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Cover Photograph: Attorney Gus J. Solomon (courtesy of Richard B. Solomon)

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Attorney Gus J. Solomon and *DeJonge v. Oregon*: Supporting Counsel and Landmark Constitutional Decisions

Harry H. Stein

DeJonge v. Oregon stands out in the Supreme Court's nationalization of the Bill of Rights. In January 1937, it incorporated the First Amendment's freedom of assembly provision and, by implication, the right to petition the government for a redress of grievances, into the due process clause of the Fourteenth Amendment. *DeJonge* continued the process of applying the Bill of Rights to the states that had been initiated for freedom of speech in *Gitlow v. New York* (1925) and *Stromberg v. California* (1931), and for freedom of the press in *Near v. Minnesota* (1931) and *Grosjean v. American Press Company* (1936).[1]

The justices would never have considered DeJonge's claim without the legal and organizational contributions of Gus J. Solomon, one of three supporting counsel in Portland, Oregon. He inspired the American Civil Liberties Union (ACLU) to appeal to the Supreme Court. Behind the scenes in the final appeal process, he acted as a major broker among the case's key constituencies. Then his "of counsel" work in the high court influenced the outcome. This young lawyer's record of persistent and shrewd contributions to *DeJonge* suggests that

Harry Stein is an independent scholar based in Portland, Oregon.

[1]*DeJonge v. Oregon*, 299 U.S. 353 (1937); *Gitlow v. New York*, 268 U.S. 652 (1925); *Stromberg v. California*, 283 U.S. 359 (1931); *Near v. Minnesota*, 283 U.S. 697 (1931); *Grossjean v. American Press Co.*, 297 U.S. 233 (1936); Martin Shapiro, "*DeJonge v. Oregon*" in *Encyclopedia of the American Constitution*, ed. Leonard Levy and Kenneth L. Karst (New York, 2000), 2:760.

scholars should closely examine whether and how supporting counsel have affected landmark constitutional decisions. Supporting counsel assist the principal attorney(s) of record in a case's preparation or management or its presentation on appeal.[2]

In the 1930s and 1940s, Solomon was at heart a "cause lawyer," as it was later termed, sharing with clients a vision of a higher good and responsibility for the ends promoted. *DeJonge* grew out of deep commitments. Largely as a result of having experienced anti-Semitism while growing up and while seeking initial legal employment in Portland "and the emphasis on social justice in the Jewish tradition, I became active as a young lawyer in the problems of the poor" and in the struggle for civil rights and liberties, "not for the Jews alone—but for everyone," he recalled.[3]

Solomon was born in Portland in 1906, the last of five children of Eastern European Jewish immigrants who had prospered economically in Portland and socially in its small Jewish community. Educated at Reed College and the University of Chicago, he steeped himself in legal realism at Columbia Law School in 1926–27 before completing a final two years at Stanford University Law School. A month before the stock market collapsed in 1929, he began a solo, meagerly compensated plaintiff and business law practice in his hometown. He also came to represent the struggling Oregon and Washington public power movement, an occasional political radical, a few Congress of Industrial Organization unions, and individual union members. Solomon regarded most of these causes as occupying the moral high ground.[4]

At Columbia University in May 1927, American Civil Liberties Union-sponsored speakers protesting the impending executions of the foreign-born anarchists Sacco and Vanzetti had, according to Solomon, "opened up new horizons for me and had a great impact on my life." Not long after returning to Oregon, Solomon plunged into civil liberties work and other

[2]For other versions of Solomon's "of counsel" role, see Richard C. Cortner, *The Supreme Court and The Second Bill of Rights* (Madison, WI, 1981), 87–97 and Fred W. Friendly and Martha J. H. Elliott, *The Constitution* (New York, 1984), 74–80.

[3]As used by Austin Sarat and Stuart Scheingold, eds., *Cause Lawyering* (New York, 1998), *cause lawyer* is a term that came to include public interest, civil rights, civil liberties, feminist, and poverty lawyers. Gus J. Solomon, "My Encounters With Discrimination and What I Did About Them," Jan. 3, 1973, in "Speeches No. 110 Through...," Gus J. Solomon Papers, Oregon Historical Society.

[4]Ibid.

highly controversial areas. First, he tried but failed to reestablish an ACLU branch in Portland. Once the Oregon Civil Liberties Committee formed in 1934, and until he reached the U.S. District Court for Oregon bench in 1949, he served as a leader of and cooperating volunteer attorney for the tiny, feuding ACLU affiliate. Meanwhile, he helped found and nurture the Oregon Legal Aid Society. By 1937, he was enthusiastically engaged in or the leader of liberal, legal, and bar groups and in pro-New Deal bipartisan politics in the heavily Republican state. Year after year, Solomon was actively Red-baited, particularly when he sought a federal judgeship, for his connections to the ACLU, public power, and liberal political causes. At his death in 1987—by then a very respected jurist—Solomon was the longest serving federal judge in Oregon history. The state's federal courthouse was soon named in his honor.[5]

Although it is a staple of constitutional history and law books, no book has appeared on *DeJonge*. The forty books that I examined that were published in the past forty years on individual landmark American constitutional decisions essentially ignored any lawyer who was not a principal attorney of record. Appeal teams, as in *U.S. v. Reese* (1876), might be listed by name without even identifying those acting as supporting counsel. Studies of *New York Times Co. v. Sullivan* (1964) and *Brown v. Board of Education* (1954) merely named the attorneys appearing "of counsel." In accounts of *Roe v. Wade* (1973) and *Tinker v. Des Moines School District* (1969), the authors did reveal that the principal trial lawyers successfully prevented themselves from being relegated to a supporting role in the Supreme Court. Paul Kens did offer the tantalizing hint that Henry Weismann "probably remained the driving force behind the *Lochner* case" (1905) when Frank Harvey Field restarted the Supreme Court appeal procedure and Weismann became "of counsel."[6]

[5]Solomon, speech to ACLU, Nov. 16, 1985, in "E.B. MacNaughton Award–1985," Solomon Papers; "Interview: Gus J. Solomon on the Beginnings of Legal Aid in Oregon," *Oregon Historical Society Quarterly* 88 (Spring 1987): 52–59. See also "Judge Gus J. Solomon on the Vietnam War-Era Draft," *Western Legal History* 1 (Summer/Fall 1988): 280–84. Information comes from my forthcoming biography of Solomon.

[6]Robert M. Goldman, *Reconstruction and Black Suffrage* (Lawrence, KS, 2001), 76; Anthony Lewis, *Make No Law* (New York, 1991), 122; Robert J. Cottrol, Raymond T. Diamond, and Leland B. Ware, *Brown v. Board of Education* (Lawrence, KS, 2003), 129; N.E.H. Hull and Peter Charles Hoffer, *Roe v. Wade* (Lawrence, KS, 2001), 143–44, 150, 167; John W. Johnson, *The Struggle for Student Rights* (Lawrence, KS, 1997), 123–24, 144; Paul Kens, *Lochner v. New York* (Lawrence, KS, 1998), 116–17.

The U.S. courthouse in Portland, Oregon, was named for Gus Solomon after his death in 1987.

The driving force behind *DeJonge* was Gus J. Solomon, the twenty-nine-year-old volunteer cooperating attorney for the ACLU who convinced the national organization to appeal this conviction to the U.S. Supreme Court. He then served as a key negotiator in obtaining and retaining the International Labor Defense's (ILD) relinquishment of DeJonge's appeal representation to the ACLU. He and his two officemates, Irvin Goodman, who had headed DeJonge's ILD trial and appeal teams, and Leo Levenson then appeared as "of counsel" in the U.S. Supreme Court. Earlier, Solomon had negotiated the stipulation of facts with the state of Oregon that was provided to the Supreme Court in lieu of an unaffordable two-thousand-page trial transcript. Additionally, he and Osmond K. Fraenkel, the ACLU's young lead appeal counsel, consulted closely on the legal strategy behind the briefs, other court filings, and Fraenkel's oral argument.[7]

[7]Levenson also worked on the briefs. For the stipulation, Solomon appeared as the only "appeals attorney" in Transcript of Record, *DeJonge v. State of Oregon*, Supreme Court of the United States, October term, 1936.

Criminal syndicalism laws had wreaked havoc among real and alleged socialists, anarchists, syndicalists, communists, and trade unionists in thirty-four states since the First World War and the Russian Revolution. Following deportation of aliens in the early 1920s and renewed fears of revolution, and in settings of unconstrained law enforcement, states in the early 1930s revised these statutes and enforced them anew. Oregon did both in 1933. Its original law prohibited the advocacy of force, violence, or sabotage as a means of instituting political change or labor organization. Its amendment banned assemblies or organizations that merely taught violence or sabotage at meetings or attempted to advocate syndicalism with oral or written communications. In the view of civil libertarians, Oregon essentially challenged the full provisions of the First Amendment both with a revised syndicalism law and a renewed drive to enforce it. Both actions were used to legitimize infiltration of organizations and spying on them and individuals like Solomon by the governor's office, state police, Oregon National Guard, and Immigration and Naturalization Service. The Portland police "Red Squad" was further emboldened to engage in spying, raids, and unrestrained jailings, to disband meetings and marches, and to blacklist union activists.[8]

American law had not yet developed what Cass R. Sunstein called today's "constitutional culture," a core set of substantive ideals held and implemented by the country's judiciary. No consensus had developed

> that the Constitution protects broad rights to engage in political dissent; to be free from discrimination or mistreatment because of one's religious convictions; to be protected against torture or physical abuse by the police; to be ruled by laws that have a degree of clarity, and to have access to court to ensure that the laws have

[8]Eldridge F. Dowell, *A History of Criminal Syndicalism Legislation in the United States* (Baltimore, MD, 1939), 118–22; Oregon Code of 1930, section 14-3113, as amended by chapter 459 of the Oregon Laws of 1933; National Lawyers Guild, Oregon Chapter, *Report of the Civil Liberties Committee* ([Portland] May 24, 1938); Jerry Lembcke and William M. Tattam, *One Union in Wood* (Madeira Park, BC, and New York, 1984), 58–59; E. Kimbark MacColl, *The Growth of a City* (Portland, 1979), 484–85; L.A. Milner, Daily Report, March 21 [1937] in Oregon Military Department Records: Communist Activity Intelligence Reports, 1932–39, Oregon State Archives; Bureau of Police, "Weekly Report of Communist Activities," April 9, 1937, Police Historical Records: Red Squad, City of Portland Stanley Parr Archives and Records Center.

