 190-98.

[23]*Warner & Wife v. Steamer Uncle Sam* (arg.), 9 Cal. 697, 705 (1858).

[24]*Warner & Wife*, 734 (Terry, C. J.). My account of what happened in conference here and in subsequent paragraphs has been inferred from the opinions. None of the justices' conference notes have survived.

[25]*Warner & Wife*, 713, 728 (Burnett, J.).

[26]*McCulloch v. Maryland*, 4 Wheat. 316, 413-14 (U.S. 1819).

[27]*Warner & Wife v. Steamer Uncle Sam*, 9 Cal. 697, 735 (1858) (Field, J., dissenting) (my emphasis).

[28]San Francisco *Alta California*, March 18, 1858; Johnson, *History of the Supreme Court Justices of California*, I, 64; O'Meara, *Broderick and Gwin*, 207-62; Buchanan, *David S. Terry*, 83-113, 123-27; Williams, *David C. Broderick*, 171-261.

[29]Edward D. Baker, "Oration Delivered Over the Dead Body of David C. Broderick, at Portsmouth Square, San Francisco, on the 18th of September, 1859," in O'Meara, *Broderick and Gwin*, 266, 268-70; Cornelius Cole to William Henry Seward, September 19, 1859, Cole Papers, UCLA; John W. Dwinelle, *A Funeral Oration Upon David C. Broderick* (New York, 1859), 16; Charles Allen Sumner, *Speech Delivered at a Republican Mass Meeting at Sacramento, on Friday Evening, September 7th, 1860* (n.p., [1860]), 25; Milton H. Shutes, *Lincoln and California* (Stanford, 1943), 47.

[30]See *inter alia* David A. Williams, "California Democrats of 1860: Division, Disruption, Defeat," *Southern California Quarterly*, 55:239-52 (1973); Gerald Stanley, "The Slavery Issue and the Election of 1860 in California," *Mid-America*, 62:35-45 (1980). For a shrewd contemporary's description of how the martyrdom myth luxuriated and an assessment of its probable political repercussions, see Howard K. Beale, ed., *The Diary of Edward Bates, 1859-1866* (New York, 1971), 49.

[31]San Francisco *Bulletin*, July 11, 1860; John Norton Pomeroy, "Introductory Sketch," in *Some Account of the Work of Stephen J. Field as a Legislator, State Judge, and Judge of the Supreme Court of the United States*, ed. Chancey F. Black and Samuel B. Smith (San Francisco, 1881), 27-28; Richard Henry Dana, *Journal*, ed. Robert F. Lucid (Cambridge, 1968), III, 915-16. For a brief but thoughtful account of Field's career, see Jan S. Stevens, "Stephen J. Field: A Gold Rush Lawyer Shapes the Nation," *Journal of the West*, 29:40-53 (1990).

[32]The Moses Taylor, 4 Wall. 411, 429-30 (U.S. 1867).

California's Constitutional Conventions Create Our Courts

Gordon Morris Bakken

California's constitutional conventions of 1849 and 1878-79 created a system of courts in a traditional American pattern of trial courts and an appellate court. The hierarchy of courts was less a problem for constitutional convention delegates than was the business of those courts. In fact, the delegates spent far more time, particularly in 1878-79, discussing constitutional law, criminal justice administration, and the costs of litigation than the structure of courts. In the process of debating the nature of our court system and the function of judges, the delegates said much about our state and our nation's legal system.

The delegates assembling in Monterey in 1849 had a variety of concerns in writing a constitution for the new state. They wanted to provide justice, industry, and economy in the constitution. The particulars of that task were in contention as the delegates wrote fundamental law. Some delegates wanted to destroy banking. Others wanted to prevent the migration of free blacks into the state. Lotteries and gambling were hot topics as were dueling, taxation, women's separate property, homestead provisions, the franchise and the cost of state government. When considering the judiciary, delegates were concerned with the need for a fair and speedy trial, the costs of litigation, and the role of judges in making law. In discussing these concerns, the delegates acknowledged both our national constitutional traditions and California's uniqueness in its Spanish and Mexican heritage. They also debated the nature of a constitution and the need to keep legislation out of fundamental law.[1]

The concepts of justice, industry, and economy were in contest in these debates. Justice was what courts dispensed, but the extent to which courts should have the authority to "legislate" for the state was at issue. Industry was what the delegates wanted to bring prosperity to the state and the issue was how the law-giving branches of government could facilitate that goal. Economy in government was what delegates thought taxpayers wanted. Good government at absolute minimum expense was a good Jacksonian goal that obviously found voice in 1849 in California.

But a broader political philosophy of popular sovereignty clearly resonated in the 1849 convention.[2] As Christian G. Fritz has so ably pointed out, the delegates knew that they had a charge as constitution makers to organize civil government and establish social institutions through fundamental law. Although the people were sovereign and the legislature was to do the will of the people in passing statutes, a constitution, when ratified by the people, was higher, fundamental law.[3] In the American mind, the judiciary was the institution that would have to interpret and apply that fundamental law.

The structure of the judiciary was not a serious question for the delegates, but the function of a system of justice was an issue. The structure of the California judiciary set out in the 1849 constitution was a traditional hierarchical one based on local trial courts run by the justice of the peace. The second level trial court was the county court. The district court was the next level of trial court. The district court had civil jurisdiction of controversies involving more than $200. Each county had one judge and sitting with two justices of the peace constituted a court of sessions. Finally, the California Supreme Court sat as the highest court of the state to hear appeals from the district courts. Other inferior trial courts quickly emerged to fit local circumstances. Justices of the peace for cities as well as counties, municipal courts, and police courts became part of the judicial landscape of California. During the 1849 debates, many delegates wanted certain provisions of law set in constitutional concrete so that neither the legislature nor the judiciary could tamper with their handiwork. L. W. Hastings, a Sutter attorney from Ohio, proposed that "as the true design of all punishment is to reform and not to exterminate mankind, death shall never be inflicted as a punishment for crime in this state." M. M. McCarver, a Sacramento farmer, retorted that "as California is situated at present, it is impracticable. The construction of penitentiaries would be enormously burdensome." He also resorted to history, noting that since "it has been a practice ever since the world was created, perhaps it would be as well to let it rest a while longer."[4] The convention voted the Hastings proposal down.[5]

In the California of 1849, the death penalty and the costs of incarceration in prison were related issues. The practice of the mining camps was to give the criminally accused a trial by jury and, if found guilty, to sentence the enemy deviant to whipping, banishment, or death. Sentence was carried out immediately.[6] This procedure and punishment

scheme was one learned from the American experience and driven by the fact that there were no jails in the diggings. With the creation of towns and jails, the question was whether local taxpayers and later state taxpayers wanted to build prisons or to save the costs of incarceration with the penalties of whipping or death. In 1851 the California legislature would decide that juries, the sovereign people, should decide the appropriate penalties for crimes against property. The statute gave the jury discretion in robbery cases of setting prison sentences of one to 10 years or death. Grand larceny had the same provisions and petit larceny, then defined as stealing property worth less than $50, had the penalty of "imprisonment in the County jail not more than six months, or . . . fine not exceeding five hundred dollars, or . . . any number of lashes not exceeding fifty upon the bare back, or . . . such fine or imprisonment and lashes in the discretion of the jury."[7] The first appellate case to test this statute found it constitutional. The defendant, George Tanner, had stolen $400 worth of food on April 3, 1852, went to trial before a court of sessions on April 14, 1852, lost an appeal in the district court on April 24, 1852, lost his petition before the Supreme Court on July 16, 1852, and his life on July 23, 1852. Justice was swift, sure, and did the will of the people expressed by a jury. For the delegates of 1849 or the jury of 1852, the incarceration of enemy deviants was an expense item for local taxpayers. It created the possibility of having the convict back on the streets in the future and did not present the same type of symbol to others in the society that would prey on law-abiding citizens.

Other delegates saw equally great evils on California's horizon. Henry Wager Halleck, a San Francisco attorney and later President Abraham Lincoln's general-in-chief, thought that a provision prohibiting lotteries had to be in the constitution because they were "immoral." The "evils of the lottery system" had to be crushed out regardless of arguments that such a prohibition was legislation, not fundamental law. Kimball Dimmick, a San Jose lawyer, agreed. "Whatever might have been usual in other Constitutions," he argued, "it was time for this Convention to present to the people of California a Constitution which would prohibit any injurious or immoral practice."[8] William Gwin, perhaps the best-informed and politically seasoned delegate, saw another monster, the banks. He moved an amendment to prohibit banking in California.[9] J. M. Jones, a San Joaquin attorney, announced that he was "prepared to go to any extent against banks in this country. The

inhabitants are against them; public opinion everywhere is against them."[10] Gwin went further, "Public opinion throughout the United States is against the banking system," he contended.[11] For California, it was a time to be tested. "Let us guard against infringing on the rights of the people, by legalizing the association of capital to war upon labor," Gwin remonstrated.[12] Charles T. Botts, a Monterey attorney, wanted "to crush this bank monster." He warned that "if you leave a loop-hole, this insinuating serpent, a circulating bank, will find its way through, because of the absolute necessity of the community for a paper currency."[13] In the Jacksonian rhetoric and mind of the time the evil was banking and the remedy was constitutional prohibition.

When the delegates debated the judicial article, they expressed the problems of their times in their rhetoric. Kimball Dimmick wanted a permanent judicial system, not subject to the legislative and popular winds of time. The system of courts "should not be established with any view to a change at some future period; that when practitioners in these courts bring in their cases they may know where they are to end." Dimmick wanted to "prevent endless litigation" stemming from rapid judicial personnel changes.[14] McCarver was concerned about swift and sure justice. He favored "a fair trial before a jury, and whenever they have decided the case, if they say hang him, then hang him in thirty days." He did not want to give the convict "an opportunity to escape." The Sacramento farmer did not want a convict "to get free . . . by any quibble of the law."[15] Winfield Sherwood, a Mormon Island lawyer, supported the right of appeal noting that "if he is guilty, he will be punished notwithstanding the appeal."[16] One delegate retorted that the problem was not appeal, but the lawyers representing men of money who could afford the process. To him, lawyers were "like vultures upon dead bodies . . . although the lawyers know they cannot succeed in their suits, they urge them to go on."[17] Thomas L. Vermeule, a Stockton lawyer, controverted the argument stating his belief "in abstract principles. I believe in their justice. If a principle be good in the abstract, it must be good in practice; and I believe the right of appeal is a righteous abstract principle."[18] Additionally, Vermeule castigated the antilawyer sentiment in the convention. "Lawyers are a very useful body of men, and when this Constitution goes forth to the world it will be greatly indebted to them for the part they took in its formation," he declared.[19]

The convention also considered the role of trial judges and juries. Pacificus Ord, a Monterey attorney, proposed that judges could not charge juries on fact, but could "state testimony and declare the law."[20] Botts thought that judges given too much latitude "could become a party to a suit . . . [and] great injustice may proceed from it."[21] Ord, swayed by the arguments, changed his position on stating testimony and favored limiting the judge to stating or expounding the law.[22] Winfield Sherwood regarded the judge as "an impartial umpire" needed to sort out the testimony and the law for the jury.[23] Hastings agreed with Botts based upon abuses from the bench in his experience.[24] As the debate wore down, Kimball Dimmick attacked the proposal as legislation. "I am opposed to introducing our Constitution sections which are more properly matters for legislative action," he maintained. Rather "our object is to establish in this article a fundamental judiciary system, and it is not necessary that we incorporate these trivial incidents which belong to the statute books of the State, or the books of the common law," Dimmick submitted.[25] With the trivial aside, the delegates passed a hierarchical system of courts. A California Supreme Court and our state trial courts were established.[26]

The discussion of law, lawyers, judges, and juries again highlights the popular sovereignty and Jacksonian democratic rhetoric of the times. Those who feared the caprice of the people, the democratic rabble, wanted juries harnessed and elite judges in control of trials and appeals. Lawyers were not to be trusted (regardless of the fact that Andrew Jackson was a lawyer) because they used procedure, technicalities, and the like to thwart the will of the people. Whigs saw this thinking as destructive of American society and antibank actions as economically naive at best. In the judiciary, at least, there was some protection for the future as elite lawyers on the bench could preserve the republican government Whigs thought necessary for the future of California.

In 1878 constitutional convention delegates would again assemble to reconstitute fundamental law for the state of California. This time the motive force behind the calling of a convention was domestic politics and depression. On the sand lots of San Francisco, Denis Kearney had rallied the working poor and the unemployed and formed the Workingman's Party. Kearney used the politics of racism, singling out the Chinese as the cause of economic distress.[27] San Francisco was ripe for such agitation.[28] It was in the midst of rapid change. The city would emerge

as a western financial center, but the influx of capital stimulated increased specialization and greater efficiency in finance. Brokers established stock exchanges enabling increased speculation in stocks. Dealers in commercial paper appeared, increasing the velocity of commercial transactions. Law firms reacted with increased specialization, servicing these clients. Investment bankers opened their doors to industry.[29] This climate of rapid change and uncertainty for urban labor enabled Denis Kearney to increase his following and call for a constitutional convention to expel the Chinese and to attack the evils of the economy, the monopoly capitalists.

In 1878 the legislature authorized a constitutional convention and the election of delegates. The press blistered with stories to enflame the public for the Workingman's Party or against them. The Democrats and Republicans had joined forces to put a nonpartisan slate forward to head off the attack from the left.[30] The Workingman's Party demanded regulation of the railroads and the monopolistic corporations, the abolition of Chinese labor and the expulsion of the Chinese from the state, equal taxation of all land of equal and productive nature, land reform in general, and the eight-hour day.[31] Nonpartisans opposed the radical nature of the proposals, branding them communistic. Albert Dibblee, a San Francisco merchant, writing to Charles Heidsieck of Rheims, France on February 26, 1878, saw "a sort of communistic movement among our laboring classes—mainly laborers of the very lowest grade."[32] Despite these dire warnings, the people elected 78 nonpartisans, 51 Workingmen, 11 Republicans, 10 Democrats, and 2 Independents to the convention. Kearney characterized the nonpartisan ticket as "composed of thieves, villainous and murderous bloodsuckers, a band of criminals and robbers.[33] His opposition thought Workingmen to be communists.[34]

The debates regarding the judiciary in 1878-79 were qualitatively more sophisticated than 1849 in that constitutional issues evoked pointed debate of a legally informed nature. The delegates discussed United States Supreme Court decisions including *Munn v. Illinois* (1877), *Dartmouth College v. Woodward* (1819), *The Passenger Cases* (1849), *The Slaughterhouse Cases* (1873), *State Tax on Foreign Held Bonds* (1873), *Barron v. Baltimore* (1833), and *Calder v. Bull* (1798). In addition, they offered opinions on jurisprudence, *stare decisis*, state constitution change, state case law from Wisconsin, Illinois, New York, and California, the national treaty power, eminent domain, state police power, federalism, the law of the land, the extent of the power of

Congress, due process, and the uniform law movement. Many of these issues flowed from the duty to write a constitution, but the extent of debate and the level of argument on point were significantly higher than 1849.[35]

For many of the delegates, *Munn v. Illinois* (1877) was an important case. The United States Supreme Court had held that state legislatures did have the authority to regulate businesses affected with a public interest. This put on the legislative agenda a vast array of opportunities to interpose the will of the people through legislation to regulate rates charged to consumers. The regulatory agenda confronted the vested rights of private property so dear to conservative Americans, making *Munn* even more of a debate issue for delegates and the nation. What were the implications of allowing states to regulate business?[36]

Constitutional argument of high order was offset by overtly racist attacks upon the Chinese. On a plane higher than racism, some delegates felt that the federal government did not have an effective immigration policy and that as a result, California was being swamped with cheap immigrant labor to the detriment of Workingmen. In the end, delegates would petition Congress for federal legislation excluding the Chinese.[37]

Other delegates felt that the state was not doing enough to stop crime and that the courts were partially to blame. An Alameda County delegate offered an amendment to the Bill of Rights providing that "nothing herein contained shall be construed to prohibit the infliction of corporal punishment for crimes."[38] The reason for the amendment was that "[o]ne of the District Judges of this State decided the law to be unconstitutional, and discharged the party . . . upon the ground that the Act conflicted with the provision in the Constitution which forbids the infliction of cruel or unusual punishment."[39] He argued further that the English experience with the whip had suppressed street crime and that California prisons held "no terror" for criminals. Rather they had turned into country clubs and it was time to do something about crime. "The duty of society is to use such punishments as will secure the safety of honest and respectable men; as will enable you to go home at night without the fear of being knocked down by a sand-club."[40]

The debate was on and its contours are not unfamiliar a century later. Patrick Reddy, one of California's most successful criminal defense attorneys, rose to the cause. Whipping was contrary to modern penology theory. What California needed was "reformatory and not vindictive."

