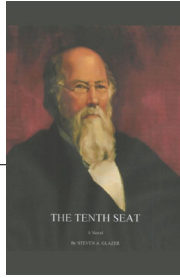


Stephen Field, Reconsidered

BY BOB SNIDER

Steven Glazer
THE TENTH SEAT: A NOVEL
 Steven Glazer, 2022



“TO ME THE ATTRACTION of the historical novel,” Gore Vidal once wrote, “is that one can be as meticulous (or as careless!) as the historian and yet reserve the right not only to rearrange events, but most important, to attribute motive.”¹ The first book by Steven Glazer, a retired federal administrative law judge, is a fictionalized history of Stephen Field, and it succeeds as both fiction and history.

Field was the first California Supreme Court justice to become an associate justice of the United States Supreme Court. His 35 years on the high court’s bench have been surpassed by only Justice William O. Douglas, at least so far. The son of a comfortable Massachusetts family, Field graduated at age 20 from Williams College in 1837 and then followed his older brother David into a prestigious Manhattan law firm, where he practiced for 10 years.

Already well traveled in Europe, Field sailed to California in 1849 as one of several thousand Argonauts, as the gold-seeking miners and capitalists were called. Field realized that the fledging miners, real estate speculators, and small businessmen would need attorneys, to say nothing of a new legal code necessary for California’s future statehood. Thus, to serve his fellow East Coast emigrants, he set up shop as a sole practitioner in newly christened San Francisco.

Field helped organize a land rush in what is now Marysville, Yuba City’s neighbor. He soon became a wealthy real estate lawyer as well as an elected First Alcalde, the traditional Mexican magistrate who served simultaneously as a judicial officer and mayor. But after the legislature created a local judgeship, the appointee despised Field for his New York roots and his perceived pro-abolitionist views. Ultimately, the dissolute judge’s enmity led to Field’s brief incarceration, temporary disbarment, and exclusion from local practice, causing him much economic distress.

When Field also failed at financial and real estate speculation, he ran for the Assembly and won the seat. He returned to law practice in Marysville after losing a state Senate race. Elected to the California Supreme Court in 1857, Field ascended to the chief justice’s seat by 1859, only 10 years after arriving in the state. That year he married Sue Virginia Sweringen Field, his wife for the next 40 years.

1. Gore Vidal, *Burr: A Novel*, New York: Vintage, 1973, 429.

The novel takes us through the Field Court’s early decisions on topics ranging from formal business incorporation to incestuous marriage. Then, during the Civil War in 1863, President Lincoln and the Senate appointed Field to the unprecedented tenth Supreme Court seat, which was created to administer the new federal circuits in the West.

Associate justices at that time were required to “ride circuit,” yet despite the coming Transcontinental Railroad, no justice was disposed to travel to nascent California, Oregon, and the western territories. Lincoln therefore nominated Field, at the urging of several prominent influencers: California Governor Leland Stanford, Secretary of War Edwin Stanton, and Field’s own brother, by then a close presidential advisor. The new tenth seat had the added bonus of packing the Supreme Court with justices loyal to the Union.

Although the extra seat was soon eliminated in 1866 by Congress’s Radical Republicans in order to prevent President Andrew Johnson from filling it, Field took over a deceased justice’s seat and remained on the court through 1897. His next three decades were highlighted by the *Slaughter-House Cases*,² where Field dissented from the landmark ruling limiting the new Fourteenth Amendment’s reach, and *Plessy v. Ferguson*,³ where he joined the Court’s majority in spawning the doctrine of racially separate but equal treatment.

Thanks to the device of historical fiction, though, this novel is far from a dry exegesis of Field’s state and federal opinions. Instead, Glazer unearths historical truths and animates them through imaginary dialogue that draws the reader in. The result is a clever interplay of fact and fantasy. Authentic trial accounts punctuate the novel, such as the lengthy divorce / alimony proceeding between a United States senator from Nevada and, depending on whom one believes, his wife or mistress. That trial, which gained national and international attention, is brought to life in the author’s hands.