> been accurately applied;[and] to be free from subordination on the basis of race and sex.[9]

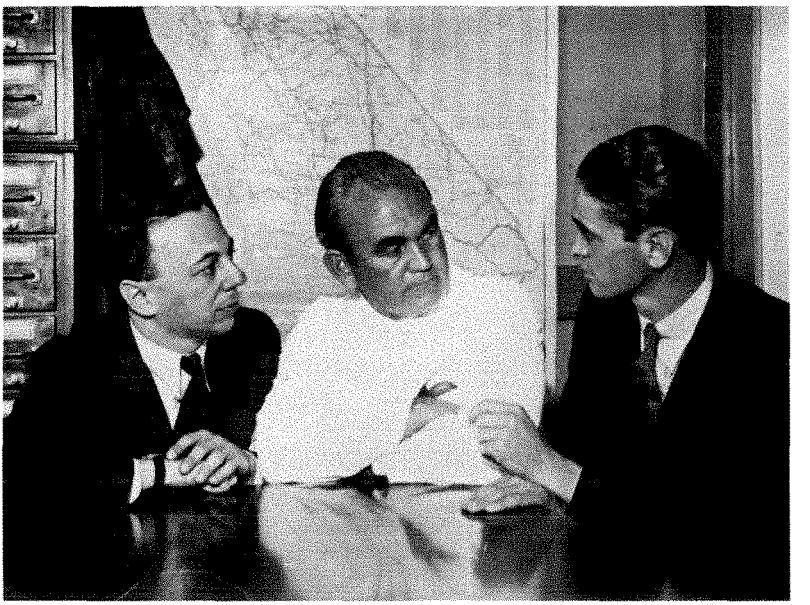
It violated Solomon's fundamental civil liberties beliefs that Dirk DeJonge and Edward R. Denny had been convicted merely for participating in a rally in Portland conducted by a political party. They were not tried for actually advocating violence or revolution at the meeting. During the July 27, 1934 event, the police arrested DeJonge, who had spoken, Denny, who had presided, and others who had been addressing and attending a rally that supposedly taught and advocated violent and unlawful overthrow of the government. The speakers had protested county jail conditions, and violent police raids and other actions that had occurred during a bloody West Coast waterfront strike. They had urged listeners to recruit people into the Communist Party, purchase Communist Party literature, and attend a rally the next day.

The communist-controlled ILD represented the accused. Since 1925, it had defended many radicals, union people, and African Americans, like the Scottsboro Boys. During the *DeJonge* trial, the prosecution produced evidence obtained elsewhere that the Communist Party, USA called for the violent overthrow of the government and had organized the event. An ILD team led by Irvin Goodman unsuccessfully argued that under both the statute and the indictment, the state had to prove the meeting was under Communist Party auspices and that it vocally championed the unlawful actions. Multnomah County's circuit court accepted the charge that DeJonge and Denny had violated the law even if nobody had actually advocated violent overthrow of the government or any other unlawful actions. That is, Denny and DeJonge, who had once been the Communist Party candidate for mayor of Portland, were tried, convicted, and ultimately sentenced to seven-year terms for participating in a meeting of persons who, in other places and times, had advocated outlawed acts.[10]

Solomon told the national ACLU that the trial "[c]ourt permitted a great number of things in evidence that were clearly erroneous and which constitute reversible error." The judge also had rejected the ILD's claim that the prosecutor, specially funded by the American Legion, had engaged in misconduct. Solomon had observed the bitter three-week trial

[9]Cass R. Sunstein, *One Case at a Time* (Cambridge, MA, 1999), x–xi.

[10]For his most detailed account of the events, see Gus J. Solomon Oral History, tape 4, side 2, Oregon Historical Society (hereafter GSOHS).



An ILD team led by Irvin Goodman, left, unsuccessfully argued that the state had to prove that the meeting attended by DeJonge was held under the auspices of the Communist Party. (Courtesy of the Oregon Historical Society, CN 001298)

in 1934 for the Oregon Civil Liberties Committee. Afterwards, he had the national ACLU ask its luminaries on the Columbia University law faculty to urge leniency on the sentencing judge, an alumnus. The local ACLU, as advised by its national officials, then refused the ILD's request to join its appeal to the Oregon Supreme Court.[11]

ACLU-ILD collaboration had been stormy and tenuous for some time and remained an issue for ACLU members suspicious of or antagonistic to Communist Party intentions and actions. Solomon sighed, "I am blamed by the A.C.L.U. here because I am too radical, and by the I.L.D." and another

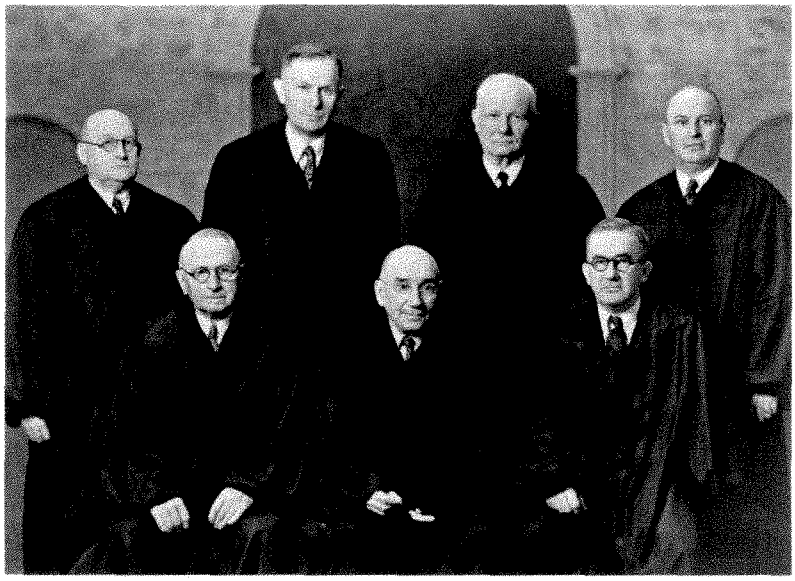
[11]Gus J. Solomon (hereafter GS) to Lucille B. Milner, Nov. 22, 1934, and Roger N. Baldwin to GS, Dec. 21, 1934, reel 7, American Civil Liberties Union in the Pacific Northwest, University of Washington, microfilmed from American Civil Liberties Union Papers, Princeton University (hereafter ACLU NW Papers).

organization "because I am not radical enough, or because the A.C.L.U. isn't willing to cooperate with them." But collaboration was cautiously reemerging in the Scottsboro Defense Committee and the lead-up to the Supreme Court's *Herndon v. Georgia* (1935). Solomon and others managed to overcome strong hesitancy within the Oregon Civil Liberties Committee about collaborating with the ILD. National ACLU director Roger N. Baldwin informed him, however, that their organization still refused to act jointly with the ILD at the trial level or in appeals thought primarily designed to advance Communist Party ends.[12]

The Oregon Supreme Court, with two dissenting, upheld the convictions. Following common state court practice in

[12]GS to Baldwin, Jan. 21, 1936, Baldwin to GS, Dec. 21, 1934, and GS to ACLU, Oct. 22, 1936, reel 7, ACLU NW Papers; Cortner, *Supreme Court and the Second Bill of Rights*, 93–94; Dan T. Carter, *Scottsboro* (1969; New York, 1971), 334; *Herndon v. Georgia*, 295 U.S. 44 1 (1935).

A bloody longshoremen's strike helped to spur the political rally in Portland where DeJonge and Denny were arrested. (Courtesy of the Oregon Historical Society, OrHi 81704)



The Oregon Supreme Court in March 1934 was composed of (l–r) Judges Kelly, Rossman, Campbell, Bailey, Bean, Rand (chief justice), and Belt. (*Oregon Journal* photo, courtesy of the Oregon Historical Society, CN 000605)

applying anarchism and syndicalism statutes, the justices ruled that mere membership in an organization advocating the proscribed doctrine constituted grounds for conviction, without any need to prove a defendant's adherence to the doctrines. So "then and there," as the statute required, did not mean advocacy of criminal syndicalism at the public event, but generally. Accordingly, the indictment properly referred to the advocacy of syndicalism and sabotage by the Communist Party, not to anything said or done at the meeting.[13]

Solomon initially had recommended that either the ILD or ACLU appeal to the U.S. Supreme Court. By September 1935, he sensed the ILD becoming less effective and the ACLU more active in constitutional cases. Later that year, a younger Portland attorney, Allan Hart, convinced him that the ACLU should make its own rehearing request to the Oregon Supreme Court. It should argue that the First Amendment applied to

[13]*Oregon v. DeJonge*, 152 Or. 315 (1935); Charles E. Rice, *Freedom of Association* (New York, 1962), 132.

the states and cite the *Herndon v. Georgia* injunction of May 1935 that a constitutional question must be "seasonably raised in the court below or passed upon by that court" for the U.S. Supreme Court to consider any appeal.[14]

Solomon and Levenson's *amicus curiae* brief in support the ILD's rehearing request contended that DeJonge's conviction violated the Oregon Constitution and that the First Amendment applied to the states, so DeJonge enjoyed the right of freedom of assembly. When, as expected, a rehearing was denied in January 1936, the ACLU had established a plausible basis for filing a writ of error in the nation's highest court. Meanwhile, anybody who helped publicize or preside over or took an active role in any peaceful Oregon meeting under Communist Party sponsorship could be tried, convicted, and imprisoned for years.[15]

Goodman, asked by Solomon about the ILD's future role, supposedly responded "that the Communist Party didn't want the appeal because some people do their best work for them in jail," that is, as class-war prisoners useful for its organizing and propaganda purposes. To many in the ACLU, the remark was further evidence that the ILD defended rights only to win a communist following and exploit revolutionary situations. After the rehearing denial, Solomon worried that DeJonge, incarcerated since January 25, 1936, would languish in prison. (The ILD was doing nothing now for Denny.) He also optimistically felt that DeJonge would fare well in the U.S. Supreme Court. He proposed to the ILD attorneys, the Communist Party's district organizer in Oregon, and the national ACLU that the ACLU take over the appeal. On reflection, all agreed. (The Communist Party's new Popular Front approach of working closely with liberals and other non-communists to defeat fascism abroad and advance the New Deal at home, announced the past summer, may have led to the ILD's decision.) Civil Liberties Committee lawyers "have no experience appealing a case from the State Supreme Court to the United States Supreme Court," Solomon admitted. "We can write the

[14]GSOHS, tape 4, side 2 cf. C. Allan Hart Oral History, tape 4, side 2, Oregon Historical Society; Portland Committee Minutes, Sept. 6, 1935, reel 7, ACLU NW Papers; GS, ACLU-E.B. MacNaughton Civil Liberties Award Speech, Dec. 8, 1965 in "Speeches No. 60 Thru No. 109," Oregon Historical Society.