Whipping had been declared cruel by "the highest court in the land" and it was a "black mark" upon civilization.[41] James Caples, a medical doctor and stock rancher from Sacramento, would hear none of it. "I demand," he began, "in the name of honesty, in the name of virtue, in the name of everything that is sacred, that the law-making power of the commonwealth of California be unshackled and left in a position to defend society against crime."[42] The legislature rather than the judiciary should decide the appropriate punishments for crime. Charles R. Kleine, a Prussian-born bootmaker and licensed Baptist minister, supporting the Workingman's Party position, averred that the way to stop crime was to remove the cause of crime: unemployment.[43]

Other delegates joined the fray with historical cases pro and con. Clitus Barbour, a Workingman's Party attorney educated at Knox College and the Northwestern Law School, ridiculed the proposal arguing that it put California into the seventeenth century with the "stocks and the pillory." Charles C. O'Donnell of San Francisco, a Workingman's Party delegate and former Union army field surgeon, noted more recent history. Two prisoners had recently died in San Quentin prison of flogging.[44] John C. Stedman, a San Francisco accountant, thought that the whip might have a place in the system for wife beaters. Wife beaters "should be tied to the whipping post and receive corporal punishment . . . and it would be considered by the people as a reform."[45] Another delegate thought that the issue was the ineffectiveness of existing punishments rather than their nature. The solution was education and jobs, not punishment enhancements.[46] District Judge Eugene Fawcett of Santa Barbara noted that proportional to population, California had more people in prison than did Ohio and that crime had increased rapidly. He saw the prison system was too good to prisoners. Inmates were "better fed, better clothed, better treated, half of them, than they were elsewhere in the whole natural course of their lives." The system of reformation had failed. Fawcett believed "in treating criminals to personal pain and chastisement, as a means of suppressing crime."[47]

Others agreed with the objective, not the methodology. John G. McCallum of Alameda, a graduate of Indiana University Law School, former El Dorado County attorney, state senator, and organizer of the Union Party of California in 1861, thought hanging was better than whipping, perhaps remembering that California provided for the death penalty for robbery in the period 1851-57.[48] One delegate did not object

to "lash[ing] every inch of their bodies off," if the rich would receive the sting equally with the poor.[49] With these parameters set, the convention adopted the amended motion, 69-63.[50] As the convention closed its business, this decision would be reversed and the provision deleted from the constitution.[51]

Although whipping generated heated debate, the issue of American immigration policy, the treaty power, and the Chinese occasioned the most racist, yet legally sophisticated rhetoric. Many delegates felt that the United States had an ineffective immigration policy and that the imagined flood of Chinese was costing Americans jobs.[52] The question for most delegates was not whether they should do something about Chinese immigration, but what was constitutionally permitted in a federal constitutional system of government.

The convention's committee on Chinese immigration proceeded on three theories in discussing remedies. "The committee . . . was not able to agree upon any definite plan . . . for the extirpation of this evil, but . . . all agreed that Chinese immigration was an evil."[53] The first plan of action was based upon the constitutional theory that the state did not have the power to prohibit immigration, but it did have the police power "to protect itself against foreign and well-known dangerous classes." The committee noted that prior state legislative actions had been declared unconstitutional, but they were proceeding with "a different plan" modeled on *The Passenger Cases*.[54] A second approach was to prohibit Chinese immigration by means of the constitution and state statute. The third plan was to prohibit Chinese employment and thereby to cause "starvation by constitutional provision." This third plan went "to the very verge of constitutional power, and the state cannot go any further." The committee also thought that Chinese criminals should not be jailed but deported to lift a burden from the taxpayers. Chinese inmates of insane asylums posed a similar threat to California's budget.[55]

Supporters of Chinese exclusion and deportation found strength in constitutional law. James J. Ayers, the editor of the San Francisco *Morning Call*, presented an extensive case law analysis supporting the power of the state to exclude foreigners and those that would "corrupt the morals or endanger the health or lives of their citizens."[56] Charles C. O'Donnell of San Francisco thought in more basic terms. Chinese immigrants posed a "sanitary question." They had leprosy, he claimed, and would infect the whole of the white race.[57] Those opposing these

committee sections raised the conflict with the federal treaty power.[58] They were met by a flurry of legal arguments to the contrary. Charles J. Beerstecher of San Francisco, a German-born graduate of the University of Michigan Law School and leading legal mind of the Workingman's Party, contended that the "reserve power inherent in the State" was sufficient. He cited Joseph Story on the U.S. Constitution and several U.S. Supreme Court decisions for authority. The Burlingame Treaty had been "given too much sanctity" by the delegates, according to Beerstecher.[59]

For Clitus Barbour and James J. Ayers, the constitutional convention was the place to push the limits of constitutional precedent. Barbour wanted practical solutions to emerge from "the chaos of ideas" to end the "curse." He declared that "the American idea . . . is a white man's government; a government of Caucasians, established by white men, and for white men." The Chinese were taking over whole neighborhoods and driving white labor out. To save California for white Americans, the state should exclude all vagrants and criminals, deny business licenses to Chinese, forbid Chinese employment on private and public works, and do it now. Even if the Supreme Court should "set it aside . . . we are not worse off." Rather action by the convention might awaken Congress and arouse the American people. Barbour wanted to use constitutional provisions to shock "their sensibilities."[60] Ayers agreed "that nothing could shock the sensibilities of the East on this subject more than to adopt a section in the Constitution declaring the power of exclusion to exist in the State." But he would go further, denying the Chinese standing to sue, revoking the license to practice of any attorney representing a Chinese client, denying Chinese business licenses, the right to fish, to purchase, own, or lease real estate, refusing employment on public works, and withdrawing the franchise from anyone employing the Chinese.[61] These were the voices of the radical right seeking to drive the Chinese from the state.[62]

The most telling rebuttal based on constitutional law analysis was advanced by James McMillan Shafter of San Francisco. He was a graduate of Wesleyan University of Connecticut, the Connecticut secretary of state from 1842-49, the speaker of the Wisconsin Assembly in 1851, a U.S. congressman, in the California Senate, 1862-63, and a Republican elected to the convention on the Non-Partisan ticket. He charged that "truth and error are recklessly or even ignorantly intermin-

gled." Delegates had "violate[d] propriety" and "by senseless virulence darken[ed] counsel by words without knowledge." The forces of fear were trying to push "these crude, unreasonable, and absurd claims" into the constitution. Shafter warned that "when constitutional law has no longer any force in the State and country, when ignorance and violence shall . . . rule us," then chaos shall reign. On another level, Shafter commended the Chinese work ethic and reminded the delegates that "the same objections which are now made to them, fifty years ago were urged against at least some European immigrants." Shafter insisted that the federal jurisdiction over immigration was exclusive, that the treaty power and specifically the Burlingame Treaty forbade the convention's proposed actions to restrict Chinese property ownership, that state police power extended "only to those who are personally objectionable, and must then only be exercised upon at least quasi-judicial examination," and that the convention's only avenue for action was a memorial to Congress.[63] Despite these apt observations, the convention rushed to pass anti-Chinese provisions, only to have them overturned in the courts.[64]

The convention was not in as much of a rush, nor were the speeches as colorful, when the structure of the judiciary came before the delegates. The report of the committee on the judiciary generated a discussion of whether the Supreme Court should hold sessions in places other than Sacramento, the election of judges, the term of office, and the costs of justice. Regarding the length of terms for Supreme Court justices, Samuel M. Wilson of San Francisco, the law partner of Joseph P. Hoge, the president of the constitutional convention, and founder with Hoge of the San Francisco Bar Association, wanted long terms for judges. A long term was necessary to attract the best legal talent, he argued, and "the continual changing of Judges is certainly one of the worst things in our system."[65] Horace C. Rolfe, representing San Bernardino and San Diego counties, warned the convention of judicial elections and politics. "This idea of a Justice of a Supreme Court being re-elected in consequence of having been a good and efficient judge, is all a delusion," he asserted.[66] George V. Smith agreed, cautioning that politics could "make the office of Supreme Judge merely a political office."[67] Others saw the judiciary article as a means of keeping the courts out of politics. Thomas B. McFarland of Sacramento thought that "the judiciary [was] by far the most important department to the people." A Supreme Court justice's salary must be sufficient and the term long enough "that he may expect

[to be judge] . . . the balance of his life."[68] Another delegate saw long terms as a barrier to political caprice. "The excellence of the judicial system . . . is predicated not on change, but on certainty, on permanence and precedent," he offered. Further, judges were a special breed having "quite a different order of talent . . . to hand down the laws unimpaired, to adhere to precedent, and to refine without over-refinement."[69] Long terms put some distance between judges and the political environment of frequent elections.

Superior court judgeships provoked plenty of palaver over pork. The judiciary committee had tried to replace the district judges with superior court judges by the numbers to avoid an increase in the number of judgeships. Delegate McCallum reporting for the committee warned that "once you depart from [the principle] . . . there will be no end to it." How true! Delegates rushed to amend to give two judges to various counties, reasoning, for example, that "if the Counties of Sacramento and Sonoma are entitled to two Judges, the County of San Joaquin ought to be."[70] One delegate objected to the plundering of the state treasury; another retorted that Santa Cruz had "at least ten lawyers who want to get upon the bench, and we want more places."[71] Patrick Reddy wanted the issue of expense buried. The "question of cost cuts no figure," he exhorted. "It is a question of providing a system whereby justice can be had promptly."[72] This issue of numbers of judges was complicated on the cost side by the question of salary.

What the convention did to reform the court system under the 1849 constitution was to specify the jurisdiction of the Superior Courts as they related to inferior courts and subject matter. The Article VI list turned into a long but necessary one to avoid the conflicts sometimes witnessed under the 1849 instrument.[73]

Like Reddy, the issue of justice could not be restrained by cost. Taxpayers wanted justice, and they would pay for it. Isaac Belcher, former two-term district attorney of Yuba County, district judge, and justice of the Supreme Court, speaking for the practicing bar, favored "giving the lawyers who go upon the bench fair pay, and then they will work for it."[74] James M. Dudley of Solano County saw the state "drifting into bankruptcy" and wanted salaries lowered. Reddy asked him if he wanted "to drive our Judges into a hash house to live?"[75] Reddy, Wilson, and others saw high salaries as a means of getting the best legal talent on the bench. Others like Eugene Casserly saw lawyers who could not make

a living wanting a place at the public treasury ATM.[76] Attempts to reduce judicial salaries beaten back, the delegates still pondered specifics in molding a judiciary.

In the process of discussing the role of the superior court judge in trials, the agents of the press pushed an amendment to bar a judge from instructing a jury regarding what constituted libel. Thomas B. McFarland of Sacramento had observed that "the greatest evil of law making, either in constitutional conventions or legislative bodies, is the desire which every man has to put in something to remedy some little matter . . . [of] his . . . personal experience."[77] But amend to remedy they did. Samuel M. Wilson scolded that "the press, in its pride and independence, ought not to ask privileges and immunities not possessed by and accorded to others."[78] Editor James J. Ayers retorted that the amendment was "to protect fearless newspaper publishers."[79] Delegate Rolfe was "sick and tired of having matters of so little importance as this thrust upon this Convention."[80] Such matters should be left to the legislature.

With a good deal of other minor tinkering, including a 90-day limit on the issuance of opinions, the convention concluded its work on a constitutional scheme for California's courts. The plan was traditional in its structure, calling for a hierarchy of courts headed by a Supreme Court. The chief justice had authority to administer the business of the court in a variety of ways. Thomas H. Laine, a Santa Clara attorney, graduate of the University of Pennsylvania, and California state senator, observed "that [the] Supreme Court is complex, cumbersome, and costly, and I believe it is a Court of fragments lightly bound together by the Chief Justice."[81] The role of the chief justice was not lost upon those that opposed the ratification of the constitution by the people. The San Francisco *Daily Alta California* in its May 5, 1879, supplement contained "an exact copy from the official document of the proposed new constitution—with our headings and comments in brackets, calling attention in very brief terms to the main defects of the instrument." In Article VI before section 2 the editors inserted: "[Judicial Despotism]."

The Chief Justice's role under section 2 was a target of criticism. On April 25, 1879, the *Daily Alta California* had favorably printed Governor Irwin's speech against the constitution. Irwin proclaimed that "the system propounded for the judiciary, so far as concerns the Supreme Court, is one of the most monstrous ever yet suggested to the world." Irwin bellowed that corrupt courts attacked the liberty of the people and that

"no man's life, liberty, or property would be safe." Why? Because "a combination of the Chief Justice and three others would be the inauguration of a reign of terror and corruption." This attack upon the chief justice was a small part of a much larger indictment. The *Placer Argus* ran a similar story on April 5, 1879, accusing the delegates of a willingness "to subvert popular institutions . . . [by creating] an all-powerful Chief Justice." On April 25, 1879, the *Los Angeles Daily Star* printed "Some Reasons Why I Do Not Like the Proposed Constitution," from a "worker." Included among the long list of grievances against the document was: "It removes the judiciary in the interest of lawyers and their wealthy clients," and "it renders the Supreme Bench a 'caste Prerogative,' confined to a select legal grade. . . ." This latter complaint was against the requirement that Superior Court and Supreme Court judges be admitted to the bar. The *Placer Argus* had, on May 3, 1879, objected to the requirement as "some men claim this is inferior to the old system." The *Los Angeles Daily Star* ran an April 27, 1879 supplement to print the Stockton speeches of Thomas H. Laine of Santa Clara and Creed Haymond, general counsel of the Southern Pacific Railroad, against the constitution. Laine iterated and the *Star* put in bold, "A Chief Justice with More Power than a King." The complaint was that after being heard in one department, you would not know whether you would be heard in bank. The *Contra Costa Gazette* offered in an April 5, 1879, editorial that several of the constitution's provisions were "a clear departure from the principles of responsible Republican government, and a substitution of Autocratic Absolutism." One of those provisions was in Article VI, concentrating power in the hands of the chief justice. The Jacksonian mind lost focus in the period.

Another attack upon Article VI was over the independence of the judiciary. The *San Luis Obispo Tribune* ran an April 19, 1879, feature on "The New Constitution" drawn from a speech by Judge R. F. Peckham in San Jose. The judge asserted that the "liberty of the people" was safeguarded by an independent judiciary. The new constitution's Article VI, section 10 provided for the legislative removal of judges. Judge Peckham offered that "no judge on the bench dare set up his legal learning in favor of the constitutional rights of a citizen against the will of an ignorant legislature." The reason was simple: two-thirds of that ignorant legislature. Further, the legislators did not have any standards to guide them, just the caprice of the times.[82] The Eureka *Democratic*

Standard saw it differently in an April 26, 1879, story entitled "Fifty Solid Reasons Why the New Instrument Should Be Adopted." Regarding the judiciary, the constitution increased "the efficiency of the Courts by simplifying proceedings and distributing business in such a way that it can be more promptly attended to, thus lessening the evils of . . . delay." Every county had a "Court of general jurisdiction . . . thereby bringing justice home to every man's door." Justice would be speedier because judges would have their salary withheld if they did not "decide cases for ninety days." The justice system was simplified "by providing for only two kinds of Courts of general jurisdiction." The new structure for the Supreme Court in two departments doubled "its working capacity and [gave] the Judge more time for the study of cases." The constitution also prevented "the slighting of cases on appeal by requiring all decisions to be in writing, stating the reasons upon which they are based."[83] In many ways, what the press saw in the constitution was conditioned by the politics of the times, and most of the editors found the mark of Denis Kearney on the document.