Other courtroom happenings colorfully describe the antics of Field’s contemporaries, even though the subject himself appears uninvolved at first. As it turns out, a plaintiff whom he ruled against — who happens to be, like Field, a former California chief justice — encounters Field a year later in a jaw-dropping encounter. To disclose more would spoil the story, but suffice it to say that the true-life episode is worthy of a Netflix plot twist.

Given California’s Code of Judicial Ethics and current Rules of Professional Conduct, it’s surprising how Field discusses pending cases with friends and family members, sits for an oral argument delivered by his brother, and assists a defendant who eventually appears before his

2. (1873) 83 U.S. 36.

3. (1896) 163 U.S. 537.

own court. Although those episodes actually took place, one can't always tell whether the author's account of oral arguments in either supreme court are verbatim or invented. Yet there lies the charm of the novel, which is peppered with real but fictionalized characters like Stanford and Lincoln when they discuss Field's nomination, or Chief Justice Roger Taney when he jousts with Field about slavery and suffrage.

The author posits plausible conversations among these historical luminaries. At the same time, he imagines Field's marital counseling for Chief Justice Salmon Chase's daughter and her husband; Field's intermittent affair with a Donner Party survivor; and his philosophical debate with John Marshall Harlan about race while *Plessy v. Ferguson* was pending. The book also contains an informative digression on the *Dred Scott*⁴ case, which vindicated slavery and led to the North-South divide and Civil War.

Predating *Dred Scott*, California's 1850 admission to statehood upset the balance between free states and slave states. It also cleaved the state Supreme Court into pro-slavery and "Free-Soiler" anti-slavery camps, culminating in a lawyers' duel. While the nation may seem gun-obsessed now, a look back at nineteenth-century California shows that personally carrying handguns was widespread, even among attorneys and judges. Fistfights, brandished pistols, and a fatal second duel all enliven the Field saga. In a nice counterpoint to the novel, those events are completely factual.

Field's role in upholding segregation in *Plessy v. Ferguson* appears at odds with his earlier opposition to anti-Asian racism, which had been memorialized in state laws such as the one prohibiting Chinese witnesses from testifying against Caucasians. As a judge in *In re Ah Fong*,⁵ Field held in 1874 that the federal government, not California, had exclusive jurisdiction over immigration. That decision halted the state's practice of rejecting Chinese entrants who, by mere conjecture, might become criminals, public charges, or "lewd and debauched women."

A few years later, Field's presidential aspirations were torpedoed by his support of Chinese immigrant rights,

as well as by his close relationship with four California railroad barons with familiar surnames — Stanford, Mark Hopkins, Collis Huntington, and Charles Crocker. The public and press viewed those magnates as oppressing farmers and stockmen, exploiting small business owners, and gouging small communities that wanted branch lines.

Glazer adroitly excavates the mind of Field, a strict constructionist whose judicial philosophy about the legislature's primacy was unshaken throughout his career. The author's anachronistic use of modern language like "Kinda" and "Yeah, sure" in conversations involving Field, who died in 1899, is a little disconcerting at first. But overall, the author creditably voices his subject's innermost thoughts and motivations as he ponders how to decide an issue. Glazer devises fictitious dialogue between Field and his wife to insert necessary historical details. He also turns some elegant courtroom phrases, such as "The well fronting the bench transformed from lawyers surrounding a woman to a buzzing hive of quarreling drones and a weeping queen bee."

At 42 chapters, *The Tenth Seat* is not a frothy beach read, yet legal history buffs, especially California ones, will love this book. So will mainliners of political gossip, as they savor the machinations behind Field's state judicial election and federal judicial appointment. While the novel is an entertaining tale, it's also meticulously researched, with over 600 end notes that run almost a hundred pages. And the several dozen illustrations and museum-quality photographs interspersed in the text transport the reader nimbly to the late nineteenth-century era. Today, when court-packing, states' rights, and racial tension are all top of mind in this country, *The Tenth Seat* reminds us of what French critic Jean-Baptiste Alphonse Karr wrote in 1849: "Plus ça change, plus c'est la même chose." ★

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4. *Dred Scott v. Sandford* (1857) 60 U.S. 393.

5. (C.C.D. Cal. 1874) 1 Fed. 213.