[15]Appellant's Petition for Rehearing in *Oregon v. DeJonge*, 152 Or. 315 (1935) in Oregon Supreme Court case file 8168, Oregon State Archives. Hart also had an unadvertised role in reviewing and editing the ACLU brief to the Oregon Supreme Court.

brief in Portland." But they needed help from experienced Supreme Court counsel. Somebody in the east would have to make the oral argument, too.[16]

For several months, Solomon traded ideas with the New York-based Fraenkel, the ACLU's principal DeJonge counsel. The Portlander conveyed suggestions made to him by the Communist Party's district organizer. He also had Goodman review a proposed ACLU filing to the high court, apparently Goodman's sole work on the ACLU appeal. (In addition, he likely conferred independently with the ILD.) In New York, Fraenkel discussed the emerging ACLU brief with ILD attorneys with whom he had recently collaborated in a Scottsboro case. He already had taught Solomon, as a filer of a rehearing brief, how to use a soon-to-be-effective Supreme Court rule that a filer of an appeal could file a brief in support of jurisdiction. After jurisdiction was noted, Solomon learned that all along "the Supreme Court was looking for a case of that kind, or some of the law clerks were, and they grabbed on to this case."[17]

He began negotiating a stipulation of facts with Portland's Deputy City Attorney Maurice E. Tarshis. This longtime friend had been assigned to argue the state's case. Solomon assumed that Tarshis, like the original prosecutors, would use Communist Party literature to introduce statements showing that it advocated violence. He now used a recent Civil Liberties Committee tactic in an amicus curiae brief that had supported a different ILD-argued criminal syndicalism appeal to the Oregon Supreme Court. In *Oregon v. Pugh*, Solomon and Levenson had—to ILD disgust—conceded "that Communism considers armed insurrection necessary and inevitable, and, indeed the only way of attaining a new social order." The pamphlet used to convict Pugh "merely expounds this viewpoint as an abstract doctrine," and Pugh in no way advocated or urged action to accomplish it. The ACLU, in other words, took the traditional liberal route of rigorously distinguishing violent action from speech or thought. Although the Oregon justices refused to declare the

[16]GSOHS, tape 4, side 2; GS, ACLU–E.B. MacNaughton Civil Liberties Award Speech; Cornter, *Supreme Court and the Second Bill of Rights*, 93; GS to ACLU, Jan. 25, 1936, reel 7, and GS to ACLU, Oct. 22, 1936, reel 8, ACLU NW Papers.

[17]Osmond K. Fraenkel to GS, March 10, 1936, reel 7, and GS to ACLU, Oct. 22, 1936, reel 8, ACLU NW Papers; Harry A. Poth, Jr., to GS, Oct. 29, 1936, reel 139, American Civil Liberties Union: The Roger Baldwin Years, 1917–1950 (microfilm of ACLU Papers, Princeton University); GSOHS, tape 4, side 2.

criminal syndicalism statute unconstitutional, they had reversed Pugh's conviction for selling radical literature.[18]

For *DeJonge*, Solomon tentatively agreed with Tarshis that the Communist Party taught and advocated the violent overthrow of governments. "I cannot see how we can be prejudiced by" admitting that some literature introduced at trial offended the statute, he explained, "for the whole theory of our appeal is that DeJonge was not charged with distributing literature, but only with assisting in presiding at an assemblage of persons which taught and advocated prohibited doctrine." From their reaction, Solomon figured that his admission greatly angered Communist Party leaders. Goodman vetoed the admission, Tarshis later swore. Then, Solomon recalled, DeJonge, accompanied by ILD Acting National Secretary Anna Damon "came to me and said that he had been told by the Communist Party to fire me," at least "theoretically," he laughed, because Fraenkel, not he, was the principal counsel. ILD national counsel Joseph Brodsky, he was told, would solely represent DeJonge and must clear any ACLU amicus curiae brief before submission.[19]

The national ACLU advised Solomon against making the admission but permitted him to substitute excerpts from official Communist Party literature that basically made the same point. ILD lawyers now said that they were too busy to take charge of the appeal and wished to retain Fraenkel's services. So the ILD agreed to Solomon's stipulation ploy, duly filed on June 2, 1936, and the ACLU retained the sole appeal authority.[20]

Fraenkel said that he planned in the Supreme Court to define the issue as simply as possible so as not to "challenge the state court's finding with regard to the character of the CP" as to forcible overthrow of the government. He would concentrate "on the fact that he [DeJonge] had not been charged with membership in the Party." Constitutionally, the ACLU brief emphasized that the statute, as applied, violated

[18]GSOHS, tape 4, side 2; petition, June 8, 1935 in *Oregon v. Pugh*, 151 Or. 561 (1935) in Oregon Supreme Court case file 8167; GS to Samuel P. Puner, Aug. 20, 1935, reel 7, ACLU NW Papers.

[19]GS to ACLU, April 21, 1936, reel 7, ACLU NW Papers; GSOHS, tape 4, side 2; Maurice E. Tarshis affidavit in "Hearings on Nomination of Gus J. Solomon, May 4, 1950, Salt Lake City, Utah" before Subcommittee of the Senate Judiciary Committee, transcript 1: 42 in Gus J. Solomon Papers, Oregon Historical Society.

[20]GSOHS, tape 4, side 2. Solomon personally paid some of the stipulation's preparation costs.

the right to petition for redress of grievance and the right to peaceable assemble. It questioned a law that "punishes a person for participation in a lawful meeting, called for lawful purpose, merely because the meeting was called by an organization which, it is charged, advocated prohibited doctrines." Because the Communist Party had been on the 1932 Oregon ballot, its authors called the punishment a very disturbing policy. The state of Oregon asked the justices to apply the bad tendency test, contending that Communist Party advocacy might spur into action the targeted "morons, especially those who are class conscious, and who believe that men in high places got there through imposition upon the toilers."[21]

On December 9, 1936, shortly after Roosevelt's resounding re-election, Fraenkel argued the case in eight uninterrupted minutes. He posed the issue as, "[D]oes a man, whether he is a Communist or not, become liable, criminally liable, if he speaks at a meeting called under the auspices of the Communist Party, no matter how lawful the subject matter of that meeting may be?" Tarshis argued the constitutionality of the Oregon statute. As Justices Brandeis, Cardozo, and Roberts sat silently, Justices Butler, McReynolds, Sutherland, Van Devanter, and Hughes barraged Tarshis with questions, leaving him ten minutes for argument. Was DeJonge a criminal under the Oregon law if he discussed the tariff? Yes, Tarshis replied. If he presided over a meeting only passing resolutions or memorializing deceased communists? Yes again. Just after argument concluded, Fraenkel sensed victory. He commented, "Justice McReynolds tried to get the young lawyer [Tarshis] to say they had made incendiary remarks, but he was honest and couldn't be led." When questioned, the deputy city attorney had "admitted that the statute purported to denounce mere meetings."[22]

In a swift ruling on January 4, 1937, a unanimous Court, with Justice Stone abstaining, invalidated the statute, not in its entirety but only as it applied to DeJonge, and reversed the

[21]Fraenkel in Ann Fagan Ginger, *Carol Weiss King* (Niwot, CO, 1993), 217–18; Appellee's Brief in Transcript of Record, *DeJonge v. State of Oregon*, Supreme Court of the United States, October term, 1936.

[22]Solomon in "Hearings on Nomination of Gus J. Solomon, June 5, 1950, Washington, D.C." before Subcommittee of the Senate Judiciary Committee, transcript 3: 345 in Solomon Papers; scrapbook of clippings in Leo Levenson Papers, in possession of Charles L. Kobin; Appendix to "Excerpts from the Diary of Osmond K. Fraenkel Relating to the American Civil Liberties Union," unpub., Harvard University Law School. Oregon's central argument to the high court is reprinted in Zechariah Chafee, Jr., *Free Speech in the United States* (Cambridge, MA, 1941), 386.

Dirk DeJonge's conviction was overturned by the U.S. Supreme Court in 1937. (*Oregon Journal* photo, courtesy of the Oregon Historical Society, CN 002357)

conviction. Writing for the Court, Chief Justice Hughes noted its 1931 rulings that freedom of speech and the press were protected in the states by the due process clause. Hughes now held that for the states the "right of peaceful assembly is a right cognate to those of free speech and free press and is equally fundamental." He declared, "[P]eaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed." A communist was "entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty." States could prohibit incitement to violent overthrow of the government, he added, but they must "preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion" so government might respond to the will of the people" and changes could occur by peaceful means.[23]

So the Court did not declare the statute unconstitutional. It did not decide whether Communist Party doctrines were inherently seditious or whether Communist Party membership could be prohibited. It refrained from establishing a general test or rule for evaluating sedition and syndicalism laws. It decided the case on the narrow grounds that the statute had been erroneously applied to DeJonge and was "repugnant to the due process clause of the Fourteenth Amendment."

The Supreme Court victory was a heady morale-builder for Solomon. "The ACLU is batting 1,000 percent in Oregon! Both the Kyle Pugh case and the Dirk DeJonge case, the only ones in which we have participated, have been reversed on appeal." Except "for our activities both men would now be in the penitentiary." In 1971, the old rabble-rouser DeJonge gratefully acknowledged Solomon's central role in securing his freedom. Indeed, without Solomon's determination and guidance, the *DeJonge* case in all likelihood would have ended with the ILD's failed request that the Oregon Supreme Court grant DeJonge a rehearing. Supporting counsel Solomon had helped to develop the basic legal strategy and arguments that led to a majestic expansion of First Amendment rights.[24]

DeJonge v. Oregon became a reference point for Judge Solomon during his distinguished career (1949–87) on the U.S. District Court for Oregon. He proudly referred to the 1937

[23]*DeJonge v. Oregon*, 299 U.S. 353 (1937).