The Workingman's Party role in the convention was to save the state from monopolists according to some. The Fort Jones *Scott Valley News* saw on March 20, 1879, that "our present [1849] constitution has been doctored by legislative enactments, so construed by the judicial tribunals, so captured by the moneyed interests . . . that it has become a protection to the rich and a barrier to the poor." The ratification fight was "the people's battle for freedom from oppression." An April 12, 1879, editorial in the *San Francisco Chronicle* put the issue of ratification in terms of economic prosperity. The 1849 document had led to depression: the 1879 constitution would lead to a "new and golden age." The ideological support for the constitution in the press was small compared with the papers that opposed the 1879 constitution.[84]

The language of opposition, like that characterizing the authority of the chief justice as a king, was filled with extremes. The *San Luis Obispo Tribune* in a March 29, 1879, editorial took a stand against "Nihilism . . . Socialism . . . Communism . . . Agrarianism . . . Sandlotism . . . [and] every species of mob rule." The *Los Angeles Daily Star*, on May 18, 1879, ran a story from a Columbia College Law School graduation speech of Professor Dwight announcing that "the new Code of California has been checkmated by a codified Constitution, a sort of Noah's Ark, with all sorts of creeping things and slimy creatures, and

without any Noah to take charge." As we know with historical hindsight, the people did ratify the 1879 constitution, and it was the judiciary at the tiller of the ark that saved the state.[85]

NOTES

[1]J. Ross Browne, *Report of the Debates in the Convention of California of the Formation of the State Constitution in September and October, 1849* (Washington, D.C., 1850).

[2]Christian G. Fritz, "Popular Sovereignty, Vigilantism, and the Constitutional Right of Revolution," *Pacific Historical Review*, 58:39-66 (1994).

[3]*Ibid.*, 50-51.

[4]*Ibid.*, 45-6.

[5]*Ibid.*, 46.

[6]Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln, 1991), 101.

[7]Gordon Morris Bakken, "Death for Grand Larceny," in *Historic U.S. Court Cases, 1690-1990: An Encyclopedia*, ed. John W. Johnson (New York, 1992), 34-35.

[8]*Ibid.*, 92-93.

[9]*Ibid.*, 108.

[10]*Ibid.*, 115.

[11]*Ibid.*, 115.

[12]*Ibid.*, 117.

[13]*Ibid.*, 125.

[14]*Ibid.*, 215.

[15]*Ibid.*, 226.

[16]*Ibid.*, 227.

[17]*Ibid.*, 228 (Noriego).

[18]*Ibid.*, 229.

[19]*Ibid.*, 231.

[20]*Ibid.*, 234.

[21]*Ibid.*, 234.

[22]*Ibid.*, 235.

[23]*Ibid.*, 235.

[24]*Ibid.*, 237.

[25]*Ibid.*, 239.

[26]Also see: Cardinal Goodwin, *The Establishment of State Government in California, 1846-1850* (New York, 1914); Lately Thomas, *Between Two Empires: The Life Story of California's First Senator, William McKendree Gwin* (Boston, 1969); Walter Colton, *Three Years in California* (New York, 1850), 410-11; Rockwell Dennis Hunt, *The Genesis of California's First Constitution* (Baltimore, 1895). For a comparative analysis with the best work on the politics of the 1849 convention see David Alan Johnson, *Founding the Far West:*

California, Oregon, and Nevada, 1840-1890 (Berkeley, 1992), 15-40, 101-38, 233-68.

[27]Hubert Howe Bancroft, *History of California, 1860-1890,* Vol. 7 (San Francisco, 1890), 371-75; William J. Courney, *San Francisco's Anti-Chinese Ordinances, 1850-1890* (San Francisco, 1956), 66-69; Doyce B. Nunis, Jr., ed., "The Demagogue and the Demographer: The Correspondence of Denis Kearney and Lord Bryce," *Pacific Historical Review,* 35:269-88 (1967); David B. Griffiths, "Anti-Monopoly Movement in California, 1873-1898," *Southern California Quarterly,* 52:93-121 (1970); Ralph Kauer, "The Workingman's Party of California," *Pacific Historical Review,* 13:278-91 (1944); Delmatier M. Waters, *The Rumble of California Politics* (New York, 1970), 70-98; Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention of 1879* (Claremont, Calif., 1930); David Alan Johnson, *Founding the Far West,* (Berkeley, 1992), 255. Johnson sees the Kearney proposals as "more starkly phrased versions of Democratic and Republican measures" and the 1879 constitution as "an effort to make sense of a modernizing corporate order by preserving freedom for the individual proprietor while at the same time accepting the presence . . . of supraindividual combinations." *Ibid.*

[28]Between 1869 and 1880 widespread occupational mobility ceased and San Francisco experienced periods of depression and high unemployment. San Francisco's workingmen saw themselves not as a part of the working class but as part of the future upper class. As with mobility, what mattered was not reality but perception. See Neil Larry Shumsky, "Dissatisfaction, Mobility and Expectation: San Francisco Workingmen in the 1870s," *Pacific Historian,* 30:21-28 (1986).

[29]William Issel and Robert W. Cherny, *San Francisco, 1865-1932* (Berkeley, 1986), 6-23.

[30]Swisher, *Motivation,* 17-31.

[31]Warren Beck and David A. Williams, *California* (Garden City, N.Y., 1972), 260-3.

[32]Dibblee to Heidsieck, Feb. 26, 1878, in Albert Dibblee Collection MSS, Bancroft Library, Carton 14, v. 221, Letterbook #24. Dibblee wrote to W. W. Hollister, a Santa Barbara rancher, on March 16, 1878, that "the Savings Banks have all been a little anxious on account of the howl raised against them by that Vagabond Kearney and his imps. Several of them have been steadily calling in loans for some time and all feel it imperative to keep a larger supply than usual of idle money on hand to meet possible contingencies." *Ibid.*

[33]*Ibid.*; Swisher, *Motivation,* 20.

[34]See Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution," *Hastings Constitutional Law Quarterly,* 17:35-80 (1989).

[35]*Ibid.*, 57-67, 71-80; Gordon M. Bakken, "Constitutional Convention Debates in the West: Racism, Religion, and Gender," *Western Legal History*, 3:213, 239-44 (1990).

[36]See generally Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933* (Cambridge, Mass., 1990); Herbert Hovencamp, *Enterprise and American Law, 1836-1937* (Cambridge, Mass., 1991); Harry N. Scheiber, "The Road to *Munn:* Eminent Domain and the Concept of Public Purpose in the State Courts," *Perspectives in American History*, 5:329-402 (1971).

[37]David Alan Johnson, *Founding the Far West*, 257.

[38]E. B. Willis and P. K. Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California . . . 1879* (Sacramento, 1880), 3 Vols., 243. In other parts of the debates, it is clear that some delegates were worried about tramps or "the dangerous class." See: Eric H. Monkkonen, *The Dangerous Class* (Cambridge, Mass., 1975); Roger Lane, *Violent Death in the City: Suicide, Accident and Murder in Nineteenth Century Philadelphia* (Cambridge, Mass., 1979); David R. Johnson, *Policing the Urban Underworld: The Impact of Crime on the Development of American Police* (Philadelphia, 1979); Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910* (Chapel Hill, N.C., 1981).

[39]Willis and Stockton, *Debates*, 243.

[40]*Ibid.*, 244. Later in the debates, delegate Howard of Los Angeles moved reconsideration of the whipping section with a proviso that whipping be limited to "garroters, hoodlums and Chinese." He supported his proposal with the observation that he did "not see any other mode of repressing hoodlums and garroters and punishing Chinese misdemeanors, because [when] a Chinaman gets in jail he is in as good a place as a hotel." *Ibid.*, 1192.

[41]*Ibid.* Reddy established a perfect record defending the criminally accused in Bodie. Bakken, *Practicing Law*, 44; Roger D. McGrath, *Gunfighters, Highwaymen, and Vigilantes* (Berkeley, 1984), 256. For biographical information on the delegates I have relied upon T. J. Vivian and D. G. Waldron, eds., *Biographical Sketches of the Delegates to the Convention to Frame a New Constitution of the State of California, 1878* (San Francisco, 1878).

[42]Willis and Stockton, *Debates*, 244.

[43]*Ibid.*

[44]*Ibid.* Also see Shelley Bookspan, *A Germ of Goodness: The California State Prison System, 1851-1944* (Lincoln, 1991); Lyle A. Dale, "The Police and Crime in Late-Nineteenth- and Early-Twentieth-Century San Luis Obispo, California," *Western Legal History*, 4:203-23 (1991); John J. Stanley, "Bearers of the Burden: Justices of the Peace, Their Courts and the Law, in Orange

County, California, 1870-1907," *Western Legal History*, 5:37-67 (1992). On colonial criminal justice administration see Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660* (Athens, Ga., 1983); Edgar J. McManus, *Law and Liberty in Early New England: Criminal Justice and Due Process, 1620-1692* (Amherst, Mass., 1993). For early 19th-century see Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800-1880* (Chapel Hill, N.C., 1989).

[45]Stedman's concern about domestic violence had already moved the California's legislature to include cruelty as a grounds for divorce. California Civil Code, Section 89 *et seq.* (1872). Also see Robert Griswold, *Family and Divorce in California, 1850-1890* (Albany, 1980). Norma Basch, "The Emerging Legal History of Women in the United States: Property, Divorce, and Constitution," *Signs*, 12:106-9 (1986); Elizabeth Pleck, "Wife-Beating in Nineteenth-Century America," *Victimology*, 4:60-2 (1979); Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* (New York, 1987); Susan Gonda, "Not a Matter of Choice," *Journal of San Diego History*, 37:195-6 (1991). Also see: Bonnie L. Ford, "Women, Marriage, and Divorce in California, 1849-1872," Ph.D. dissertation, University of California, Davis, 1985; Willis and Stockton, *Debates*, 245.

[46]*Ibid.*, 245 (Blackmer).

[47]*Ibid.*

[48]*Ibid.*, 246 (McCallum). See Gordon Morris Bakken, "The Influence of the West on the Development of Law," *Journal of the West*, 24:66-72 (1985).

[49]Willis and Stockton, *Debates*, 247 (Joyce).

[50]*Ibid.*

[51]*Ibid.*, 1172. Whipping as a punishment in California harkened back to the gold rush period. It has colonial roots, but the absence of jails and the seeming effectiveness of the punishment made it culturally acceptable at that time. See Bakken, *Practicing Law*, 101. The attack upon whipping was part of "the new penology" that argued that prison could reform the offender's behavior if properly designed, professionally staffed, and offering generous rewards for good behavior. Bookspan, *Germ of Goodness*, 30.

[52]See Scheiber, "Race, Radicalism, and Reform," 50-1; Bakken, "Constitution Convention Debates," 242-4.

[53]Willis and Stockton, *Debates*, 628.

[54]On *The Passenger Cases* (7 How. 283) see Carl B. Swisher, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Taney Period, 1836-64* (New York, 1974), 383-92.

[55]Willis and Stockton, *Debates*, 628-30.

[56]*Ibid.*, 634-6.

[57]*Ibid.*, 638-41.

[58]*Ibid.*, 242 (Stuart).

[59]*Ibid.*, 246-7.

[60]*Ibid.*, 649-51.

[61]*Ibid.*, 651-3.

[62]On the anti-Chinese movement in California see Sucheng Chan, *This Bitter-Sweet Soil* (Berkeley, 1986), 38-40; Gary B. Nash and Richard Weiss, eds., *The Great Fear: Race in the American Mind* (New York, 1970), 107-17, 124, 149; Alexander Saxon, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley, 1971).

[63]*Ibid.*, 673-7.

[64]See Bakken, "Constitutional Convention Debates," 242-4; Scheiber, "Race, Radicalism, and Reform," 68-70.

[65]On Hoge and Wilson see Bakken, *Practicing Law*, 39. Also see Christian Fritz, "Popular Sovereignty, Vigilantism, and the Constitutional Right of Revolution," *Pacific Historical Review*, 58:64-66 (1994); Willis and Stockton, *Debates*, 959.

[66]*Debates*, 959.

[67]*Ibid.*, 960.

[68]*Ibid.*, 961.

[69]*Ibid.*, 962 (Johnson).

[70]*Ibid.*, 968 (McCallum committee report; Hall).

[71]*Ibid.*, 969 (Cross and White).

[72]*Ibid.*, 970.

[73]This is an issue of interest only to lawyers and the section was forged in committee. Swisher, *Motivation*, 96-98, contains a discussion of the place for sessions of the Supreme Court as the only issue of controversy on the article.

[74]Willis and Stockton, *Debates*, 974.

[75]*Ibid.*, 987.

[76]*Ibid.*, 989. Reddy puts it well at 992: "There is no economy in having inexperienced and incompetent Judges. It delays business, piles up work on the Supreme Court, and harasses and annoys litigants, besides putting them to a great deal of unnecessary expense."

[77]*Ibid.*, 996.

[78]*Ibid.*, 998.

[79]*Ibid.*, 999.

[80]*Ibid.*, 999-1000.

[81]*Ibid.*, 1357.

[82]The press was consistent on wanting "justice," but not on how to obtain it. The *Placer Argus* ran a Nov. 3, 1877, story prior to the convention election. The *Argus* wanted "a change in the judiciary system of our State. We have

altogether too many Judges. Just think of a District Court, a County Court, and a Probate Court in every one of the fifty-two counties of the State! Let us have a less[er] number of Courts and more justice." The press in the nineteenth century frequently made fun of lawyers and judges, yet they knew that the rule of law was necessary for a stable society. The *Fresno Weekly Expositor*, Oct. 18, 1878, thought that California had "too many Courts." The problem was expense in an unfair taxing system. Bakken, *Practicing Law*, 114-37.

[83]This last reason, written opinions with reasons, was a long-term complaint of the practicing bar. Early cases could be very terse and decisions handed down with absolutely no case citations. Bakken, *Practicing Law*, 29. Also see Gordon Morris Bakken, *The Development of Law in Frontier California: Civil Law and Society, 1850-1890* (Westport, Conn., 1985), 7-83.

[84]Dudley T. Moorhead, "Sectionalism and the California Constitution of 1879," *Pacific Historical Review*, 12:287-8 (1943); Gordon Morris Bakken, "California Constitutionalism: Politics, the Press and the Death of Fundamental Law," *Pacific Historian*, 30:5-17 (1986).

[85]The ark was Professor Dwight's term and as Noah did, so did the 1878-79 delegates in gathering the life blood of the state into one vessel, the constitution. The constitution was defective in many ways, and it was for the courts to judicially remove the most vile sections. See Scheiber, "Race, Radicalism, and Reform," 67. The federal courts did much to cut away the constitutionally objectionable sections in violation of the treaty power, but the California Supreme Court also played an important role. See Ex parte Ah Cue, 101 Cal. 197 (1894); Estate of Tetsubmi Yano, 188 Cal. 645 (1922); Roger Daniels, *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion* (Berkeley, 1962); Robert Higgs, "Landless by Law," *Journal of Economic History*, 38:216-20 (1978); Charles J. McClain, Jr., "The Chinese Struggle for Civil Rights in Nineteenth-Century America: The First Phase, 1850-1870," *California Law Review*, 72:529 (1984). Regardless of the cases favoring equality and the rights of Asians, the struggle for access to land and citizenship continued well past World War II.

Racial Minorities and the Schools: A Look at the Early Decisions of the California Supreme Court

Charles McClain

INTRODUCTION

With justification the state of California has always prided itself on its commitment to universal free public education. That commitment was symbolized in the state's first constitution, the constitution of 1849, which committed the legislature to provide a system of common schools for the education of the state's children.[1] Subsequent constitutional revisions only reinforced and strengthened that pledge.[2] With respect to California's racial minorities, however, the promise of access to the benefits of education proved for a long time partial and incomplete. This article examines the history of legislation affecting the education of minority schoolchildren in California and the first instances in which the state's highest court, operating within the framework of the state constitutional commitment, was called upon to apply and interpret that legislation.

Ground rules, albeit incomplete, for the treatment of nonwhite schoolchildren were established in a series of laws enacted in the first two decades of the state's history. California's first general school law, enacted in 1855, made no mention of race, but a statute passed in 1860 flatly forbade the admission of "Negroes, Mongolians, and Indians" into the public schools. The 1860 law permitted, though it did not require, school districts to establish separate schools for the education of these children.[3] Then in 1866 the legislature made it mandatory for the trustees to establish such schools if the parents or guardians of 10 such children should apply for them. It also allowed districts to admit nonwhite children to white schools when it was impracticable for them to establish separate schools, but only if a majority of the white parents did not object.[4] Finally, in 1870 the state enacted a new comprehensive school law. One provision stated that the schools should be open for the admission "of all white children between five and 21 years of age, residing in the district." Like its predecessors, the law provided for the education of children of African and Indian descent in separate schools but, unlike

them, it contained no provision permitting nonwhite children to attend integrated schools when it was infeasible to establish separate schools for them. The new law failed to make any explicit provision for the education of Asian children.[5]

WARD v. FLOOD

With the law in this posture an African American family in San Francisco determined in the fall of 1872 to test the validity of state-mandated segregation. Harriet and A. J. Ward had lived in San Francisco since 1859 and were the parents of an elementary school child who was denied admission to the school nearest her home on account of race (the city maintained a separate school for black schoolchildren). To press their case in court they retained John W. Dwinelle, a prominent San Francisco lawyer and onetime state assemblyman. He is today perhaps best remembered for the fact that he was a chief sponsor of the legislation that created the University of California and was a member of its first board of regents.[6]

Dwinelle made a variety of arguments but relied mainly on the equal protection clause of the newly enacted Fourteenth Amendment. He contended, as had Charles Sumner before the Massachusetts Supreme Court in the famous 1850 case of *Roberts v. City of Boston*,[7] that the forcible segregation of black schoolchildren by the state stamped them with the badge of inferiority, thus reinforcing popular prejudices and that this amounted to a denial of the equal protection of the laws (Sumner had made his argument under the "free and equal" clause of the Massachusetts constitution).

The California tribunal took seriously the equal protection claim. "The education of youth is emphatically their protection," it declared. And it would be a clear denial of equal protection if the legislature were to exclude children from the benefits of education solely because of their race. Having said that, however, it rejected the argument, as had the Massachusetts court in the *Roberts* case, that segregation of schoolchildren by race, in and of itself, amounted to a denial of equal protection. If blacks were the objects of odious caste distinctions, the maintenance of separate schools was not responsible for that, it said, quoting liberally from the *Roberts* case.[8] It did go out of its way, however, to affirm that the state was under a solemn obligation to provide an

education at public expense for all its schoolchildren. Education in the common schools, it said, was "a right—a legal right—as distinctively so as the vested right in property owned is a legal right." And it went on to rule that, notwithstanding the absence of any statutory mandate to that effect, the exclusion of nonwhite schoolchildren from white schools would only be countenanced where separate schools were actually maintained; otherwise these children would have the right to attend the white schools.[9]

TAPE v. HURLEY

In 1880 a revision in the state's education law repealed those sections of the Political Code having to do with the segregation of children of African and Indian descent (in 1872 the state's education laws had been codified in the Political Code). It also omitted the word "white" from the open admissions provision of the state school law referred to above so that that section now read: "Every school, unless otherwise provided by law, must be open for the admission of *all children* [emphasis added] between six and twenty-one years of age residing in the district." This change in the law's wording opened the way for the Chinese to seek access to the state's public schools.

At the commencement of the 1884 school year Joseph Tape, a self-described westernized Chinese (he wore western dress and was a member of a local Protestant congregation) attempted to enroll his daughter in San Francisco's Spring Valley Elementary School. Upon being rebuffed by the school authorities he determined to challenge the decision in court and through his attorney sought a writ of mandate from the superior court ordering the school principal to admit his daughter. That court issued the writ but its decision was appealed to the state Supreme Court. It affirmed the decision of the superior court. The 1880 law was plain and unambiguous, said the court, and was broad enough to include all children who were not precluded by some other law from attending the public schools. And there was no other law it was aware of that forbade the entrance of children on the basis of race or nationality.[10]

The court in *Tape* had based its decision solely on its interpretation of the relevant statute. In ordering the Tape child admitted to the San Francisco school it was, it said, simply giving effect to the intention of the legislature as manifested in the language of the 1880 school law

(something of a stretch, it must be said; the session that produced that law was the most Sinophobic in the state's history).[11] By implication, then, it had left the way open for the legislature to make whatever special provisions it chose for the education of Chinese or other nonwhite schoolchildren. This it forthwith proceeded to do. A few months after the decision it amended the political code to read:

> Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious of infectious diseases, and also to establish separate schools for children of Mongolian or Chinese descent. When such separate schools are established Chinese or Mongolian children must not be admitted into any other schools.[12]

On the authority of this provision the San Francisco Board of Education established a separate primary school for Chinese children in Chinatown.

WYSINGER v. CROOKSHANK

The political code as amended in the wake of *Tape*, it should be noted, failed to make any provision for the segregation of children of African descent, and in the fall of 1888 Arthur Wysinger, a black schoolchild living in the small rural town of Visalia, brought a legal action through his father and legal guardian, Edmond, to challenge anew the practice of segregating children of African descent. He sought admission to a public school in that town, but the principal refused to admit him on the grounds that he was colored and that there was a separate school for colored schoolchildren established in the district. He applied for a writ of mandate to the superior court but was turned down. The decision was then appealed to the state supreme court on the sole question whether it was within the authority of the school board to establish a separate school for children of African descent and to exclude them from the schools established for white children.

If the statutes were in the same posture that they had been when *Ward v. Flood* or for that matter *Tape v. Hurley* was decided, said the court, there could be no doubt of the board's authority in the matter. But it pointed out that the law had been changed in 1885 and that in its present wording gave no authority to school boards to establish separate schools for children of African descent. Indeed, said the court, the legislative revision had taken that power away. The powers of school

boards were limited to the passing and enforcement of rules that were consistent with law.[13] The high court therefore ordered the judgment reversed and directed the court below to issue a writ compelling the admission of the petitioner. Following the decision, the legislature did not bother to reinstate the segregation of African American schoolchildren, but the laws permitting school districts to segregate Asian schoolchildren (Japanese were later added to Chinese) and children of Native American descent remained on the books until well into the twentieth century.

PIPER v. BIG PINE SCHOOL DISTRICT

Several decades later, in 1924, the California Supreme Court was again asked to confront the question of school segregation but this time in the context of a third ethnic minority's claims. Under the education law then in force the governing bodies of school districts were given the power "to establish separate schools for Indian children, and for children of Chinese, Japanese or Mongolian parentage." When such schools were established the children in question could not be admitted to any other schools. The statute then went on to provide that in California school districts where the United States government had established a school for Indian children these children should not be admitted to the district school.[14]

Alice Piper, a Native American child of 15, sought admission to a school in the Big Pine School District in Inyo County, the district where she lived, but she was refused admission by the board of trustees on grounds of ancestry. (The school district provided no separate schools for Indian children.) The board justified its action on the authority of the political code, pointing to the fact that the federal government maintained a school for Indian children within the territorial boundaries of the school district. This school, it claimed, corresponded with respect to curriculum and hours of study to the public school and otherwise afforded equal educational opportunities. Having been rebuffed by the board, Piper's parents brought a mandamus proceeding in the Supreme Court to compel the school district to admit her. The court had no difficulty deciding that the writ should issue.

The legislature was constitutionally bound, it said, to provide for the education of the state's children. It again affirmed that education was a (state) constitutional right and a matter of paramount importance. "The

public school system of this state," said the court, indulging perhaps in some mild hyperbole, "is a product of the studied thought of the eminent educators of this and other states of the Union, perfected by years of trial and experience." It was calculated to open doorways "into chambers of science, art and the learned professions, as well as into fields of industrial and commercial activities."[15] The state constitutional mandate was not satisfied, as the school district sought to argue, by the existence of a federal school in the neighborhood. The constitutional obligation inhered in the state alone and was one that it could not delegate to anyone else, even to the federal government. It could satisfy its constitutional obligation by providing separate schools for Indian children (the doctrine of separate but equal was still alive and well) but not by relying on the existence of a federal school. "To argue that petitioner is eligible to attend a school which may perchance exist in the district but over which the state has no control is to beg the question," the court declared.[16]

CONCLUSION

The cases discussed above span some 50 years. They were decided by different courts in different eras and revolved around the claims of different racial groups. One should be cautious then in generalizing about them. Nonetheless, one cannot fail to be struck by certain common themes that run through them, it seems to me. One is impressed by their relative liberality and sympathy for minority claims—this in a period of time when courts were not generally noted for their liberality in matters of race. In all of the cases the California Supreme Court made clear that its point of departure and ultimate touchstone for decision making was the child's right to an education. The education of the state's schoolchildren was a duty imposed on the legislature by the state constitution, the court said in one way or another in each of them, the opportunity to acquire the benefits of education a corresponding right. And it saw itself as duty bound to enforce that right for all children regardless of color. To that end school board regulations and even state laws were to be narrowly construed in favor of the child's access to the schools. The power to segregate, the court said more than once, was never to be implied or read into legislation but rather was to be allowed only when clearly expressed in statutory language. In none of the decisions is there detectable any of that sense that one often encounters in southern courts in the pre-*Brown*

era that racial segregation was part of the state's social fabric and as such deserving of the strong protection of the court. Of course these decisions could only go so far in making real the rights of minority children to equal educational opportunity. The reverse side of the court's line of analysis was that if the legislature wished to segregate, it merely needed to make that clear in explicit statutory language. If it did so, the court had no doctrinal barrier to put in its way (like virtually all courts, state and federal, in the years under discussion, the California Supreme Court never saw fit to question the received doctrine of "separate but equal"). The rights of minority schoolchildren in California and elsewhere would be put on a much more secure basis in 1954 when the U.S. Supreme Court at long last decided to accept the argument that had been advanced more than a century earlier by the Massachusetts lawyer Charles Sumner and in 1872 by California's own John W. Dwinelle.

NOTES

[1]Cal. Const. 1849, Art IX, Sec. 3.

[2]See, *e.g.*, the Constitution of 1879, Art. IX.

[3]Stats. of California, 1860, Chap. 329, pp. 321- 22.

[4]Stats. of California, 1866, Chap. 342, at p. 398.

[5]Stats. of California, 1869-70, Chap. 66, pp. 838-39.

[6]For further information on the background of the case see B. Gordon Wheeler, *Black California: The History of African-Americans in the Golden State* (New York, 1973), 136-37.

[7]59 Mass. (5 Cush.) 198 (1850).

[8]There was another issue in the case, namely whether the plaintiff in the case was old enough to attend the school in question. The court thought she was not but chose to address the constitutional claim anyway.

[9]*Ward v. Flood*, 48 Cal. 36, at 50, 56-57 (1874). Later in the year the state's education law was changed to reflect this ruling. *Amendments to the Codes of California, 1873-74*, 97.

[10]*Tape v. Hurley*, 66 Cal. 473 (1885). For an interesting account of the long struggle of California's Chinese to gain equal access to public education see Victor Low, *The Unimpressible Race: A Century of Educational Struggle by the Chinese in San Francisco* (San Francisco, 1982).

[11]A discussion of the anti-Chinese measures that came out of the 1880 legislative session would be beyond the scope of this article. Suffice it to say that the list was long and harsh. One, for example, gave cities the power to expel all their Chinese inhabitants or segregate them in designated ghettoes.

[12]Act of March 12, 1885, Stats. of California, 1885, Ch. 97, at 99-100.

[13]*Wysinger v. Crookshank*, 82 Cal. 588, at 593 (1890).

[14]Sec. 1662 Cal. Polit. Code, 1921 Cal. Stats. 1160.

[15]*Piper v. Big Pine School Dist.*, 193 Cal. 664, at 673 (1924).

[16]*Id.*, 672-4.

Roger J. Traynor: Legend in American Jurisprudence

Amy Toro

Unquestionably one of the most notable jurists in American history, Roger J. Traynor was appointed to the California Supreme Court in 1940 at the young age of 40 . He was then elevated as chief justice in 1964 by Governor Pat Brown and continued to serve on the court until 1970. While on the bench, Traynor wrote a total of 950 opinions; the constitutional historian Bernard Schwartz called him one of the "ten greatest American judges."[1]

Traynor combined a commitment to rationality with a sensitivity to the results of his decisions and a rare clarity of prose style. In responding to rapid growth and social change in the United States in general, and in California in particular, Traynor made major contributions to American jurisprudence in the areas of product liability, conflict of laws, civil procedure, constitutional rights, taxation, and criminal law. Under his leadership, the Supreme Court of California became widely regarded as "the most innovative court in the country."[2]

Prior to his ascent to the bench, Traynor was primarily a scholar. He graduated from the Boalt Hall School of Law in 1927, where he served as the editor of the *California Law Review*. Simultaneously, he was earning a Ph.D. in political science at the University of California, Berkeley. He remained at Berkeley to serve as a law professor at Boalt from 1930 until 1940, when he was appointed to the court. An authority on tax law, Traynor also served as a consultant to the California Board of Equalization and the United States Treasury Department.

His opinions reflected his scholarly background, especially evident in his frequent references to law review articles—a practice now common, but then innovative, in opinion writing. After his retirement from the bench in 1970, Traynor returned to teaching, this time at Hastings College of the Law. Thus, Traynor committed his life to the study and

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the development—one might fairly say to the *modernization*—of California and American law.

During his tenure on the California Supreme Court, as one commentator wrote, Traynor "inspired a dramatic renaissance of the common law."[3] The Traynor Court modified tort law to reflect the changes in the marketplace—its growing impersonality, the expanding complexity of products, and the increasing purchasing power of consumers.

In 1944, for example, in his concurrence in *Escola v. Coca Cola Bottling*, Traynor set forth the essential principle of strict liability for defective products.[4] This principle was to replace the traditional common law requirement of privity between the parties, substituting for it a system that allowed manufacturers to insure against injuries, to distribute the cost equally to consumers, and to provide compensation to injured victims. In the decades that followed, the law of defective products was transformed, not only in California but throughout the United States, to reflect Traynor's early insights regarding strict liability.

In other areas of tort law, Traynor contributed to the undermining of governmental, family, and charitable immunities and to the development of the tort of intentional infliction of emotional distress.[5] Traynor also led in the modification of other private law areas, such as property and contracts law. In all of these reforms, as G. Edward White has contended, Traynor often "de-emphasized formalities in the face of immediate practical consequences."[6]

In the conflict-of-laws area, Traynor also rejected old formalities, overturning sterile and rigid rules that had often produced irrationality and confusion regarding what law ought to be applied. Traynor adopted instead "interest analysis," a test that balanced the interests of the different states—the forum state, the state of domicile, and the state where the event occurred—in determining what law ought to be applied. Traynor's contribution to conflict-of-laws principles also demonstrates his continued attention to and interaction with the academic community: he relied on scholarly works in formulating his own theories, and he also contributed to the scholarly debate through his academic writing.

Traynor was, on the whole, supportive of governmental activism. For example, he upheld innovations in the taxation area, extending approval to government seizure of land for tax delinquency and giving judicial validation to new types of corporate income tax. He also supported the government in some aspects of criminal procedure, allowing prosecutors

and police greater leeway in the areas of search and seizure, and of discovery. His support of governmental activism did not, however, indicate an insensitivity to individual rights; indeed, the California Supreme Court was ahead of the U.S. Supreme Court in extending protection of these rights, especially with respect to Fourth Amendment guarantees. And Traynor wrote the ourt's opinion declaring an antimiscegenation statute unconstitutional, 16 years before the U.S. Supreme Court followed suit. He also supported the First Amendment rights of those with minority political opinions, as in cases involving the ACLU and the Communist Party.

Opposed to "judicial lethargy," Chief Justice Traynor subscribed to the view that "the real concern is not the remote possibility of too many creative opinions but their continuing scarcity." He welcomed "judicial boldness."[7] During his time on the court, Traynor remained committed to this principle, with results that profoundly changed the landscape of American jurisprudence.

NOTES

[1]Bernard Schwartz, "The Judicial Ten: America's Greatest Judges," *Southern Illinois University Law Journal*, 405, 407 (1979), quoted in Jerome Hall, "Chief Justice Traynor and Criminal Law," *Hastings Law Journal*, 35:817, 826 (1984).

[2]Grant Gilmore, *The Death of Contract* (1974), 91, quoted in Edmund Ursin, "Judicial Creativity and Court Law," *George Washington Law Review*, 49:229 (1981).

[3]Matthew O. Tobriner, "Chief Justice Roger Traynor," *Harvard Law Review*, 83:1769 (1970), quoted in Ursin, "Judicial Creativity."