[24]GS to ACLU, Jan. 6, 1937, reel 8, ACLU NW Papers; DeJonge in David R. Hardy, "The 1934 Portland Longshoremen's Strike" (B.A. thesis, Reed College, 1971), 73.

decision in speeches, correspondence, conversations, and bench remarks in trials that seemingly raised a due process of law issue. Few, however, had noticed his efforts in *DeJonge* before he gained the bench, the usual fate of supporting counsel in a legal star system. Local press remarks about his connection had faded away by 1939.[25]

One agency, however, took a damaging interest in it and his supposedly communist ACLU connection. On the heels of the decision, the Portland Police "Red Squad" began a several-year campaign among his actual and potential clients. In tandem with the recession of 1937, its boycott exertions slashed his professional income from around $3,000 in 1936 to $800 in 1937. But the boycott never deflected him from civil liberties pursuits or ACLU activities, which continued until he ascended to the bench. At the same time, a group of Oregonians launched an effort to discard the offending state syndicalism law. Surprisingly, they did not solicit Solomon's aid. The 1937 legislature repealed the statute and substituted a simple conspiracy law.[26]

No discussion of Solomon's role in the landmark decision occurred after the Second World War, even when he mentioned *DeJonge* as a notable professional achievement during his battle for a federal judgeship. By 1949, the American legal profession, except for some aging Oregon practitioners, did not associate his name with *DeJonge v. Oregon*. Only in the final years of his life did commentators begin to discuss Solomon's role in American constitutional development.[27]

The list of names appended to a high court decision may obscure the critical work done behind the scenes. Apart from *DeJonge v. Oregon*, there likely were other—perhaps many other—supporting counsel who had a significant impact on landmark American constitutional decisions. Scholars ought to seek them out. Their discovery would introduce us to some weighty figures, deepen our understanding of legal career development and (in appellate situations) of the legal collaboration disguised by the legal star system, refine our analyses of the complexities involved in constitutional appeals, and broaden our knowledge of the American constitutional process.

[25]Author's interview of Mark Silverstein; *Oregonian*, Nov. 2, 1937; Transcript of Proceedings, 60–61 in *Tanner v. Lloyd Corp.*, 308 F.Supp. 128 (D.Or. 1970) in Solomon Papers.

[26]GS, ACLU-E.B. MacNaughton; GSOHS, tape 4, side 2; Oregon Laws of 1933, chapter 459 as amended by Oregon Laws of 1937, chapter 362.

[27]MacColl, *Growth of a City* (Portland, 1979), 483–84; Friendly and Elliott, *Constitution*, 75–80; Cortner, *Supreme Court and the Second Bill of Rights*, 87–97.

Desegregating the Valley of the Sun: *Phillips v. Phoenix Union High Schools*

Matthew C. Whitaker

Integration is the great issue of our age, the great issue of our nation and the great issue of our community. We are in the midst of a great struggle, the consequences of which will be world-shaking.[1]

—Martin Luther King, Jr.

Popular opinion has always held that Phoenix, Arizona, has offered newcomers opportunities to enjoy freedom from the racial tensions and antagonisms of more densely populated cities. Celebrated Western poetry, novels, and films bear witness to this fact. Generally, however, Phoenix's race relations have mirrored those in most American cities: segregated and unequal by custom and by law.[2] Historically, people who migrated to Phoenix, particularly

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[1]Martin Luther King, Jr., *New York Times*, February 27, 1956.

[2]Lincoln Ragsdale, Sr., interview conducted by Mary Melcher, April 8, 1990, Phoenix, Arizona, Arizona Historical Foundation, Arizona State University (hereafter TP, AHFASU); Eleanor Ragsdale interview conducted by Mary Melcher, spring 1990, Phoenix, Arizona, TP, AHFASU; Ragsdale, "Minority Entrepreneurship: Profiling an African American Entrepreneur" (Ph.D. diss., Union Graduate School, 1989), 80. Also see Matt McCoy, "The Desert Metropolis: Image Building and the Growth of Phoenix, 1940–1965" (Ph.D. diss., Arizona State University, 2000); United States Census of Population, 1940, *General Characteristics by States* (Washington, DC, 1940); Universal Memorial Center, Inc.: *A Celebration and Worship Service Honoring the Life of Dr. Lincoln Johnson Ragsdale, Sr.* (Phoenix, 1995), 3; *A Celebration and Worship Service Honoring the Life of Eleanor Dickey Ragsdale* (Phoenix, 1998), 14.

white and black Americans, brought with them cultural attitudes about race that they attempted to adapt and negotiate after establishing themselves in the city. They modified their concepts of race and ethnicity only insofar as these concepts would continue to validate their preconceived notions.

Like the majority of whites in American cities, Phoenix's founders and ruling white elite supported systematic campaigns to create a flourishing community "run by Anglos, for Anglos."[3] Many of the city's founders, in fact, were white, had Southern roots, and harbored the same anti-black, anti-Indian, anti-Latino, and anti-Jewish attitudes that dominated race relations in the Reconstruction and Jim Crow South.[4]

Phoenix was incorporated in 1870. Surrounded by a series of upper Sonoran Desert mountain ranges, such as South Mountain, Camelback Mountain, and the Estella, Superstition, and San Tan Mountains, "The Valley," as it has come to be called, soon became a Western outpost of white supremacy and racial inequality.

The white male founders of Phoenix quickly imported mechanisms from states such as Texas, Oklahoma, and Arkansas, which formed the *gestalt* of a racial caste system, defining race relations and socioeconomic mobility in Phoenix through-out the twentieth century. *De facto* segregation in the city existed from its birth. African Americans were systematically locked out of the dominant European American society in Phoenix, as they were segregated from white Americans in restaurants, theaters, housing, hospitals, hotels, swimming pools, buses, social clubs, and other places of public accommodation.[5]

De jure segregation was implemented in the Arizona Territory in 1864, when an anti-miscegenation law prohibiting marriages between "Whites, Negroes, Mulattos, and Mongolians" was passed. The law was amended in 1877 to include Indians. Children of such marriages possessed no legal rights of inheritance. De jure segregation was encoded in law again by the territory's white supremacist leaders during the first

[3]Bradford Luckingham, *Phoenix: The History of a Southwestern Metropolis* (Tucson, 1995), 8, 15.

[4]L. Jeffrey Cook, "Patterns of Desert Urbanization: The Evolution of Metropolitan Phoenix," in Gideon Golaney, ed., *Urban Planning for Arid Zones: American Experiences and Directions* (New York, 1978), 205–208; Geoffrey Padraic Mawn, "Phoenix, Arizona: Central City of the Southwest, 1870–1920" (Ph.D. diss., Arizona State University, 1979), 2–3; Michael H. Bartlett, Thomas M. Kolaz, and David A. Gregory, *Archaeology in the City: A Hohokam Village in Phoenix, Arizona* (Tucson, 1986), 17–34; Luckingham, *Phoenix*, 8, 15.

[5]Ibid.; Cook, "Patterns of Desert Urbanization," 205–208; Mawn, "Phoenix," 2–3; Bartlett, Kolaz, and Gregory, *Archaeology in the City*, 17–34.

decade of the twentieth century. On March 17, 1909 the territorial legislature passed a law enabling Arizona school districts to segregate students of African descent from pupils of European ancestry. Arizona's fledgling state constitution of 1912 also designated "interracial" marriages unlawful.[6]

The economic, social, and political isolation that people of color experienced in Phoenix amplified not only the effects of institutional racism, but the negative effects of the Great Depression of the 1930s and demobilization after World War II. Most racial minorities in Phoenix attended separate and unequal schools; worked in low-wage, nonmanagerial, labor-intensive occupations; lived in geographically segregated, substandard housing; and suffered physically as a result of a shortage of health care providers serving the black community. Before the arrival of an aggressive and astute interracial cadre of civil rights leaders following World War II, systematic resistance to this oppression was waged primarily by prominent individual leaders and a small number of progressive community activists.[7]

World War II ushered in a new chapter in Phoenix history as the number of professional people of color and Jewish Americans in the city increased. Led by leaders such as African American attorney Hayzel B. Daniels, Jewish attorneys Herbert Finn, Ruth Finn, William P. Mahoney, Jewish magistrate Fred Struckmeyer, and prominent black business leaders and community activists such as Lincoln J. Ragsdale, Sr. and Eleanor Dickey Ragsdale, those who opposed racial segregation in Phoenix fought to make the city more racially tolerant and inclusive.[8]

[6]Arizona Territorial Legislature, Comp. Laws, 1877, C. 30, sec. 3; *Arizona Reports of Cases Argued and Determined in the Supreme Court of the Territory of Arizona, to April 16, 1893*, vol. 5; *Arizona Republican*, 4, 7, 10, 1912; Mary Melcher, "Blacks and Whites Together: Interracial Leadership in the Phoenix Civil Rights Movement," *Journal of Arizona History* 32 (Summer 1991): 196; Richard E. Harris, *The First 100 Years: A History of Arizona Blacks* (Apache Junction, AZ, 1991), 53–57; Bradford and Barbara Luckingham, *Discovering Greater Phoenix: An Illustrated History* (Phoenix, 1998), 58.

[7]Melcher, "Blacks and Whites Together," 196; Harris, *The First 100 Years*, 53–57; Luckingham, *Discovering Greater Phoenix*, 58.

[8]Federal manuscript census schedule, 1940, 1950, 1960, Government Documents, Hayden Library, Arizona State University; *Arizona Republic*, November 27, 28, 30, 1942 and February 26, 1943; (Phoenix) *Arizona Sun*, February 1, 8, 16, 23, 1951; Quintard Taylor, Jr., *In Search of a Racial Frontier: African Americans in the American West, 1528–1990* (New York, 1998), 270–71; Bradford Luckingham, *Minorities in Phoenix: A Profile History of Mexican American, Chinese American, and African American Communities, 1860–1992* (Tucson, 1994), 156–57; Thomas E. Sheridan, *Arizona: A History* (Tucson, 1995), 273–74; Universal Memorial Center, *Dr. Lincoln Johnson Ragsdale, Sr.*, 4.