[4]*Escola v. Coca Cola Bottling*, 24 Cal.2d 453 (1944).

[5]G. Edward White, *The American Judicial Tradition* (1977), 309.

[6]*Id.*, 310.

[7]Roger J. Traynor, "Comment on Courts and Lawmaking," in M. Paulsen, ed., *Legal Institutions Today and Tomorrow* (1959), 48.

The Jurisprudence of Innovation: Justice Roger Traynor and the Reordering of Search and Seizure Rules in California

Ben Field

INTRODUCTION

The idea of judicial creativity caused great anxiety among legal scholars and jurists during the first half of the twentieth century. Building on the judicial philosophy of Oliver Wendell Holmes, Legal Realism emerged in the 1930s as a school of jurisprudence devoted to exploring the uncertainty of judicial law making. Justice Roger Traynor's career on the California Supreme Court from 1940 to 1970 coincided with widespread controversy among the Realists and other contemporary legal scholars about the subjectivity and arbitrariness of judicial decisions. Justice Traynor agreed with the Realists on certain fundamental propositions about the nature of judging. He did not share their anxiety, however, over the absence of fixed legal principles, or their cynicism about the legitimacy of judge-made law. While the Realists brooded over the intellectual justification for the judicial process, Traynor forthrightly encouraged judicial innovation.

Traynor's innovative decisions in search and seizure cases reveal the underlying assumptions of his judicial philosophy. Traynor grounded his philosophy of judging on a pragmatic theory of justice. Legal decisions required the application of judicial experience to the facts, he contended, not the mechanical application of precedent. Like the Pragmatist philosophers, Traynor embraced an ideal of action.[1] Judges had a duty to weed out obsolete legal rules, which abounded in search and seizure law. Traynor also believed that judges had a responsibility to create new

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search and seizure rules in response to the changing realities of crime and punishment in California.

Traynor's method of judging involved a process of inquiry and social verification that closely paralleled the Pragmatists' concept of scientific method.[2] William James argued that

> [w]e must find a theory that will work and that means something extremely difficult; for our theory must mediate between all previous truths and certain new experiences. It must derange common sense and previous belief as little as possible, and it must lead to some sensible terminus or other that can be verified exactly.[3]

Like James, Traynor searched for workable rules. His process of judicial inquiry embodied the principle that law ought to resonate with the circumstances of life. Traynor saw his search and seizure decisions in the social context of crime and policing. He allowed his judicial experience and his knowledge of the law enforcement system to guide him toward practical responses in search and seizure cases. With each new search and seizure case, he tested the functionality of legal rules.

Legal Realists believed that judging, when stripped of its claim to the legitimacy of time honored rules, would succumb to the prejudices of judges. Realists feared the law would become unpredictable and inconsistent as a result; judicial rulings liberated from precedent would be unruly. Traynor provided an answer to the Realists' fears. He insisted that careful judicial innovation would be a vast improvement over the mechanical application of obsolete legal rules. He believed judges would not abuse their power to innovate because caution typified the bench. Traynor also discerned limits to judicial creativity.[4] He asserted that judging demanded a self-conscious effort to make rules that functioned as coherent bodies of law. Self-imposed consistency circumscribed the creative pragmatism of rule making in individual cases.

PEOPLE v. CAHAN

Before Traynor gave rational structure to it, search and seizure law in California was a disjointed body of law. The centerpiece of Traynor's search and seizure decisions was *People v. Cahan*.[5] Decided in 1955, *Cahan* created a judicial rule of evidence barring the admission at trial in California courts of evidence obtained in an illegal police search.[6] The

primary objective of *Cahan* was to deter law enforcement authorities from engaging in such searches.

Traynor's opinion in *Cahan* demonstrated his pragmatic approach to judging. Charles Cahan, a bookmaker, had been convicted on the basis of statements he had made in conversations covertly recorded by the police.[7] The police had broken into Cahan's house without a warrant and installed listening devices that enabled them to make the recordings.[8] These recordings formed the evidentiary basis for Cahan's conviction. After assessing the risk of freeing criminals by excluding illegally obtained evidence of their guilt, Traynor concluded that police often could obtain the necessary evidence without violating the Fourth Amendment. Although the trial briefs contained no empirical evidence of the frequency of illegal police searches, Traynor argued that, based on his own experience, they had become routine. Traynor reasoned that police probably did not exhaust their legal options when breaking the law was easier and carried no risk of punishment.[9] He refused to act, in effect, as an accessory after the fact to illegal searches. Therefore, he felt compelled to adopt the exclusionary rule, the only alternative to continued court complicity with lawless police activities.[10]

In the two years following *Cahan*, the California Supreme Court and lower courts decided over one hundred search and seizure cases.[11] Traynor led the way in converting the constitutional principle (embodied in the Fourth Amendment) into "workable rules."[12] His judicial creativity was fired not only by evidence that a rule had become outmoded, but by his drive to make coherent previously discordant legal rules. Traynor's opinions on search and seizure reflect his devotion to creating a rational scheme of rules based on consistent, practically obtainable objectives.

TRAYNOR'S INTELLECTUAL DEVELOPMENT

Traynor asserted that judges should descend to the everyday business of life to make decisions.[13] As Oliver Wendell Holmes explained, "The life of the law has not been logic: it has been experience."[14] Traynor's earliest intellectual development suggests a source of his willingness to engage in practical analysis of the everyday business of life. He grew up in Park City, Utah, surrounded by mountainous terrain he later analogized to the path of the judge.[15] Park City was a mining town, and Traynor fondly remembered its color and diversity as part of his earliest educa-

tion. "I should count it a loss," he later wrote, "if we were to become so self-consciously mannered as to shut the windows of the parlor and the study to the language of the street."[16] Life in Park City must have been difficult for Traynor's parents, Felix and Elizabeth (O'Hagan) Traynor, who had immigrated from Hilltown, County Down, in Northern Ireland.[17] His father was a miner in Nevada and Utah until occupational disease forced him to quit when Traynor was six.[18] Traynor helped his father with a drayage business until his father died several years later.[19] Traynor's experiences in Park City molded an intellect unfettered by convention, and he remained attentive to the "language of the street" throughout his career on the bench.

Traynor demonstrated an interest in practical policy questions early in his academic career. After receiving his bachelor's degree at UC Berkeley in 1923, Traynor stayed on as a graduate student in political science and law. The law school (Boalt Hall) used the case study method originated by Christopher Columbus Langdell, a proponent of the oracular theory of judging. However, in his writings as a graduate student, Traynor examined legal questions from a policy perspective rather than within the traditional (Langdellian) framework of doctrine and theory. Each of his five student comments in the *California Law Review* dealt with practical policy issues, not questions of legal principle.[20] Traynor's political science Ph.D. dissertation analyzed the process for amending the United States Constitution.[21] Interestingly, it did not presage his later support for legal reform. To the contrary, it criticized various contemporary reform proposals. The dissertation did, however, foreshadow Traynor's method of analysis as a judge. Citing colonial experiences with charter amendments and the subsequent history of federal constitutional amendments, Traynor concluded that the provisions for amending the Constitution reflected the policies best suited to the needs of republican government.[22] His dissertation approached its topic pragmatically, scrutinizing the history of constitutional amendments to determine whether the constitutional amendment process had adequately accommodated contemporary political conditions and served contemporary political needs. Traynor also critically examined the amendment process as a system of rules made coherent by their underlying policy objectives. He would later employ this pragmatic approach and systemic perspective throughout his career on the bench.

Traynor was known primarily as a tax expert when Governor Olson nominated him to the California Supreme Court in 1940. He had taught the first tax class at Boalt Hall in 1929.[23] He helped write California's tax code as counsel to the State Board of Equalization and served as deputy attorney general in the tax division.[24] His role in revamping the state's tax laws demanded a circumspect analytical approach which, like many of his later decisions as a judge, advanced a coherent system of rules. Although Traynor recused himself from tax cases while on the California Supreme Court, his experiences critiquing and reforming the tax code helped establish a systemic approach toward legal reform that would echo through his judicial decisions.

Once on the bench, Traynor came to view criminal law as an incoherent collection of archaic rules. The development of criminal law, he wrote in 1959, "has been warped by successive irrationalities that have matched the potions and bloodletting of medicine."[25] Early in his judicial career Traynor embraced the position on the Fourth Amendment set forth by Benjamin Cardozo that "the use of evidence obtained through a search and seizure (illegal under the Fourth Amendment) . . . does not violate due process of law for it does not affect the fairness or impartiality of the trial."[26] The defendant could attempt to recover criminal and civil penalties from the police for their illegal action, but the courts would nevertheless admit the illegally obtained evidence.[27] Traynor's view that search and seizure cases hinged on due process rights changed as he observed over the course of years the practical impediments to legal action against scofflaw police officers.

SOCIAL CHANGE AND LEGAL REFORM

Traynor's career on the California Supreme Court spanned 30 years of explosive social change in California. During his tenure on the bench, the population of California tripled.[28] The state industrialized rapidly and became increasingly urban.[29] With these changes came increased social problems. Federal Bureau of Investigations crime statistics showed a nationwide increase in crime beginning in the 1940s,[30] and the California Department of Justice substantiated this trend. From 1952 to 1962, reported felonies in California increased 110 percent;[31] felony arrests in California increased 70 percent, and the rate rose from 507 per 100,000 Californians to 578 per 100,000;[32] felony charges in California Superior

Court increased 240 percent;[33] and felony convictions increased by 150 percent.[34] The state's population, by comparison, increased 50 percent during 1952-62. Some critics of FBI crime statistics argued that the increased reporting of previously unreported crime created the illusion of a crime wave.[35] However, this phenomenon does not appear to have caused the rise indicated by crime statistics in California.[36]

Law enforcement had adapted to the rise in crime. A transition from an adjudicative to an administrative law enforcement system began in the late nineteenth century and accelerated during the twentieth century.[37] With the advent of professional police and prosecutors, the focal point of law enforcement shifted from the courts and jury rooms to the streets, station houses, and district attorneys' offices.[38] Professional police applied scientific techniques, such as fingerprinting and blood testing. Professional prosecutors replaced part-time and volunteer lawyers who were brought in to try criminal cases. Lawrence Friedman and Robert Percival have noted that in the old system, "a system run by amateurs, or lawyers who spent little bits of their time and energy, with no technology of detection or proof, a trial was perhaps as good a way as any to strain the guilty from the innocent."[39] The professionalization of law enforcement and the advent of police science demanded changes in the law of criminal procedure. Traynor's search and seizure decisions would demonstrate his concern over the practical effect of sophisticated police tactics on the privacy rights of individuals.

Traynor urged judges to consider realistically the changes in law enforcement and to modernize accordingly the rules of criminal procedure. One of the distinguishing features of Traynor's opinions is its resonance with the changing conditions of life in California. The judge's calling, he contended, was to resolve legal controversy and "restore litigants to normal living much as a hospital restores the ailing and the injured."[40] The law, like medical treatment, should be administered only in accordance with the most current information and accurate diagnosis.

Traynor's search and seizure opinions defy categorization as pro- or antilaw enforcement. While his opinion in *Cahan* creating the exclusionary rule reflected his concern about the rights of those accused of crimes,[41] Traynor also believed that "our police . . . have a heroic job to do," and he often commended police officers for their difficult and dangerous work.[42] In *The Self-Inflicted Wound*, Fred Graham argues that the U.S. Supreme Court's "criminal [rights] revolution" nearly destroyed

the U.S. Supreme Court's all important reputation as the conscience of society.[43] *Cahan* and other Traynor opinions, which the U.S. Supreme Court later followed, similarly provoked a strong, negative reaction from some Californians, and Traynor worried about attacks on the courts in response to *Cahan.*[44] He feared the court might become the scapegoat for rising crime.[45] However, public reaction to the court's search and seizure cases was proved to be mixed, and dramatic signs of public discontent with the court's positions on criminal procedure appeared only occasionally. The 1958 Los Angeles County Grand Jury took the unusual step, however, of issuing an extensive report condemning the *Cahan* and other decisions:

> This ridiculous overliberality of interpretation of our constitution reflects a dangerous softness of thinking and a weak and watery philosophy, on the part of these people whom we put into a position to make such important decisions.[46]

The Grand Jury called for the removal of four justices from office, but no credible campaign against the judges emerged.[47]

The liveliest debate over the court's actions took place on the pages of California newspapers. Some newspapers attacked the court as pro-criminal defendant. The *San Francisco Examiner* reported that *Cahan* was "a change that gave the criminal defendant the greatest break he had ever received."[48] In a six-article series on the court's search and seizure cases, the *Examiner* claimed that *Cahan* and the court's subsequent search and seizure rulings were universally condemned:

> The initial blast by the four justices was followed by twenty-three aftershocks in the succeeding ten months. Some of these struck the law enforcement officers with even more devastating effect than the grandaddy effusion of April 27, 1955 (*Cahan*). Before the last one subsided, criminal justice in California had acquired a distinctly new look. The supreme court had rewritten the rule book on the law of arrest and on many phases of criminal procedure—and the revisions were drastic.

The *Examiner* characterized the court's search and seizure decisions as a self-inflicted wound.

Other newspapers did not share the *Examiner's* view. The *San Francisco Chronicle* editorial board came out in favor of the decision:

> For half a century the Constitutions of the United States and of the State of California have not meant what they said in protect-

> ing "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" by the police in California. They do now.[49]

The *Los Angeles Times* and the *Sacramento Bee* also supported the court.[50] To the extent that such newspaper commentary reflected public opinion, one must say that public opinion revealed a wide range of responses to the court's search and seizure decisions.

Some explicit support for the majority decision in *Cahan* came from the legal community. Several search and seizure cases attracted the attention of the American Civil Liberties Union. The ACLU did, at the very least, help bring the problem of illegal police searches to the attention of the California Supreme Court. In 1952, ACLU attorneys argued *Rochin v. California* before the U.S. Supreme Court.[51] This case, which the California Supreme Court had declined to review, involved evidence obtained in a warrantless search of Mr. Rochin's home and subsequent medical procedures that caused him to vomit two capsules containing morphine. The impact of the ACLU's efforts, however, appears to have been limited. The ACLU's Southern California Branch filed *amicus curiae* briefs in only 11 search and seizure cases from the time of Traynor's first search and seizure case in 1942 to *Mapp v. Ohio*, in which the U.S. Supreme Court required all states to adopt the exclusionary rule, if they had not already done so.[52] The same two ACLU lawyers filed each of the 11 briefs. Perhaps a lack of sufficient staff or *pro bono* volunteers prevented the ACLU from launching a comprehensive litigation strategy to challenge illegal police searches systematically in courts across the state.

There were some expressions of support from the bar for *Cahan* and the reform of search and seizure rules. The Criminal Courts Bar Association, a Los Angeles County organization dominated by defense attorneys, filed an *amicus* brief on the defendant's behalf in the *Cahan* case itself.[53] The majority opinion in *Cahan* also evoked some active support in northern California. The Marin County Bar Association also filed an *amicus* brief on the defendant's behalf. Moreover, the Marin County bar leadership agreed almost uniformly with the court's opinion.[54] In a vote of Marin bar committee members, 19 of 28 members favored a motion to file the *amicus* brief. The seven members opposed to the brief were from the district attorney's office.[55] Support for the court's decision in *Cahan* may have been similarly strong among lawyers

elsewhere in California, but few lawyers actually organized to bring illegal search cases before the state courts.

Law enforcement initially opposed the court's search and seizure decisions. Los Angeles Police Chief William Parker, for example, blamed *Cahan* for a 35.8 percent increase in the crime rate in Los Angeles during the first quarter of 1956.[56] The Oakland police chief claimed the decision "placed a stumbling block in the way of law enforcement officers."[57] James Don Keller, district attorney and county counsel of San Diego County spoke for the majority of prosecutors and police officers when he wrote:

> At a time when the State of California and practically every area of the State was experiencing a tragic increase in narcotic traffic, the *Cahan* decision was not far short of disastrous to State and local agencies charged with responsibility for enforcement of the narcotics laws. . . . In bookmaking operations, while street bookmaker or collector may be arrested, the principals in the operation transact their dealings by telephone and make few, if any personal contacts, thus surveillance is of no value.[58]

However, with time, the new rules announced by the California Supreme Court seemed less onerous. Edmund G. Brown, Sr., who opposed *Cahan* when he served as attorney general in 1955, later admitted that it improved police conduct.[59] The new rules gained acceptance as police departments gradually incorporated them into the police training programs.

Traynor worried about the perception that "due process rules are the source of all our woes."[60] He noted that no empirical studies proved a correlation between crime and court rules.[61] "[T]hose who equate due process rules with coddling of criminals have failed dismally," he wrote, "to explain why crime flourishes when there is no such so-called coddling."[62] Moreover, the court's search and seizure cases evidently did not impede convictions. Felony convictions in California kept pace with population growth during the fifties.[63] In 1962 Traynor stated that "there has been a substantial abatement of the fear that the [*Cahan*] rule would frustrate law enforcement. It has become increasingly clear that acceleration of crime in our state, as in others, cannot be explained by the simplistic reference to the presence or absence of the exclusionary rule."[64] During the fifties, Californians generally did not seem to blame the court's decisions favoring criminal defendants for the rise in crime.

If public fear of crime and the perception that the "liberalization" of criminal procedure fostered crime did not become a force for counter-reform in California, they did have that effect in Washington, D.C., during the late sixties. By 1968 racial animosity and urban riots had charged the national-level debate over the rights of criminal defendants. The U.S. Senate voted 51 to 31 in favor of an amendment to the Omnibus Crime Control and Safe Streets Act of 1968 designed to reverse *Miranda v. Arizona*.[65] Although the anti-Supreme Court provisions did not become law, they signified the strength of the reaction to the Court's criminal procedure reforms.

The California Supreme Court's criminal procedure decisions were handed down prior to the tumult of the sixties. The atmosphere surrounding these decisions and the objectives behind them differed significantly from those surrounding the U.S. Supreme Court decisions; consciousness of the disparate treatment of racial minorities by the criminal justice system and fear of racial violence did not animate controversies over the California court decisions in the fifties. Although the California court's "liberalizing" decisions before 1960 had some vocal critics—and a few dedicated supporters—political pressure external to the judiciary seems to have had little effect on the reform of criminal procedure in California. Nor did *Cahan* and its progeny become a "self-inflicted wound" to the California court's reputation.

SETTING THE STAGE FOR THE REFORM OF SEARCH AND SEIZURE RULES

During Traynor's first year on the California Supreme Court he gave a radio speech in which he recalled the words of the British statesman William Pitt regarding the evil of arbitrary search and seizure:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter, but the King of England may not enter. All his force dares not cross the threshold of the ruined tenement.[66]

The Fourth Amendment of the U.S. Constitution embodied the principle that unreasonable and unwarranted searches violated fundamental rights. However, California's search and seizure rules often deviated from this principle in practice. There were two reasons for this deviation. First,

the Fourth Amendment contains ambiguous language regarding the requirements for a legal police search. The first clause prohibits unreasonable searches and seizures, and the second clause creates a warrant requirement for searches:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[67]

Of several interpretations of the Fourth Amendment that emerged, two were dominant, though often inconsistent. The Fourth Amendment has been interpreted to mean both that some warranted searches were illegal and that some unwarranted searches were legal.[68] As a result, the police executed the vast majority of searches without warrants. In 1968, there were about 30,000 reported major crimes in San Francisco, a city of 750,000 people, and the police obtained 20 search warrants during the year.[69] In Los Angeles the courts issued only 1,897 warrants from 1930, when the court began keeping track of warrants, to 1968.[70] In 1968 the courts of Los Angeles, a city of three million, issued 197 warrants, more than ever before.[71] The courts' search and seizure decisions had done little to encourage police to obtain warrants. As a result, law enforcement agencies had developed search policies with little judicial oversight or control.

The second reason for the deviation of California search and seizure rules from Fourth Amendment principles was that the federal judiciary had done little to rein in local law enforcement agencies. Federalism persisted in the law of criminal procedure. Until the 1949 case of *Wolf v. Colorado*, the Supreme Court did not compel the states to meet the requirements of the Fourth Amendment.[72] Even with *Wolf*, the Court did not require the exclusion of evidence illegally obtained by nonfederal police.[73] Frankfurter, speaking for the Court, stated that freedom from unreasonable searches and seizures was "implicit in the 'concept of ordered liberty' and as such is enforceable against the States through the Due Process Clause."[74] However, the Court declined to interfere with states' policies designed to deter illegal searches: "it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistent-

ly enforced, would be equally effective." The Court continued to rely on a due process analysis, but it had sent a message to the states that they should adopt the exclusionary rule or its equivalent.[75]

Traynor and his brethren received the Supreme Court's message, but they "clung to the fragile hope that the very brazenness of lawless police methods would bring on effective deterrents other than the exclusionary rule."[76] A succession of illegal search cases made it "abundantly clear that it was one thing to condone an occasional constable's blunder but another thing to condone deliberate and systematic routine invasions of the Fourth Amendment."[77] The Fourth Amendment created a right without a remedy. Finally, the cases of *Rochin v. California*[78] and *Irvine v. California*[79] convinced the California court that it could no longer participate in the "dirty business" of condoning illegal searches.[80]

The facts of *Rochin* were so disquieting that the U.S. Supreme Court reversed the defendant's conviction on the grounds that the police methods used violated the Due Process Clause of the Fourteenth Amendment. With "some information" that Mr. Rochin had narcotics, the police forced their way into his house, where they found Mr. and Mrs. Rochin in their bedroom.[81] When the police asked about two capsules by the side of the bed, Mr. Rochin put them in his mouth. The police tried to pry the capsules from Mr. Rochin, but ultimately took him to a hospital where a doctor caused the defendant to vomit the capsules by feeding him an emetic solution through a tube. Lab analysis proved that the capsules contained morphine. The California Supreme Court had denied without opinion Rochin's petition for a hearing. However, the case shocked Traynor and some of his colleagues, and they hoped the state attorney general's office would file criminal charges against the police officers responsible for the search.[82] The attorney general took no action.

Irvine provided a tougher test of the due process standard for convictions based on illegally obtained evidence. The police had entered Mr. Irvine's home without a warrant three times using a duplicate key, which they had made.[83] They installed a listening device in Mr. Irvine's hall, moved it to his bedroom, and finally moved it again to a bedroom closet. At trial police officers testified to incriminating conversations they heard through the listening devices, and Mr. Irvine was convicted of bookmaking and related offenses. Justice Jackson, writing for the Court, asserted that *Irvine* differed from *Rochin* because it did not involve

coercion.[84] The trespass on the defendant's property and the eavesdropping alone provided grounds for a reversal of the conviction.

Justice Jackson expressed doubts about the efficacy of the federal exclusionary rule as a deterrent to illegal searches by federal law enforcement officers.[85] However, his message to the state supreme courts was mixed. He argued that "to upset state convictions even before the states have had adequate opportunity to adopt or reject the [exclusionary] rule would be an unwarranted use of federal power."[86] "[S]tate courts may wish to reconsider their evidentiary rules," he claimed.[87] *Irvine* troubled Traynor, and he answered Jackson's ambiguous message with a series of decisions that reordered search and seizure rules in California.[88]

TRAYNOR'S PHILOSOPHY OF JUDICIAL ACTION

People v. Cahan marked the departure of the California courts from the due process analysis of search and seizure cases. It was a tough case for Traynor. Years after *Cahan* he reflected on the decision:

> Of all the two-faced problems in the law, there is none more tormenting than the admissibility of illegally obtained evidence. Whichever face one turns to the wall remains a haunting one because there is always that haunting fear that the court has impinged too far on one or the other of the two great interests involved: first, effective law enforcement, without which there can be no liberty; and second, security of one's privacy against arbitrary intrusion by the police.[89]

In *People v. Gonzales*, 13 years before *Cahan*, Traynor had rejected arguments for the exclusionary rule and upheld a conviction based on illegally obtained evidence.[90] Looking back on *Gonzales* Traynor later wrote, "In 1942 clear academic postulates were as yet unclouded by long judicial experience."[91] Traynor's experience observing police practices suggested that only the exclusionary rule would deter illegal police searches.

Cahan and its progeny tested Traynor's philosophy of judging. Traynor came to believe that "(t)here are . . . reasonable grounds for differences of opinion as to the means of enforcing the Fourth Amendment."[92] Logic alone could not resolve or reconcile these differences. However, Traynor had great confidence in the ability of judges to reach pragmatic solutions to even the most difficult problems.

> [L]egal problems need not take [the judge] by storm if he makes a little advance, uncloistered inquiry into what people most want out of their lives and how they wish to live with one another. It is from the stuff of their relationships with one another and with the state that the common law develops.[93]

Where precedent failed, as it had failed to stop police from conducting illegal searches, the judge had a duty to find a practical alternative. "Uncloistered inquiry" would provide the experience necessary to render pragmatic judgment.

G. Edward White provides a different explanation for Traynor's departures from precedent. In "Rationality and Intuition in the Process of Judging: Roger Traynor,"[94] White argues that where a case required a choice between competing legal principles Traynor relied on intuition.[95] Traynor's writings provide some support for this view:

> Once he [the judge] has marshalled the data pertinent to a controversy, he must articulate a solution that calls for a discriminating sense of which available principle, if any, should govern the case. His task is least complicated when he can choose from among several plausible alternative principles that readily fit the case without looking anachronistic. As the badlands get worse there are clearer indications of what form reclamation might take, though the need remains for judgment of the highest order—that combinations [sic] of analysis and intuition culminating in decisions that proves prophetic.[96]

Traynor did not, however, use the word "intuition" often in describing his decision-making process.[97] The word denotes an absence of rational thought and inference, which seems inconsistent with Traynor's approach to judging. Moreover, the word describes a mysterious mental process, and, as a result, sheds little light on Traynor's more difficult decisions.

Traynor immersed himself in the scholarly debate over the mysteries of judging. He knew and read the work of the Legal Realist scholars, such as Jerome Frank, Karl Llewellyn, and his colleague at Boalt Hall, Max Radin. He wrote an essay responding to Frank's influential argument in *Courts on Trial* regarding fact skepticism and rule skepticism.[98] He also cited Llewellyn's Realist classic *The Common Law Tradition* in several law review articles.[99] Judge Frank endorsed Traynor's nomination to the California Supreme Court, though Traynor was a political unknown at the time.[100] However, Traynor's closest

relationship was with Max Radin, who served as dean at Boalt Hall (the University of California, Berkeley, Law School) while Traynor was a professor there.

Governor Culbert Olson nominated Traynor to the Supreme Court when the State Qualifications Committee rejected Radin, the governor's previous nominee, because of his "radical tendencies."[101] Another Boalt man, then-Attorney General Earl Warren, was one of two members of the Qualifications Commission to vote against Radin.[102] Although Radin's chance to sit on the state Supreme Court faded after the ugly confirmation fight, Radin was not jealous of Traynor's success. To the contrary, when Governor Olson called Radin to ask his advice on a substitute nominee, Radin immediately recommended Traynor.[103]

Traynor and Realists such as Frank, Llewellyn, and Radin rejected the proposition that law was composed of fixed principles.[104] "It is commonly believed" Traynor wrote, "that the decisions of a day in court are reflex arcs of the wisdom of the ages, just as it is commonly believed that the ages have been wise."[105] According to this oracular theory of justice, espoused by nineteenth century theorists, such as Harvard Law School Dean Christopher Columbus Langdell, judges found immutable principles of law and applied them to the case at hand. Citing Radin's *The Theory of Judicial Decision*, Traynor wrote that immutable principles of law "may encase notions that have never been cleaned and pressed and might disintegrate if they were."[106] Traynor and the Realists accepted the idea of the judge as lawmaker.

The conviction that judges made the law undermined the traditional concept of the judge's role. If Oliver Wendell Holmes, the philosophical progenitor of Realism, was correct that law reflected "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men," then judicial decisions had to find a new jurisprudential justification.[107] Realist scholars cynically belittled the claims of judge-made law as a source of impartial justice. Judge Learned Hand contended, in criticism, that the principles of Realist jurisprudence were: "that a judge should not regard the law; that this has never really been done in the past, and that to attempt to do it is an illusion."[108] According to the Realists, judicial decisions were not the product of logical deduction from broad principles, and judicial neutrality was impossible.

Traynor did not share the more extreme Realists' cynicism about the prospects for judge-made law. Unlike them, he believed that judicial objectivity was possible. He asserted that judges were "uniquely situated to articulate timely rules of reason . . . as independent and analytically objective as that of the legal scholars."[109] Their freedom from political influence, their detachment from adversarial interests, and their tradition of public service insulated them from bias.[110] Traynor maintained that judges could overcome their predispositions by bringing to bear in the cases before them a "cleansing doubt of his [the judge's] omniscience."[111] In addition, "[t]he disinterestedness of the creative decision is further assured by the judge's arduous articulation of the reasons that compel the formulation of an original solution and by the full disclosure in his opinion of all aspects of the problem and of the data pertinent to its solution."[112] The writing was the final test of judicial objectivity. Through a pragmatic process of verification by scholars and practitioners, each opinion could be purged of any remaining improper bias.

The Realists argued that judicial decisions were result-oriented in that judges reasoned backwards from results chosen on the basis of their subjective values.[113] They saw judicial rationality, expressed through the language of decisions, as a facade. Traynor rejected this theory of result-oriented judging:

> He [the judge] comes to realize how essential it is . . . that he be intellectually interested in a rational outcome . . . he can strive to deepen his inquiry and his reflection enough to arrive at last at a value judgment as to what the law ought to be and spell out why. In the course of doing so he channels his interest in a rational outcome into an interest in a particular result. In that limited sense he becomes result-oriented.[114]

Traynor maintained that reason brought "the good" to light and that the will could then follow the path illuminated by reason.[115] "The old proverb that when there's a will there's a way is reversed," he wrote, "The judge must first find the way and then summon the will."[116] For Traynor, the act of judging was not the rationalization of a preconceived result, but the willful pursuit of a rational result. Traynor's formulation of the process of judicial decision making mirrored the Pragmatic theory that a reasoned inquiry could yield functional truths, propositions that served some useful purpose.[117] Traynor agreed with William James and John Dewey that the process of reasoned inquiry had a value—the value

of yielding decisions that could improve life and society. Unlike the Legal Realists, Traynor thus embraced a philosophy of judging that emphasized reason and downplayed the subjective values of the judge.

Traynor's sanguine assessment of judicial objectivity and rationality supported his view that the judiciary could be held responsible for the health of the law. The judge's "quality control" function in the legal process demanded that as soon as a precedent became outdated, the judge should eliminate it.[118] Traynor never mourned the death of a precedent. A "bad precedent is doubly evil," he insisted, "because it has not only wrought hardship but threatens to continue wreaking it."[119] Traynor not only accepted the idea of the judge as lawmaker, he encouraged judges to take a creative part in shaping the law. "I believe," he wrote, "that the primary obligation of a judge, at once conservative and creative, is to keep the inevitable evolution of the law on a rational course."[120] The stability of the law, in Traynor's view, thus depended not on its permanence, but on its flexibility.

Traynor considered judges better equipped to reform the common law than were legislators. Judicial expertise and temperament, along with the relative permanence and detachment of judicial office, supplied the essential basis for an intelligent, critical evaluation of the law.[121] In response to the challenge, brought with unusual fervor by the prosecution in *Cahan*, that "legislators have a unique sensitivity to popular needs or what is sometimes called an ear to the ground," Traynor argued, "we certainly cannot afford now, if we ever could, to play law by ear."[122] Legislators were more susceptible than judges to the passions of the day. "Too often they legislate madly, confounding the confusions of one paragraph with several more to explain what the first paragraph is deemed to mean."[123] In areas of the common law, such as criminal procedure, bound to raise popular passions, only the judiciary could produce educated, well-articulated reform.

Traynor sought to ensure that judges would rise to their responsibilities as objective and rational lawmakers. He advocated specialized instruction for members of the bench, supporting the Conference of California Judges seminar program and advocating the establishment of the California College of Trial Judges.[124] He also helped design a merit plan for the selection of judges.[125] At the 1967 opening session of the College of Trial Judges, he proudly noted that, according to the Task Force Report on the Courts of the President's Commission on Law

Enforcement and Administration of Justice, California had among the most ambitious program for the education of judges.[126] Traynor believed that special training for judges would enable them to take a more detached and critical view of their cases.