The campaign for civil rights in Arizona was largely a grassroots movement, but key battles were won in court. The aforementioned leaders became prominent members of the local chapter of the National Association for the Advancement of Colored People (NAACP) and the Phoenix Urban League (PUL). They were also among the founders of the Greater Phoenix Council for Civic Unity (GPCCU). Established in the 1940s, the GPCCU worked to eliminate "discrimination in Phoenix and surrounding communities" and to "cooperate with local, state, and national groups working toward the same ends." It was the NAACP, GPCCU, and PUL that were instrumental in forcing the desegregation of Phoenix's public schools as early as 1953, in what proved to be a major precedent-setting legal victory in *Phillips v. the Phoenix Union High School District.*[9]

Although Phoenix civil rights leaders were far removed from the civil rights movement in the American South, they understood the exigencies of white racism and black protest. They were motivated by ongoing racial discrimination and by World War II's and America's promise of freedom and democracy, and were buoyed by a growing and more vocal black population. These activists were also supported by the intense postwar liberalism of many white Phoenician activists and national milestones in civil rights. The national school desegregation effort reached its acme between 1936 and 1954, beginning with the desegregation of the University of Maryland Law School in *Murray v. Maryland,* and ending with the legal desegregation of America's schools in *Brown v. Board of Education of Topeka, Kansas* in 1954. Activists battled de jure school segregation in the courts with aggressive coalition building and creative legal maneuvering. In the face of this sustained and forceful effort, legal school segregation fell.[10]

Of course, as Quintard Taylor, Jr., has posited, the Phoenician desegregation movement—and activism throughout the West—"paralleled the movement East of the Mississippi with regard to strategy, tactics, and objectives." The Western movement, however, occurred in an environment where African Americans were often not the largest racial

[9]Taylor, *In Search of a Racial Frontier,* 270–71; Luckingham, *Minorities in Phoenix,* 156–57; Sheridan, *Arizona,* 273–74; Universal Memorial Center, *Dr. Lincoln Johnson Ragsdale, Sr.,* 4.

[10]Matthew C. Whitaker, "'Creative Conflict': Lincoln and Eleanor Ragsdale, "Collaboration and Community Activism in Phoenix, 1953–1965," *Western Historical Quarterly* 34: 2 (May 2003): 166; Robert J. Cottrol, Raymond T. Diamond, and Leland B. Ware, *Brown v. Board of Education: Caste, Culture, and the Constitution* (Lawrence, KS, 2003), 58–64.

minority. Due to the small black population in Phoenix, African American leaders were forced to form partnerships with Mexican Americans and white integrationists. The multiracial alliances that were forged as a result "pushed civil rights beyond black and white." The diversity of these racial coalitions gave the Phoenix movement social capital, economic strength, and optimism that were almost unheard of in the South. Phoenix's various racial alliances forced the white establishment to change the ways in which it perceived and dealt with racial inequality. Unlike white Southerners, white Phoenicians who were determined to maintain their economic and political hegemony were compelled to grapple with the resistance of African Americans, Mexican Americans, and American Indians, in addition to a critical mass of very outspoken Jewish activists. In the end, the optimism, social capital, and determination of this diverse group of Phoenix leaders produced one of the nation's early, precedent-setting cases against school segregation and white supremacy.[11]

The fight to end school segregation in Arizona began in March 1909, when the Arizona territorial legislature passed a law permitting school segregation in the state. Despite the existence of de facto segregation in the state, this move both surprised and angered the African Americans throughout Arizona, particularly black Phoenicians. The vast majority of whites in Arizona supported the measure, with the exception of the governor of the state, Joseph H. Kibbey, who swiftly vetoed it. When he refused to sign the bill and sent it back to the legislature, he attached a memo that characterized the reactionary move as "utterly ridiculous, un-Christian, and inhuman." Nevertheless, Kibbey did not oppose segregation solely on moral grounds. He stated,

> It would be unfair that pupils of the African race should be given accommodations and facilities for a common school education, less effective, less complete, less convenient or less pleasant so far as the accessories of the school and its operations are concerned than those accorded pupils of the white race in the same school district.[12]

Kibbey opposed segregation primarily for economic reasons. He did not agree with allocating additional funds necessary to

[11]Taylor, *In Search of a Racial Frontier*, 179–280; Whitaker, "'Creative Conflict,'" 166.

[12]Kibbey quoted in Mary E. Gill and John S. Goff, "Joseph H. Kibbey and School Segregation in Arizona," *Journal of Arizona History* 21 (Winter 1980): 411–22.

produce African American schools that were equal in every way to white schools. Many businesses with black and white employees resented this expense as well.

The territorial legislature overrode Kibbey's veto, and segregation became legal in Arizona on March 17, 1909. Dr. Benjamin B. Moeur, chairman of the convention organized in 1910 to draft Arizona's constitution for statehood, angrily bemoaned the anti-segregationist rhetoric of Governor Kibbey and his supporters, stating, "You gentlemen can do what you please, but I for one, won't send my children to school with the niggers, and I will fight sending them until I die!" Moeur, whose name is respectfully inscribed on buildings throughout Arizona, was the state's leading advocate for racial separatism, emphatically calling for "complete and total segregation."[13]

William P. Crump, a local African American businessman, responded to the legislation, declaring, "[F]rom the organization of the territory to the present time the children of all classes of its cosmopolitan citizenship have gone to school together and there has been no friction or trouble of any kind, and as a result there is not a community in America where the relations of the black and white are more amicable and peaceful than Phoenix." Clearly some whites supported the Black Phoenicians' efforts, but those who did were in the minority. Although few Arizona districts adopted school segregation, Phoenix did, adding itself to a long list of cities that sought to maintain white supremacy by denying people of color the opportunity to improve their condition by receiving a high-quality education.[14]

In August 1910, Maricopa County District Attorney George Bullard stated that African American residents favored segregation in the schools, indicating to him that their children would not get an even break with whites in integrated schools and that they would be ostracized. In response to this move to segregate black people educationally, the African American community formed delegations, led by leaders such as Crump, J.T. Williams, Lucy B. Craig, and others. Crump disputed Bullard's claim that black people wanted separate facilities. He countered by noting that "98 percent of the African Americans he knew in Phoenix bitterly resented the policy [of segregation]." Crump stated,

[13]Moeur quoted in Kotlanger, "Phoenix, Arizona, 1920–1940," 296–99; Gill and Goff, "Joseph H. Kibbey," 411–22; Morris J. Richards, *The Birth of Arizona: The Baby State* (Phoenix, 1940), 16–24.

[14]Crump quoted in Luckingham, *Minorities in Phoenix*, 134; *Arizona Republican*, March 31, 1910, January 3 and March 12, 1911; Gill and Goff, "Joseph H. Kibbey," 411–22.

> We do not oppose it from any desire for social equality, for that is foreign to our thoughts. We fight it because it is a step backward; because there are not enough colored children here to enable them to establish a fully equipped school; because it is an injustice to take money of all taxpayers to establish ward schools and then force the colored children to walk two miles to school while their property is taxed to provide ward schools for all other children. I wish to deny emphatically that there has been a revulsion of feeling among colored people themselves in favor of segregation. There may be a stray colored person or two who have drifted in from Texas or Arkansas who may have the idea that they would prefer separate schools. This is because they do not know any better.[15]

In rejecting social equality but insisting upon equal protection under the law, Crump and several other black leaders were supporting the philosophy of Booker T. Washington, the most prominent African American leader of the time. Like Washington, Crump supported the idea that in "purely social" matters, the white and black residents of Phoenix could "be as separate as the fingers, yet one as the hand in all things essential to mutual progress." Later, on September 22, 1911, Washington visited Phoenix. During his stay he met with local black leaders and denounced desires to seek social integration as "folly." Washington called for hard work and self-discipline, stating, "[J]ust in preparation as we learn to dignify labor in this generation, will we lay the foundation on which to rise and grow in what the world calls the higher and more important things in life.[16]

In conceding black people's civil and political subjugation in return for limited economic mobility, Washington and Crump allowed white people to use segregation as a means of systematizing discrimination and inequality. Following the teachings of Washington, Crump was able to maintain his position as the axis between the races, but in doing so, he weighted down the boots he so strongly advised black Phoenicians to pull themselves up by. Crump was willing to accept second-class citizenship, political sterility, and social invisibility temporarily, in hopes of acquiring economic viability.

[15]Crump quoted in Luckingham, *Minorities in Phoenix*, 134.

[16]Booker T. Washington, *Up From Slavery* (New York, 1901), 162; *Arizona Republican*, September 23, 24 and October 19, 1911; Booker T. Washington, "The Race Problem in Arizona," *The Phoenix Independent* 71 (October 1911), 909–13.

In spite of African American objections and protests, segregated schools became a reality in Phoenix. In September 1910, sixteen black students enrolled and were forced to walk two miles across Southern Pacific and Santa Fe railroad tracks, to Douglass School to study under the instruction of black principal J.T. Williams and black teacher Lucy B. Craig. Douglass School was adjacent to Block 41 which was bounded by Jackson and Madison, Fifth and Sixth Streets. Undaunted, however, African Americans and the small group of white people who supported them continued to organize and develop strategies for countering attempts to force them into second-class citizenship.[17]

In 1910 Samuel F. Bayless, a local black merchant, filed suit against the segregation of African American children in Douglass School. Joseph H. Kibbey, then former governor of Arizona, acted as Bayless' attorney. Bayless, with Kibbey's help, won an injunction that allowed African American children in grades one through four to attend their neighborhood schools. In 1912 the ruling was overturned and all African American children were forced to attend separate schools.

Many whites were undaunted in their opposition to school desegregation. White separatists continued to attack African Americans verbally in the local press; often their aspersions were paternalistic and threatening in tone. On October 12, 1912, the *Arizona Democrat* wrote, "The Negroes who are responsible for allowing a mass meeting to protest against the segregation law are doing their race a great injury. The colored people in Arizona are nicely treated, and we suggest that they conduct themselves in such a manner that this kindly feeling will continue."[18]

Between 1913 and September 16, 1926, black students continued to attend separate facilities. Most of them attended classes in a makeshift building on the campus of Phoenix Union High School located at Van Buren and First Street in downtown Phoenix. On September 15, 1923, the school was moved to a frame and brick structure at Ninth and Jefferson Street. This site was larger and provided room for athletics, a

[17]Kotlanger, "Phoenix, Arizona," 455; Luckingham, *Minorities in Phoenix*, 134; Harris, *First 100 Years*, 65; *Arizona Democrat*, April 29, 1912. For more on W.E.B. Du Bois and Booker T. Washington and their views with regard to racial and gender equality, "the franchise," and black political philosophy, see Manning Marable, *W.E.B. Du Bois: Black Radical Democrat* (New York, 1987) and Louis Harlan, *Booker T. Washington: The Wizard of Tuskegee, 1901–1915* (New York, 1983).