According to Traynor, the health of the law depended on judicial willingness to innovate. "Judicial office has a way of deepening caution, not diminishing it," he wrote, "The danger is not that they will exceed their power, but that they will fall short of their obligation."[127] While Realist scholars doubted that judges could transcend their prejudices, Traynor not only believed they could, but asserted that the health of the law depended on it.

> In the interest of coherence as well as efficiency, it is for the courts to consign to oblivion what has proved over the years to be chaff. . . . There is no place in the living law for period pieces or parrot paragraphs or ill-conceived figments of what has passed as legal imagination.[128]

Traynor sought out and excised obsolete rules of criminal procedure. One such precedent was the "mere evidence rule" that prohibited police from seizing property they had no right to possess. The rule prescribed that if a person had a right to replevy property seized, the search had violated that person's property rights, and the search was illegal.[129] The U.S. Supreme Court adopted the rule, which traced its roots to the English common law,[130] in *Gouled v. United States.*[131] Under *Gouled*, only searches for stolen property, which a thief had no right to keep, contraband, the possession of which was illegal, and instrumentalities of the crime, which constituted a danger to the community, could be legally seized. *Gouled* prohibited the police from seizing "mere evidence" of a crime, such as incriminating records or a blood stained shirt. Traynor announced that if the "mere evidence rule" ever came before him, he would overrule it, and he did so in 1966 in *People v. Thayer.*[132] "The modern view," Traynor wrote, "is that the exclusionary rules exist to protect personal rights rather than property interests and that common-law property concepts are usually irrelevant."[133] The "mere evidence rule" had become obsolete, Traynor believed, and so he acted upon his precept that judges should expurgate law that had outlived its purpose.

Traynor also feared the alternative to innovative judicial law making. If judges failed to modernize the law, the law as an institution might crumble under the weight of changing social conditions:

> [T]here is increasing concern that an evolution of sorts in the law may no longer be good enough to match the revolutionary changes that science and the attendant revolution of rising expectations in the world are making on our lives.[134]

The transformation of the living law into an anachronism might even prepare the way for antidemocratic forces. Traynor's decisions on criminal procedure, in particular, exhibit the fear that if the judge "tends [the law] badly or merely passively, it can develop weaknesses or disorders or, worse still, frightening powers."[135] Traynor's search and seizure opinions demonstrate his preference for reform in response to the changing social conditions.

Traynor appreciated the importance of the principle behind the Fourth Amendment, but his search and seizure opinions highlighted the practical problem of redeeming Fourth Amendment rights. In 1941, Traynor asserted that the Fourth Amendment was "the guardian of our private lives . . . the law at its best—deep rooted in human experience, precise in language, clear in purpose."[136] Philosophical commitment to the Fourth Amendment did not, however, impel Traynor's decision in *Cahan*. In contrast to the U.S. Supreme Court's decision in *Mapp v. Ohio*, which deemed the exclusionary rule "an essential part of both the Fourth and the Fourteenth Amendments," Traynor justified the decision as the means to achieve the policy objective of deterring illegal police searches.[137] Consistent with this practical approach, Traynor believed that the exclusionary rule should not be retroactive.[138] Those already convicted or about to be convicted on the basis of illegally obtained evidence should not benefit from the court's decision to deter future illegal searches. "[T]he policy to deter illegal police activity," Traynor asserted, "is outweighed by the policy of finality of judgments."[139] Deterrence of illegal searches was the guiding policy objective of *Cahan*.[140] Past illegal searches could not be deterred. Therefore, Fourth Amendment rights should have a prospective remedy only. The principles underlying the Fourth Amendment did not require the invention of the exclusionary rule; the practical problem of deterring illegal police searches did.

Traynor was unable to carry a unanimous court in favor of his "judicially declared rule of evidence."[141] Three of Traynor's seven brethren dissented in *Cahan* although they agreed with Traynor on the illegality of the search.[142] The dissenters argued that the policy issues addressed in *Cahan* should have been left to the legislature.[143] Traynor,

on the other hand, saw the addressing of policy issues, such as the ones raised by *Cahan*, as the judge's highest calling.

THE COHERENCE OF PRAGMATIC REFORM

Cahan and its progeny suggest the parameters of Traynor's judicial pragmatism. Pragmatism in epistemology, ethics, and politics is "an open, free ranging quest for the most satisfactory solution to specific problems arising from concrete circumstances."[144] Traynor's brand of judicial pragmatism was constrained by his demand for intellectual coherence within the law and his insistence on the textual consistency of his judicial opinions. "He [the judge] must compose his own mind as he leaves antiquated compositions aside to create some fragments of legal order out of disordered masses of new data."[145] As Justice Raymond Sullivan, Traynor's colleague on the court, noted, Traynor had a "jurisprudential sense . . . [H]e looked at the entire scope of the law and saw how it all fitted. He could fit the day to day problems into his broad ideas and concepts."[146] Donald Barrett, senior staff attorney for the court from 1948 to 1981, concurred, contending that "Judge Traynor was particularly concerned with keeping the pattern of the law straight."[147] Thus, the objective of *Cahan* to deter illegal police searches influenced every significant search and seizure case that Traynor decided after 1955—whether it dealt with standing to have evidence excluded, consent to search, search incident to arrest, or other related issues.

In the years following *Cahan*, Traynor systematically revised rules of search and seizure, making them into a "reasonably orderly constellation."[148] "If we keep in mind that the *raison d'être* of the exclusionary rule is the deterrence of lawless law enforcement," Traynor wrote, "we can guard against confusion in the attendant rules we develop."[149] For instance, the deterrence rationale of the exclusionary rule demanded a thorough reworking of the rules of standing. Before Traynor's opinion in *People v. Martin*, in 1955, standing to sue depended on the defendant's property interest in the place searched.[150] If the defendant owned or had authority over the place searched, he or she had standing to object to an illegal search. If the defendant lacked the necessary property interest, evidence obtained in an illegal search could be used against him or her. The policy objective of deterring police illegality made standing irrelevant. Since the purpose of the exclusionary rule was not to punish

past illegal searches, but to deter future ones, "such [illegally obtained] evidence is inadmissible whether or not it was obtained in violation of the particular defendant's constitutional rights."[151]

The rationale of the exclusionary rule did not always benefit the criminal defendant. Mistakes by the police resulting in illegal searches did not automatically require the exclusion of evidence. In *People v. Gorg*, the owner of a home in which the defendant, Gorg, occupied a room consented to a police search of the room.[152] Traynor ruled that the marijuana found during the search was admissible at trial even though the owner legally lacked the authority to consent to the search. The police, Traynor averred, had acted reasonably and in good faith on the owner's consent. Therefore, the search, though illegal, did not implicate the deterrence rationale of *Cahan*, which sought to deter *knowing* violations of the Fourth Amendment's terms.[153]

In a 1955 opinion for the court, Traynor created a similar "good faith" exception to the knock notice rule (Penal Code section 844), which required police to announce their presence before entering a dwelling. The police had seen heroin users come and go from a Mr. Maddox's apartment many times during their month-long surveillance of the apartment. Joined by a cooperative heroin user, they approached the front door, and the heroin user knocked. When the police heard a voice inside yell, "Wait a minute," and then the sound of retreating feet, they kicked in the door, searched the apartment, and found heroin. Although the officers violated the knock notice rule, Traynor refused to allow the formal requirements of the law to stand in the way of the practical needs of law enforcement. The court waived the requirements of the knock notice statute because the officers had reasonably believed compliance with the statute would allow the suspect to escape or to destroy evidence: good faith noncompliance with the knock notice statute did not render inadmissible the evidence seized.[154] The searches did not undermine the *Cahan* rationale because the "officer's right to invade the defendant's privacy" arose from the exigency of the situation.[155]

The *Cahan* rationale also influenced the rules of arrest. Traynor realized that "[o]nce they [the police] have made an arrest and obtained the evidence their very success may serve as a retroactive makeweight for probable cause."[156] He also noted that there was no action for false arrest if the police found evidence of a crime in the search incident to the arrest. In other words, protections against illegal searches of a person

were only as good as the protections against arrest without probable cause. *People v. Brown* prevented the police from searching illegally arrested suspects without triggering the exclusionary rule.[157] The police watched Ms. Brown walk in front of their car carrying something clenched in her fist. They approached her from behind and grabbed her wrists. Then they identified themselves and asked her to open her hand, but she refused. So they opened her hand and took from her a small rubber container. Lab analysis showed the contents of the container to be heroin. Traynor reasoned that the police must have probable cause to arrest before arresting a suspect and conducting a search incident to the arrest. The police had lacked probable cause to arrest Brown, and therefore the search was unconstitutional. Citing *Cahan*, Traynor argued that to condone the search of Brown would "destroy the efficacy of the exclusionary rule."[158] Just as a search was not justified by the evidence it uncovered, an arrest could not be justified by the evidence uncovered in a search incident to arrest.

The rationale of *Cahan* thus protected the criminal defendant from searches incident to arrest predicated on illegal arrests. It justified, however, an exception to the exclusionary rule when the police arrested a suspect illegally but in good faith. In *People v. Chimmel*, police officer De Coma obtained an arrest warrant that turned out to be invalid.[159] De Coma and other officers arrested Chimmel at his home. They thoroughly searched his house and garage and found stolen coins. Despite the invalidity of the arrest warrant, the court (with Traynor concurring) decided not to invalidate the search incident to arrest.[160] "No evidence even intimates that De Coma procured the [arrest] warrant in bad faith or exploited the illegality of the warrant," Justice Tobriner wrote.[161] The California Supreme Court held that De Coma's good faith reliance on the magistrates' finding of probable cause saved the arrest and the search. Later, however, the U.S. Supreme Court overturned Chimmel's conviction.[162]

Traynor recognized that the exclusionary rule placed pressure on the police to justify searches by conflating reasonable cause to investigate and reasonable cause to arrest.[163] He sought to reduce "the risk of arrest without probable cause by giving the police clear authorization to stop persons for restrained questioning whenever there were circumstances sufficient to warrant it."[164] The courts had long upheld the police practice of temporarily detaining and questioning people without probable cause

to arrest them.[165] Traynor maintained an expansive view of reasonable cause to investigate. Two men sitting in a parked car on a "lover's lane" raised sufficient suspicion to justify a brief detention and search of their car.[166] The new requirements of the exclusionary rule raised questions about the extent of the protections against search and seizure. Traynor gave police the leeway necessary to investigate suspicious circumstances without triggering Fourth Amendment safeguards.

Traynor recognized that the policy objectives of the exclusionary rule conflicted with other policy objectives of criminal procedure. For instance, Traynor and his brethren sought to increase judicial control and oversight over law enforcement by encouraging the police to obtain search warrants. "[T]he police may have a shorter reach if they are armed with a warrant than if they are not," Traynor acknowledged, "Understandably, they may prefer to go unarmed."[167] Traynor loosened the requirements for obtaining warrants in order to encourage their use. However, he also accommodated the policy objectives of the exclusionary rule when, in *Priestly v. Superior Court* he held that a magistrate's determination of probable cause to issue a search warrant required the disclosure of the identities of anonymous informers. This ruling jibed with the exclusionary rule because it prevented police from conducting illegal searches and then acting as anonymous informants for subsequent legal searches. Thus, even where the competing policy objective of discouraging warrantless searches was at issue, Traynor demanded consistency with *Cahan*.

In sum, Traynor's conception of the law gave him a framework for judicial innovation. Many contemporary judges and legal scholars perceived an absence of fixed legal principles and therefore responded only cautiously to the call for legal reform. Traynor recognized a holistic quality of the law demonstrated by the functional relationship of legal rules. *Cahan* and its progeny were practical solutions to the problem of illegal police searches that functioned as part of a system of rules. Traynor pursued the policy objective of deterring illegal searches within the framework of Fourth Amendment principles. The historical development of search and seizure practices from these broad, ambiguous principles had created an experiential context for Traynor's innovations. The exclusionary rule altered search and seizure practices—from warrant requirements to standing—but Traynor carefully avoided judgments solely

based on overarching Fourth Amendment principles, relying in addition upon a policy rationale for constitutional innovation.

CONCLUSION

Traynor conceived of the law as a living entity whose health depended on its responsiveness to community needs. Judicial experience had alerted him to the societal pressures favoring the prosecution or the defense in search cases. On one hand, crime and the fear of crime were rapidly increasing. On the other, police procedures had become more sophisticated, more invasive, and more administrative. Traynor's consistency did not, however, stem from any particular predisposition to favor law enforcement in some cases and criminal defendants in others. Like the Pragmatist philosophers, Traynor believed that judgment was the process of bringing experience to bear on the facts.[168] His jurisprudence reflected, in this respect, the rationale expressed by John Dewey: "A moral law, like a law in physics, is not something to swear by and stick to at all hazards; it is a formula . . . [whose] soundness and pertinence are tested by what happens when it is acted upon."[169] In Traynor's years on the bench, he sought to identify and weed out dysfunctional rules. In *Cahan* he overruled his own decision, *Gonzales*,[170] having come to recognize that it had failed to prevent or punish illegal searches, and he created new rules to serve that function.

Traynor's judicial philosophy gave judges a vital creative role to play. His search and seizure decisions asserted judicial control over law enforcement procedures in response to police disregard of judicial admonitions against illegal searches. The health of the law required that law enforcement, which had become a professional, administrative operation, yield to judicial authority. Thus, Traynor's judicial philosophy promoted not only the health of the law but also the prestige of judges and the institutional self-interest of the court. The judge's responsibility for reforming the law corresponded with an elevation of the judge's authority.

Traynor's philosophy of judging justified an expansive role for judges. His own efforts to reform outmoded precedent ranged widely from criminal law to torts, contracts, and conflicts of law. Although these topics are beyond the scope of this article, it is important to note that Traynor's judicial philosophy impelled innovation in areas of the law

aside from criminal procedure. For example, Traynor's approach toward allocating the risks of defective products in *Escola v. Coca Cola Bottling Company* parallels his pragmatic assessment of police search tactics in *Cahan*.[171] Here too Traynor looked beyond the narrow confines of conventional adjudication and saw a role for judges as policymakers.

Traynor also recognized the impermanence of all judicial decisions, including his own. It was a stance that militated against broad statements of principle, but it also impelled him to respond to new demands placed on the law. The absence of an effective deterrent to illegal searches created one such demand. Traynor's response in the series of cases beginning with *Cahan* may obscure his appreciation of the transitory nature of his own decisions because of their innovativeness. However, it is significant that Traynor's tool for protecting Fourth Amendment rights was a judicial rule of evidence, not a broad statement of principle. Traynor's "workable rules" of search and seizure directly affected police procedure, but Traynor intended them to endure only so long as they remained truly "workable rules," while the overarching principles of the Fourth Amendment would remain indefinitely. The ideal judge, Traynor declared, "can write an opinion that gives promise of more than a three-year lease on life by accurately anticipating the near future."[172] Traynor's understanding of the evolving nature of the law fostered both boldness and humility.

NOTES

[1]For a discussion of the Pragmatic ideal of action see David Hollinger, "The Problem of Pragmatism in American History," *Journal of American History*, LXVII(1):105 (1980).

[2]For a discussion of the Pragmatic theory of scientific inquiry in the context of Oliver Wendell Holmes's jurisprudence see Morton White, *Social Thought in America: The Revolt Against Formalism* (Boston, 1957), 208.

[3]James quoted in Morton White, *Science and Sentiment in America: Philosophical Thought from Jonathan Edwards to John Dewey* (New York, 1972), 209.

[4]On Traynor's involvement in Realist debates see text at notes 96 *et seq.*

[5]*People v. Cahan*, 44 Cal.2d 434, 451 (1955). For discussion of the constitutional context of *Cahan*, see text below at notes 70-86.

[6]The exclusionary rule required the exclusion from trial of evidence obtained by the police in violation of the right to the "'security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment . . . and as such enforceable against the States through the Due Process Clause of the Fourteenth Amendment.' An essentially identical guarantee of personal privacy is set forth in article I, section 19 of the California Constitution." *Cahan* 44 Cal.2d 434, 438 (quoting *Palko v. Connecticut*, 302 U.S. 319, 324-25.)

[7]*Ibid.*, 436.

[8]*Ibid.*

[9]Traynor, "*Mapp v. Ohio* at Large in the Fifty States," *Duke Law Journal*, 319, 322 (1962).

[10]*Ibid.*, 445.

[11]Note, "Two Years with the Cahan Rule," *Stanford Law Review*, 9:515, 536 (1957).

[12]*People v. Cahan*, 44 Cal.2d at 451.

[13]Roger Traynor, "La Rude Vita, La Dolce Giustizia; or Hard Cases Make Good Law," *University of Chicago Law Review*, 29:223, 230 (1962).

[14]Oliver Wendell Holmes, *The Common Law* (1881), 5.

[15]Elizabeth Roth, "The Two Voices of Roger Traynor," *American Journal of Legal History*, 27(3):269, 288 (1963).

[16]Traynor, "Many Worlds Times You" (Address at the University of Utah Commencement), June 9, 1963. Copy in Roger J. Traynor Papers, Hastings College of the Law.

[17]J. Edward Johnson, *History of the Supreme Court Justices of California*, vol. 2, "Biography of Chief Justice Roger Traynor" (San Francisco, 1966).

[18]*Ibid.*

[19]*Ibid.*

[20]See Comment, "Adverse Possession: Personal Property: Tracking and Payment of Taxes," *California Law Review*, 14: 218 (1926); Comment, "Inheritance Taxation: Tax Payable at Domicile of Testator on Intangible Personalty in Another Jurisdiction," *California Law Review*, 14:225 (1926); Comment, "Taxation: Stock Issued by Reorganized Corporation as Income," *California Law Review*, 14:244 (1926); Comment, "Real Property: Landlord and Tenant: The Rule in Dumpor's Case," *California Law Review*, 14:328 (1926); and Comment, "Damages: Date at Which Rate of Exchange Should be Applied," *California Law Review*, 14:405 (1926).

[21]Traynor, "The Amending of the United States Constitution, An Historical and Legal Analysis" (Ph.D. Dissertation, University of California, Berkeley, 1927).

[22]*Ibid.*, 205.

[23]Based on my interview of Professor Jennings who was one of Traynor's students.

[24]Roth, "The Two Voices of Roger Traynor," 295. For biographical background on Traynor, see Amy Toro, "Roger J. Traynor: Legend in American Jurisprudence," reprinted in this *Yearbook*.

[25]Traynor, "Comment" on Justice Charles Breitel's "The Courts and Law making" in Monrad G. Paulsen, ed. *Legal Institutions Today and Tomorrow* (New York, 1959), 56.

[26]*Gonzales*, 20 Cal.2d 165, 169 (1942).

[27]*Ibid.*, 170-71.

[28]*Los Angeles Daily Journal*, September 11, 1978

[29]See *California Blue Book 1950*; *California Blue Book 1960*; and *California Blue Book 1970*.

[30]Fred Graham, *The Self-Inflicted Wound* (New York, 1970), 73.

[31]In 1952 there were 137,878 felonies reported. *Crime in California* (1952), 8. In 1962 there were 289,393 felonies reported. *Crime in California* (1952), 25.

[32]In 1952 there were 58,211 felony arrests. *Crime in California* (1952), 12. In 1962 there were 98,813 felony arrests. *Crime in California* (1952), 47.

[33]In 1952 there were 12,926 felony charges in Superior Court. *Crime in California* (1952), 38. In 1962 there were 43,851 felony charges in Superior Court. *Crime in California* (1952), 81.

[34]In 1952 10,923 defendants were convicted and sentenced for felonies. *Crime in California* (1952), 40. In 1962 27,084 defendants were convicted and sentenced for felonies. *Crime in California* (1962), 116.

[35]See, e.g., Robert Cipes, *The Crime War* (New York, 1968).

[36]The percentage of felonies reported that the police determined were unfounded after the arrest of a suspect or investigation rose very slightly through the fifties and early sixties. Unfounded felony reports constituted 3.4 percent

of all felonies reported in 1954 (*Crime in California* (1954), 26); 3.8 percent of all felonies reported in 1956 (*Crime in California* (1956), 31); 4.3 percent of all felonies reported in 1958 (*Crime in California* (1958), 29); 4.2 percent of all felonies reported in 1960 (*Crime in California* (1960), 31); 4.3 percent of all felonies reported in 1962 (*Crime in California* (1962), 25); and 4.4 percent of all felonies reported in 1964 (*Crime in California* (1964), 25). The virtually constant frequency of unfounded felony reports suggests that the pattern of reporting had not changed.

[37]Lawrence Friedman and Robert Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California 1870-1910* (Chapel Hill, N.C., 1981), 193-94.

[38]*Ibid.*

[39]*Ibid.*

[40]Traynor, "Fact Skepticism and the Judicial Process," *University of Pennsylvania Law Review*, 106:635, 636 (1958).

[41]*Cahan*, 44 Cal.2d at 442.

[42]Traynor, "Lawbreakers, Courts, and Law-Abiders," *Missouri Law Review*, 31:181, 206 (1966).

[43]Graham, *The Self-Inflicted Wound*, 5.

[44]Traynor, "Givers and Takers of the Law," *Journal of Public Law*, 18(2):247, 251 (1969).

[45]*Ibid.*, 253.

[46]*Los Angeles Daily Journal*, December 23, 1958.

[47]*Ibid.*

[48]*San Francisco Examiner*, April 29, 1956.

[49]*San Francisco Chronicle*, April 29, 1955.

[50]See *Los Angeles Times*, May 1, 1955; and *Sacramento Bee*, May 7, 1955.

[51]*Rochin*, 342 U.S. 165.

[52]This figure is based on a WestLaw search using the search terms "amici" and search for the period from April 2, 1942 through June 19, 1961.

[53]See Criminal Brief No. 8173 and 8177 (Hastings Law Library).

[54]*Ibid.*

[55]*Ibid.*

[56]*San Francisco Chronicle*, April 6, 1956.

[57]*San Francisco Chronicle*, April 21, 1955 .

[58]Letter of November 21, 1956, from James Don Keller as quoted in: Note, "Two Years with the Cahan Rule," *Stanford Law Review*, 9:515, 538.

[59]"The over-all effects of the Cahan decision, particularly in view of the rules now worked out by the Supreme Court, have been excellent. A much greater education is called for on the part of all peace officers of California. As a result, I am confident they will be much better police officers. I think there

is more cooperation with the District Attorneys and this will make for better administration of criminal justice." Letter of Dec. 7, 1956, from Edmund G. Brown, attorney general of the state of California, on file with the *Stanford Law Review*.

[60]Traynor, "Lawbreakers, Courts, and Law-Abiders," *Missouri Law Review*, 31:181, 187 (1966).

[61]*Ibid.*, 204.

[62]*Ibid.*

[63]See Samuel Walker, *Taming the System: The Control of Discretion in Criminal Justice 1950-1990* (New York, 1993). Walker states, "The evidence is overwhelming that the exclusionary rule has no impact whatsoever on police handling of the 'high-fear' crimes of murder, rape, robbery and burglary." *Ibid.*, 45.

[64]Traynor, "*Mapp v. Ohio*," 319, 323.

[65]See Graham, *The Self-Inflicted Wound*, 12, 121; also see Victoria A. Saker, "Federalism, the Great Writ, and Extrajudicial Politics: The Conference of Chief Justices, 1949-1966," in *Federalism and the Judicial Mind: Essays on American Constitutional Law and Politics*, ed. Harry N. Scheiber (Berkeley, Calif., 1992).

[66]Traynor, "The Right of the People Against Unreasonable Search and Seizure," Radio Speech KLX, November 14, 1941 (Traynor Papers).

[67]U.S. Constitution, Amendment IV.

[68]See Richard Funston, "The Traynor Court and Criminal Defendants' Rights: A Case Study in Judicial Federalism" (Ph.D. Dissertation, University of California, Los Angeles, Political Science Department, 1970), 61-62.

[69]Graham, *The Self-Inflicted Wound*, 204.

[70]*Ibid.*

[71]*Ibid.*

[72]*Wolf v. Colorado*, 338 U.S. 25 (1949).

[73]*Ibid.* The U.S. Supreme Court mandated the exclusionary rule for federal law enforcement officers in 1914. In *Weeks v. United States*, federal law enforcement officials had entered the defendant's house without a warrant and seized papers, which became the basis of a mail fraud prosecution. The Court held that the evidence unfairly prejudiced the trial against the defendant. *Weeks v. United States*, 232 U.S. 383 (1914).

[74]*Wolf*, 27-28.

[75]See Note, "Two Years with the Cahan Rule."

[76]Traynor, "*Mapp v. Ohio*," 319, 324.

[77]Traynor, "*Mapp v. Ohio* Still at Large in the Fifty States" (Transcription of Speech by Traynor, Appellate Judge's Conference New York City, August 1964, Traynor Papers).

[78]*Rochin v. California*, 342 U.S. 165 (1952).

[79]*Irvine v. California*, 347 U.S. 128 (1953).

[80]Traynor, "*Mapp v. Ohio* Still at Large."

[81]*Rochin*, 342 U.S. at 166.

[82]Traynor, "Remarks of Justice Roger J. Traynor at the Conference of Chief Justices in San Francisco, August 1-4, 1962" (Traynor Papers).

[83]*Irvine*, 342 U.S. 165.

[84]*Ibid.*, 133.

[85]*Ibid.*, 135.

[86]*Ibid.*, 134.

[87]*Ibid.*

[88]Traynor, "*Mapp v. Ohio* Still at Large."

[89]*Ibid.*

[90]*People v. Gonzales*, 20 Cal.2d 165 (1942).

[91]Traynor, "*Mapp v. Ohio*," 319, 320.

[92]Traynor "*Mapp v. Ohio* Still at Large."

[93]Traynor, "Better Days in Court for a New Day's Problems," *Vanderbilt Law Review*, 17:109 (1963).

[94]G. Edward White, *The American Judicial Tradition* (New York, 1976), 292.

[95]*Ibid.*, 295.

[96]Traynor, "Badlands in an Appellate Judge's Realm of Reason," *Utah Law Review*, 7:157, 160-61 (1960).

[97]The above excerpt is the only use of the word "intuition" I have found.

[98]Traynor, "Fact Skepticism and the Judicial Process," *University of Pennsylvania Law Review*, 106:635 (1958).

[99]See Traynor "Badlands," and his "No Magic Words Could Do It Justice," *California Law Review*, 49:615 (1961).

[100]"Biography of Traynor."

[101]*Los Angeles Times*, August 8, 1940.

[102]*Bakersfield Californian*, August 3, 1940.

[103]Professor Stephan Riesenfeld, who happened to be in Radin's office when the Governor called, reported this conversation to me in an interview, September 29, 1993.

[104]See White, *The American Judicial Tradition*, chapters on Frank and Traynor.

[105]Traynor, "Better Days in Court," 109, 123.

[106]Traynor, "Badlands," 157, 161.

[107]Oliver Wendell Holmes, *The Common Law* (1881), 5.

[108]As quoted in White, *The American Judicial Tradition*, 268.

[109]Traynor, "Badlands," 157, 167.

[110]*Ibid.*

[111]Traynor, "La Rude Vita," 223, 234.

[112]Traynor, "Comment" on Breitel, 52.

[113]Karl Llewellyn, "Realism in Jurisprudence—the Next Step," *Columbia Law Review*, 30:431, 444 (1930); White, *The American Judicial Tradition*, 273.

[114]Traynor, "La Rude Vita," 223, 234.

[115]*Ibid.*, 235.

[116]*Ibid.*

[117]See Hollinger, "The Problem of Pragmatism," 97.

[118]*Ibid.*, 229.

[119]*Ibid.*, 231.

[120]Traynor, "The Limits of Judicial Creativity," *Iowa Law Review*, 63:1, 7 (1977).

[121]Traynor, "Stare Decisis Versus Social Change" (Dedication of New Law Building, Duke University, April 26-27, 1963, Traynor Papers).

[122]*Ibid.*

[123]Traynor, "The Limits," 1, 4.

[124]"Remarks of Chief Justice Roger Traynor," Opening Session, College of Trial Judges, August 20, 1967 (Traynor Papers, Hastings Law Library).

[125]Traynor, "Good Judges, Good Law" (a dedication of the Earl Warren Legal Center, Boalt Hall, January 2, 1968; Traynor Papers).

[126]*Ibid.* For discussion of judicial reform in the Traynor era, see Harry N. Scheiber, "Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960-1990," *Southern California Law Review*, 66(5): 2050-2120 (1993).

[127]Traynor, "No Magic Words," 615, 620.

[128]Traynor, "Better Days in Court," 109, 122.

[129]Graham, *The Self-Inflicted Wound*, 213-214.

[130]Funston, "The Traynor Court and Criminal Defendants' Rights," 101.

[131]*Gouled v. U.S.*, 255 U.S. 298 (1921).

[132]Traynor, "*Mapp v. Ohio*," 330-331; *People v. Thayer*, 63 Cal.2d 635 (1965), *cert. denied*, 304 U.S. 908 (1966).

[133]*Ibid.*, 638.

[134]Traynor, "No Magic Words," 615, 623.

[135]Traynor, "Better Days in Court," 109, 123.

[136]Traynor, "The Right of the People Against Unreasonable Search and Seizure, Radio Speech KLX, November 14, 1941 (Traynor Papers).

[137]*Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

[138]*In re Lessard*, 62 Cal.2d 497 (1965).

[139]Traynor, "Remarks of Justice Roger J. Traynor at the Conference of Chief Justices in San Francisco, August 1-4, 1962" (Traynor Papers).

[140]Traynor, "*Mapp v. Ohio*," 319, 334.

[141]*Cahan*, 44 Cal.2d at 442.

[142]*Ibid.*, 453.

[143]*Ibid.*, 457.

[144]James T. Kloppenberg, *Uncertain Victory: Social Democracy and Progressivism in European and American Thought 1870-1920* (New York, 1986), 148.

[145]Traynor, "Better Days in Court," 109.

[146]Oral History Project: Justice Raymond L. Sullivan, Hastings Sixty Five Club, February 11, 1987, at 21 (Traynor Papers).

[147]Oral History Project: Donald P. Barrett Esq., Senior Attorney, Supreme Court of California 1948-1981, May 28, 1986, July 28, 1986, at 21 (Traynor Papers).

[148]Traynor, "*Mapp v. Ohio*," 319, 323.

[149]*Ibid.*, 319, 334.

[150]*People v. Martin*, 45 Cal.2d 755 (1955).

[151]*People v. Martin* 45 Cal.2d 755, 761 (1955).

[152]*People v. Gorg*, 45 Cal.2d 776, 780—81, 291 P.2d 469, 471-72 (1955).

[153]*People v. Gorg*, 45 Cal.2d 776, 780—81, (1955).

[154]*People v. Maddox* 46 Cal.2d 301, (1956); Also *People v. Moore*, 140 Cal.App.2d 657, (2d Dist. 1956).

[155]*Maddox* at 306.

[156]Traynor, "*Mapp v. Ohio*," 319, 333.

[157]*People v. Brown* 45 Cal.2d 640 (1955).

[158]*Ibid.* at 644.

[159]*People v. Chimmel*, 68 Cal.2d 436 (1968).

[160]*Ibid.*

[161]*Ibid.* at 444.

[162]The Court overturned Chimmel's conviction on the grounds that, even if the arrest was valid, the subsequent warrantless search of Chimmel's house violated the Fourth Amendment. The Court held that a search incident to arrest could not expand beyond the area in the arrestee's immediate control. *Chimmel v. California*, 395 U.S. 752 (1969).

[163]*People v. Mickelson*, 59 Cal.2d 448 (1963).

[164]Traynor, "*Mapp v. Ohio*," 319, 334.

[165]*Giske v. Sanders* 9 Cal.App 13 (1908).

[166]*People v. Martin*, 46 Cal.2d 106 (1956).

[167]Traynor, "*Mapp v. Ohio*," 319, 333.

[168]William James, "The Moral Philosopher and the Moral Life," *The Will to Believe*, 158, as quoted in Kloppenberg, *Uncertain Victory*, 137.

[169]John Dewey, *The Quest for Certainty*, (New York, 1929, 1960) 278 as quoted in *ibid.* at 135.

[170]*People v. Gonzales*, 20 Cal.2d 165 (1942).

[171]*Escola v. Coca Cola Bottling Company* 24 Cal.2d 453 (1944).
[172]Traynor, "No Magic Words," 615, 625.