[18]Kotlanger, "Phoenix, Arizona," 455; Luckingham, *Minorities in Phoenix*, 134; Harris, *First 100 Years*, 65.

science room, and a library. On August 18, 1925, the school board passed a resolution to purchase approximately 4.87 acres of land at 415 East Grant Street as a site for a high school for students of the "African race," at a cost of $11,000 from the city of Phoenix. Board minutes indicate that on December 21, 1925, Pierson and Johnson, the lowest bidders at about $110,000, were awarded the construction contract for the Colored High School building. The building was completed and accepted on September 16, 1926. In 1943 the name of the school was changed from Phoenix Colored High School to Carver High School, in honor of noted African American scientist George Washington Carver.[19]

Lack of proper funding led to the quick deterioration of Carver, and it was in awful condition when new principal W.A. Robinson was hired in 1945. "The high school had no library, no music equipment, no modern home economics, no shop equipment, and no art equipment," Robinson recalled. With regard to athletic equipment, the school possessed only "worn-out parts of football and basketball uniforms marked with the names of other schools in the system." Under Robinson's leadership, Carver improved. He stressed excellence and black pride. Meager improvement in the school's infrastructure brought the facility "up somewhere near the legal requirement that a segregated Negro high school be as good as the segregated white schools," Robinson recalled.

Despite its problems, Robinson believed, Carver had dedicated, capable, and committed teachers. Although most of its students lacked resources, Carver produced graduates who became successful citizens and leaders in the Phoenix community. The school became the center of much activity in the black community. Its auditorium offered a community meeting room, while its administrators supervised a number of programs and expositions. Carver provided evening education for adults, and its sports teams were routinely among the top in the state. Nevertheless, Robinson argued, Carver still offered "a separate but unequal education." The black school continued to lack the financial resources possessed by its white counterparts and was thus unequal and costly to operate.

Between 1940 and 1950, protests against segregation in schools intensified. By 1948, in fact, Lincoln and Eleanor Ragsdale had become powerful members of the NAACP and GPCCU, and the fiery Lincoln Johnson Ragsdale embodied the

[19]Donald R. Van Petten, *The Constitutional Government of Arizona* (Phoenix, 1952), 141; Harris, *First 100 Years*, 63–67.

movement's more aggressive and dynamic leadership.[20] Born on July 27, 1926 in Ardmore, Oklahoma, Lincoln Ragsdale completed high school there in 1944, as World War II reached a fever pitch. He entered the air force shortly after his high school graduation and was subsequently stationed at the famous Tuskegee Flying School in Alabama. After his graduation from Tuskegee in 1945 as a commissioned officer and pilot, he was assigned to Luke Air Field (now Luke Air Force Base) in Litchfield Park, Arizona, one of the first black pilots to serve there. Ragsdale settled in Phoenix after his honorable discharge from the air force in November 1945 and established himself quickly as a successful mortician, like his father and grandfather before him.

Eleanor Dickey Ragsdale was born in Collingdale, Pennsylvania, on February 23, 1926, and graduated from high school in Darby, Pennsylvania, seventeen years later. She then enrolled in Cheyney University of Pennsylvania, where she majored in elementary education. After her graduation in 1947, she migrated to Phoenix, Arizona, to accept a teaching position at Dunbar Elementary School for black children. Eleanor met Lincoln Ragsdale in 1947, and they were married two years later, just as their careers as business and civil rights leaders were taking off. Not long after they established a home in Phoenix, it became clear to the couple that the "desert oasis" that was now their home was no promised land for black people. Phoenix was segregated, hostile, and unequal.[21]

Under Lincoln Ragsdale's leadership, the NAACP joined with the GPCCU, the PUL, and other state and local organizations to press for school desegregation.[22] In 1951, Hayzel B.

[20]W.A. Robinson quoted in Harris, *First 100 Years*, 63–67; W.A. Robinson, "The Progress of Integration in the Public Schools," *Journal of Negro Education* 25 (Fall 1956): 371–79, Harris, *The First 100 Years*, 69–74, 81–98, 138–41; Lincoln Ragsdale, Sr., and Eleanor Ragsdale, interview conducted by Dean E. Smith, April 4, 1990 and November 3, 1990, Phoenix, Arizona, Arizona Collection, Arizona State University (hereafter TS, ACASU); Irene McClellan King, interview conducted by Maria Hernandez, TS, ACASU; *Arizona Sun*, September 13, 1946. Also see Mary Logan Rothschild and Pamela Claire Hronek, *Doing What the Day Brought: An Oral History of Arizona Women* (Tucson, 1992).

[21]Universal Memorial Center, Dr. Lincoln Johnson Ragsdale,Sr., 3; Lincoln Ragsdale, Enlisted Record of and Report of Separation: Honorable Discharge WD, AGO Form, 53-5, Air Corps (Washington, DC, November 19, 1945); Universal Memorial Center, Eleanor Dickey Ragsdale, 3–14. Lincoln Ragsdale also earned a Bachelor of Arts degree in business from Arizona State University and eventually completed a doctorate in business administration from Union Graduate School in Cincinnati, Ohio.

[22]Lori K. Baker, "Lincoln Ragsdale: The Man Who Refused to Be Invisible," *Phoenix Magazine* 28:1 (1993), 97.

Daniels, a member of the Arizona State Legislature's lower house—who was also the first African American to graduate from the University of Arizona College of Law in Tucson and the first African American admitted to the Arizona Bar—introduced a bill to allow schools to desegregate voluntarily. A counter-initiative seeking to mandate desegregation lost at the polls in 1952. Late that same year, however, largely through the efforts of the NAACP and the GPCCU, a bill passed in Arizona that made school segregation optional at both the elementary and high school levels. It was patterned after a California law that was later declared unconstitutional by the supreme court of that state. Not surprisingly, the Arizona measure lacked teeth and was not easily enforceable. White legislators and Phoenix law enforcement were unwilling to support it.

Although most Arizona cities desegregated their schools voluntarily, the Phoenix public school system refused. Lincoln Ragsdale believed that Arizona's educational system—and Phoenix's decision to remain segregated—were designed to "humiliate" black children and "teach them that they were inferior." The long-term effect of this treatment, Ragsdale argued, was to control African Americans and keep them "subservient." If a person is "beaten down and called a nigger often enough," he asserted, "he begins to believe it. . . . This is what the system [in] Arizona did."[23]

In an interesting and ironic turn of events, the desegregationists, led by Hayzel Daniels and Herbert Finn, then decided to attack their own law, arguing that any form of school segregation, optional or otherwise, was unconstitutional. Daniels found a good friend and a staunch advocate in Finn, who was as committed to desegregation as Daniels. Finn, a passionate Jewish attorney and committed civil rights activist, "took some hits for being on the front line of the desegregation effort," according to his daughter, Elizabeth Finn. In 1953, in fact, the *Phoenix Gazette* ran a cover story reporting that Herbert Finn had been elected president of the

[23]*Arizona Sun*, April 20, October 26, 1951, December 1, 1960; Daniels, "A Black Magistrate's Struggle," 335–38; Melcher, "Blacks and Whites Together," 195–216; Luckingham, *Minorities in Phoenix*, 161–62; William Mahoney interview, conducted by Mary Melcher, February 16, 1990, Phoenix, Arizona, Arizona Historical Foundation, Arizona State University; Lincoln and Eleanor Ragsdale, interview conducted by Dean E. Smith, TS, ACASU; Greater Phoenix Council for Civic Unity, ed., *To Secure These Rights* (Phoenix 1961), 9–13, 17–46; Harris, *The First 100 Years*, 69–74, 81–98, 138–41; Lincoln Ragsdale, Sr., quoted in Lincoln and Eleanor Ragsdale, interview conducted by Dean E. Smith, TS, ACASU.

Attorney Hayzel B. Daniels, 1953. (Courtesy of The George Washington Carver Museum and Cultural Center, Phoenix, Arizona)

Arizona Council for Civic Unity (ACCU), a statewide antidiscrimination institution that served as an umbrella organization for local groups such as GPCCU. "In those days," Elizabeth Finn recalled, "the paper printed the home address of persons who were mentioned in the newspaper. We received a letter postmarked the day after the article appeared, anonymously of course, calling him a 'nigger-loving kike'. In addition, I recall having to leave my house for two reasons as a youngster: because the roof was leaking and because we had received another bomb threat."[24]

Finn rarely backed down, however, and neither did Daniels. When asked on one occasion why he was so committed to

[24]Elizabeth Finn, "The Struggle for Civil Rights in Arizona," *Arizona Attorney* (July 1998), http://www.myazbar.org/AZAttorney/archives/July98/7-98a5.asp.

fighting for school desegregation through the courts, Daniels proffered emphatically, "People do not have the right to vote on my constitutional rights."[25]

Lincoln and Eleanor Ragsdale helped raise the first $5,000 needed by the NAACP, the GPCCU, and the ACCU to aid their attorneys in their efforts to sue the state in a heated battle for school integration. Tapping into every potential source of financial support, Lincoln Ragsdale also succeeded in persuading legendary conservative politician Barry Goldwater to donate $400 to the city's NAACP to help in the struggle to desegregate Phoenix schools. Goldwater would eventually become "one of the principal financial supporters of the suit." Then a city councilman, he later became a United States senator and the Republican nominee for president in 1964. The lawsuit, filed in United States District Court on behalf of African American parents of children seeking admission to the all-white Phoenix Union High School, was unsuccessful. Federal District Court Judge David Ling dismissed the case, advising the litigants to first seek redress in the state court system.[26]

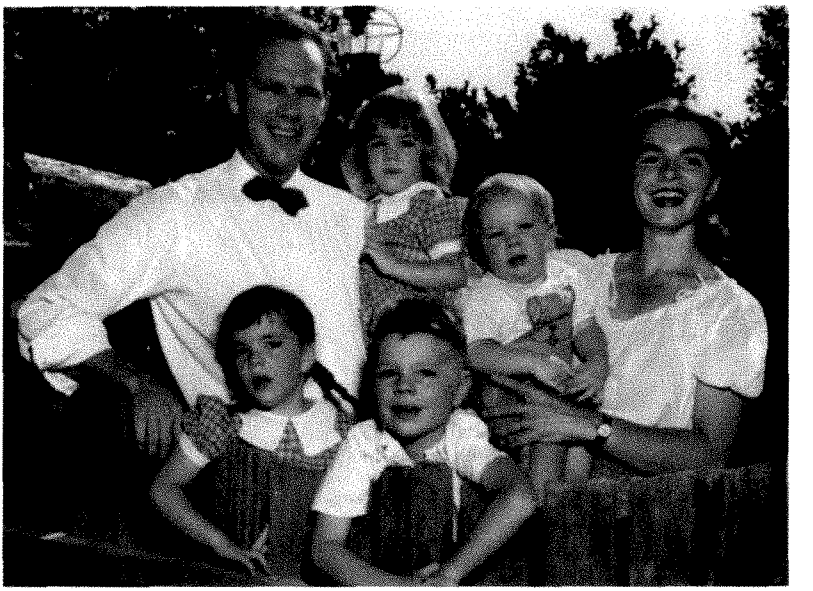
Working with black Arizona legislators Hayzel Daniels and Carl Sims, Lincoln Ragsdale, and white leaders such as Finn and Mahoney, activists responded to the recalcitrance of the Phoenix public school system by pressuring the white, male-dominated Arizona court system into outlawing racial segregation. In June 1952, Daniels, Mahoney, and Finn filed a lawsuit on behalf of "plaintiffs Robert B. Phillips, Jr., Tolly Williams, and David Clark, three black children seeking admission to Phoenix Union High School."

Mahoney was a particularly influential integrationist. Born in Prescott, Arizona, in 1916, William P. Mahoney, Jr., had a prestigious legal and political career. In addition to serving as Maricopa County attorney (1953–56), Mahoney was a trial judge advocate in the Pacific war crimes trials following World War II. In 1962, he was appointed U.S. ambassador to Ghana by President John F. Kennedy.[27]

[25]Ibid.; *Phoenix Gazette*, February 1, 1953.

[26]*Arizona Sun*, October 26, 1951; Finn, "The Struggle."

[27]*Arizona Sun*, February 13, 1953 and December 1, 1960; Melcher, "Blacks and Whites Together," 195–216; Luckingham, *Minorities in Phoenix*, 161–62; William Mahoney, interview conducted by Mary Melcher, TP, AHFASU; Lincoln and Eleanor Ragsdale, interview conducted by Dean E. Smith, TS, ACASU; Lincoln Ragsdale, interview conducted by Mary Melcher, TP, AHFASU; GPCCU, *To Secure These Rights*, 9–13, 17–46; Harris, *The First 100 Years*, 69–74, 81–98, 138–41. On the NAACP's methods for opposing school segregation, read March V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925–1950* (Chapel Hill, 1987); Christopher R. Reed, *The Chicago NAACP and the Rise of Black Professional Leadership, 1910–1966* (Bloomington, IN, 1997).



William and Alice Mahoney and family, 1953. (Courtesy of Hon. Elizabeth Finn, Presiding Judge, Glendale Municipal Court, Glendale, Arizona)

In May 2001, Joe Stocker, a friend of Mahoney's and a fellow civil rights activist, recalled his introduction to Mahoney, and the extent to which Mahoney dedicated himself to "the cause" and to soliciting Stocker's support. "I became involved with the Council for Civic Unity through an acquaintance, William P. Mahoney, Jr.," he remembered. "Bill Mahoney was an attorney at the time I first knew him, but he eventually became a leading democratic politician in Arizona. I got to Phoenix in 1946," Stocker recalled, and shortly "after I ran into Bill downtown in front of a place called Sam's Cigar Store, which at that time was a famous lunching place. Bill said, 'hey, we've got a [civil rights] organization going you ought to be a part of.' I was a flaming liberal out of the New Deal days and Bill was a liberal, and I said, 'Hey, great.'"[28]

The meeting between the two activists was Stocker's introduction to the GPCCU, where he ultimately served as president and executive secretary. Working alongside Mahoney, Daniels, and Finn to desegregate the Phoenix public schools, he lobbied the state legislature, wrote for magazines,

[28][Phoenix] *Jewish News* (May 11, 2001).

and raised money to support the NAACP and other civil rights causes. Stocker maintains that he was peripherally involved with the landmark desegregation case in Phoenix, and that others, including Daniels, Finn, and Mahoney played a more prominent role. Stocker's advocacy, organizational skills, and fundraising acumen, however, played a key role in the effort that he argues "broke the back of school segregation." Stocker later went on to become an active member of the Anti-Defamation League and the editor of the [Phoenix] *Jewish News*.[29]

The lawsuit that Daniels, Mahoney, and Finn filed on behalf of Phillips, Williams, and Clark in 1952 named members of the school's governing board as defendants. Financed by the NAACP, the GPCCU, the Ragsdales, and friends and associates of Stocker, the attorneys successfully argued the case in the Maricopa County Court against school segregation. Their arguments were based on reasoning used in recent California segregation cases that had attacked Mexican American school segregation. Like the attorneys in the California cases, Daniels, Finn, and Mahoney argued that the segregation of students for racial and ethnic reasons at the whim of school board members was an "unconstitutional delegation of legislative power."[30]

The attorneys also argued that the high schools in the Phoenix Union High School District,

> set apart for white students, particularly Phoenix Union High School, are superior to the schools set apart for pupils of the African race in that students of all races, colors, and national descent, except African, are admitted thereto, and in that segregation of African pupils by race has a detrimental effect upon such African pupils, imparting to them a stigma of inferiority, retarding their educational and mental development, and depriving them of some of the benefits they would receive in an integrated school system free from racial discrimination and segregation.[31]

[29]Ibid.

[30]*Arizona Sun*, February 13, 1953 and December 1, 1960; Melcher, "Blacks and Whites Together," 195–216; Luckingham, *Minorities in Phoenix*, 161–62; William Mahoney, interview conducted by Mary Melcher, TP, AHFASU; Lincoln and Eleanor Ragsdale, interview conducted by Dean E. Smith, TS, ACASU; Lincoln Ragsdale, interview conducted by Mary Melcher, TP, AHFASU; GPCCU, *To Secure These Rights*, 9–13, 17–46; Harris, *The First 100 Years*, 69–74, 81–98, 138–41; *Robert B. Phillips, Jr., et al. v. Phoenix Union High Schools and College District, et al.*, no. 72909, The Superior Court of the State of Arizona in and for the County of Maricopa, February 17, 1953, Phoenix, Arizona, 22.

[31]*Phillips v. Phoenix Union High Schools*, 22.

Superior Court Judge Fred C. Struckmeyer believed that the plaintiff's case was well argued and that racially segregated schools were both unlawful, narrowminded, and intolerant. In a landmark decision, Struckmeyer handed down the first legal opinion in the United States declaring school segregation unconstitutional. He ruled that Arizona's school segregation laws were specious because they constituted an "unconstitutional delegation of powers by the legislature to subordinate bodies."[32] Although many whites refused to accept or acknowledge Struckmeyer's ruling, the judge and his decision were preserved and sustained, in part, by his upstanding reputation.

Struckmeyer was considered a practical, fairminded person by many Phoenix residents, who understood and respected both the letter and spirit of the law. He was born in Phoenix in 1912 and became a Maricopa County Superior Court judge in 1950, serving through 1955. He later became the chairman of the Arizona Racing Commission, a formative defense litigator, and a member of the Arizona State Supreme Court from 1955 to 1982. Before his 1953 ruling, Struckmeyer had felt that school segregation by race was at best an arbitrary and capricious policy. By 1953, however, no doubt with the help of Daniels, Mahoney, and Finn, the magistrate had come to believe that school segregation was inherently racist and unconstitutional. His ruling reflected his belief system, pragmatism, and understanding of constitutional law.[33]

In his ruling, Struckmeyer declared, "[I]f the legislature can confer upon the school board the arbitrary power to segregate pupils of African ancestry from pupils of Caucasian ancestry, then the same right must exist to segregate pupils of French, German, Chinese, Spanish, or other ancestry; and if such unlimited and unrestricted power can be exercised on the basis of ancestry, it can be exercised on such a purely whimsical basis as the color of hair, eyes, or for any other reason as pure fancy might dictate." He went on to say, in his "Judgement and Order," that "the action of the Phoenix Union High Schools and Junior College District in segregating members of

[32]*Arizona Sun*, February 13, 1953 and December 1, 1960; William Mahoney, interview conducted by Mary Melcher, TP, AHFASU; Lincoln and Eleanor Ragsdale, interview conducted by Dean E. Smith, TS, ACASU; Lincoln Ragsdale, interview conducted by Mary Melcher, TP, AHFASU; GPCCU, *To Secure These Rights*, 9–13, 17–46.

[33]See "Fred C. Struckmeyer, Jr.," at http://www.struckmeyerandwilson.com/fstruckmeyer.html. This is the official website of the law firm of Struckmeyer and Wilson. The firm was founded in 1971. At that time, it was known as Maupin, Wilson & Maud, later changed to Maupin and Wilson. In 1982, with the addition of retired Arizona Supreme Court Chief Justice Fred C. Struckmeyer, Jr., the firm became known as Struckmeyer and Wilson.

Judge Fred C. Struckmeyer, 1953. (Courtesy of the Herb and Dorothy McLaughlin Photograph Collection, Arizona State University Libraries)

the African race from those of the Caucasian race is unlawful in that it is a denial of the equal protection of law, and an unconstitutional delegation of power to an administrative board." After delivering the decision, Struckmeyer proclaimed that " a half century of intolerance is enough."[34]

Eleanor Ragsdale remembered sitting in the courtroom with her husband, after participating in a contentious struggle to desegregate the city's education system, the day Struckmeyer rendered his decision. "I felt it was a giant step in the right direction," she recalled.[35] Many Phoenix Union High School board members, including its president Dr. Trevor G. Brown, Frank Haze Burch, Dr. Norman A. Ross, and Hay Hyde, wanted to appeal the decision. In the end, though, the group decided that the U.S. Supreme Court would probably outlaw school segregation nationwide, and therefore voted to adhere to Struckmeyer's ruling. It is worth noting here that it was a Mexican American initiative that informed a key African American strategy in fighting school segregation.

Aided by a powerful legal precedent and by financial help from leaders such as the Ragsdales, Daniels and Finn submitted a lawsuit against Wilson Elementary School District in Phoenix in 1953, just months after the initial Struckmeyer ruling. Judge Charles E. Berstein ruled in this case that segregation in elementary schools was unconstitutional. Like the members of the Phoenix Union High School board, Wilson's board members accepted and abided by the court's decision.

Largely ignored by historians of the larger movement to desegregate America's schools, Phoenix, Arizona, in the words of Mahoney, is nothing more than "a footnote in *Brown v. the Board of Education of Topeka, Kansas*" decision of 1954. The Supreme Court requested a copy of the Phoenix, Arizona, rulings, but failed, inexplicably, to acknowledge the important role they played in the national ruling against segregated schools.[36]

[34]Hon. Fred Struckmeyer quoted in the *Arizona Sun*, February 13, 1953; Luckingham, *Minorities in Phoenix*, 161–62; *Phillips v. Phoenix Union High Schools*, 22.

[35]Hon. Fred Struckmeyer quoted in the *Arizona Sun*, February 13, 1953; Luckingham, *Minorities in Phoenix*, 161–62; Eleanor Ragsdale quoted in Lincoln and Eleanor Ragsdale, interview conducted by Dean E. Smith, TS, ACASU.

[36]Luckingham, *Minorities in Phoenix*, 161–62; Eleanor Ragsdale quoted in Lincoln and Eleanor Ragsdale, interview conducted by Dean E. Smith, TS, ACASU; William Mahoney, interview conducted by Mary Melcher, TP, AHFASU. On the significance of the *Brown v. Board of Education* decision at the national level, see Richard Kluger, *Simple Justice: The History of* Brown v. Board of Education *and Black America's Struggle for Equality* (New York, 1975).

Dr. Lincoln J. Ragsdale, Sr. leads a march in protest of Phoenix's segregated schools, neighborhoods, and places of public accommodation. (Courtesy of Lincoln Ragsdale, Jr.)

School desegregation in Phoenix was bittersweet. The first casualty of desegregation was George Washington Carver High school. It was closed in 1953. Four hundred eighty-one Carver students were directed to schools in their residential zones, primarily Phoenix Union High School and South Mountain High School. The same action was taken in Phoenix's elementary schools, where students were instructed to report to schools in their neighborhoods. Demographics, residential patterns, and economics all contributed to an educational system that was far from integrated. White students remained in predominantly white schools, while minorities found themselves again in underfunded minority neighborhood schools. Some black children ended up in former predominantly Mexican American schools, while some Mexican American children found themselves in former predominantly black schools. Only a small group of black Phoenicians resided in white school precincts.[37]

[37]*Arizona Sun*, February 13, 1953; Luckingham, *Minorities in Phoenix*, 162; Baker, "The Man Who Refused to Be Invisible," 97.

W.A. Robinson, Carver's former principal, had mixed feelings about the practicality of school desegregation. He believed that integration was in some way more favorable, in principle, than the former pattern of complete segregation in the schools. Nevertheless, he argued that Phoenicians maintained "a sort of belief that desegregation can be carried out successfully without greatly disturbing the former pattern of school attendance and teacher employment."[38]

Like many African Americans, Robinson also was concerned about the possible negative effects of desegregation in black communities. Segregation allowed black institutions to emerge that catered to African Americans in ways that white institutions would and/or could not. Leaders like Robinson wanted to know how black children would be treated in all-white schools. If desegregation meant that black children would have to learn while being ostracized, mocked, terrorized, beaten, and humiliated, many black people wondered how efficacious such an education would be. Teachers who worked at desegregated schools were often unwilling and unprepared to teach multiracial classes. Moreover, few teachers and personnel from Carver found other jobs in their chosen profession. Calvin C. Goode, a graduate and employee of Carver and a future Phoenix City Council member, recalls that after his administrative position at Carver was eliminated, he was not considered for a management job at the Phoenix Union High School bookstore because it was considered unacceptable "to have a black man supervising white women."[39]

Despite the limitations of the *Phillips v. Phoenix Union High School* ruling, the subsequent ruling in the *Wilson* case, and the *Brown v. Board of Education* ruling in 1954, these cases did open the door for future innovations in civil rights. The determination and spirit of civil rights leaders, particularly the uniquely multiracial association of Western activists in Phoenix who often led the way in winning victories for racial equality, contributed greatly to the demise of de jure school segregation. The strength of their organizations, the trust of their constituents, and the dedication of their partners and those who adopted their strategies worked to pressure the courts and, ostensibly, private institutions and governmental leaders and agencies, to render decisions that

[38]Robinson, "The Progress of Integration in the Public Schools," 371.

[39]Elizabeth Finn, "Civil Rights Struggles for Every Generation," *Arizona Attorney*, July 1998, http://www.myazbar.org/AZAttorney/archives/July98/7-98a5.asp; Lincoln and Eleanor Ragsdale, interview conducted by Dean E. Smith, TS, ACASU.

systematically undermined generations of legal inequality. These changes provided for the advancement and diversification of educational institutions, electoral politics, the arts, and the nation's social consciousness. It also opened up new avenues for expressions of unity and identity among myriad groups and paved the way for today's emphasis on diversity and multiculturalism.

Still, it must be noted that in fundamental ways, the *Brown v. Board of Education* ruling was a mixed blessing. In the decades since the decision was rendered, the demographics of the country have changed in ways the authors of the landmark ruling never envisioned. As journalist Claudio Sanchez has argued, "[T]hroughout the country, patterns of housing and immigration have created neighborhoods that are extremely segregated. And in such areas, the quality of education provided by public schools is far from equal. Nowhere is this more evident than in California, where 100 percent of the students in some schools are members of minority groups."[40]

Yale constitutional law scholar Jack M. Balkin has stated,

> Criticized and even openly defied when first handed down, in a half century *Brown* has become a venerated symbol of equality and civil rights. Its meaning, however, remains as contested as the case is celebrated. Since the ruling, constitutional interpreters from myriad disciplines and walks of life have found within it different meanings and have evaluated its legacy differently. Both supporters and opponents of affirmative action, for example, have claimed the mantle of *Brown*, both criticizing the other side for betraying its spirit. Meanwhile, the opinion itself has often been condemned as spiritless, weak, and written to avoid controversy.[41]

Indeed, Balkin declares that fifty years after *Brown*, "America's schools are increasingly divided by race and class. Liberals and conservatives alike harbor profound regrets about the development of race relations since *Brown*, while disagreeing heatedly

[40]Claudio Sanchez, "Fifty Years After *Brown v. Board of Education:* Patterns of Immigration Often Create Schools Contrary to Ruling," National Public Radio (March 8, 2004): http://www.npr.org/templates/story/story.php?storyId=1751945.

[41]Jack M. Balkin, ed., *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decision* (New York, 2002), 3.

about the proper role of the courts in promoting civil equality and civil rights."[42]

Derrick Bell, legal scholar and visiting professor at New York University Law School, posits that America has yet to come to terms with its white supremacist past and present. The result of this historical amnesia and contemporary cecity, he asserts, is the ongoing segregation and socioeconomic marginalization of people of color. *Brown* did not eliminate the legacy of white supremacy, white racism, or white socio-economic domination. He asserts,

> The existence of a dominant white race and the concept of color-blindness are polar opposites that the Equal Protection Clause cannot easily mediate. It has proven barely adequate as a shield against some of the most pernicious modes of social domination. The Equal Protection Clause all too readily lends itself to the staid formalisms that both "separate but equal" and "color blindness" emblematize. Rather than critically engaging American racism's complexities, the Court substituted one mantra for another: where "separate" was once equal, "separate" is now categorically unequal.[43]

Bell, perhaps better than most contemporary critics of the *Brown* ruling, offers astute observations of the limitations of the decision. His sage interpretation of the ruling and his view of its legacy remind us that many challenges still lie before us. History has shown, however, that much can be accomplished at the local, state, and federal level through hard work and coalition building in the pursuit of true social, economic, and political equality. The courts will no doubt continue to play a critical role in the ongoing quest for racial equality. Nevertheless, historical precedent has also demonstrated that to be successful the courts must cease to view racism as a fixable deviance, for it has functioned and continues to function unwittingly and consciously as an ideological lens through which many Americans view themselves, their nation, and the world. Most people have come to view the law as inherently constructed to eradicate racism, rather than as holding the potential to take part in its consolidation. As Bell declares, by dismissing "separate but equal" without "dismantling" it, the

[42]Ibid.

[43]Derrick Bell, "Bell, J., dissenting," in Jack M. Balkin, ed., *What Brown v. Board of Education Should Have Said*, 3.

Court seemed to foretell, if not "underwrite," the failure of integration.[44] To eradicate de facto segregation, America must dismantle its resilient, subterranean edifice of racial separation. This will take a monumental effort, but history has demonstrated that there have always been, and will continue to be, people who will rise to the occasion.

[44]Ibid.

Wide Open Spaces? The Texas Supreme Court and the Scramble for the State's Public Domain, 1876–1898

Paul Kens

Under the terms of the 1845 agreement by which it joined the United States, Texas retained ownership of its public domain. This arrangement was unique in the late nineteenth-century American West. Outside of Texas, the federal government controlled virtually all public lands. Even though it occasionally gave the states land to use for specific purposes—public education or the building of railroads, for example—the decisions driving how the public domain would be used and distributed originated in Washington. In Texas it was the other way around. The state, not the federal government, controlled distribution of public land. Estimated to be approximately 170,000,000 acres,[1] Texas's public domain was roughly equivalent to the size of modern California and Arizona combined and larger than the total area of New York, Pennsylvania, Massachusetts, Rhode Island, Maine, New Hampshire, Vermont, New Jersey, Maryland, Delaware, and North Carolina.

The state's use of this enormous resource provides an opportunity to compare local and federal policymaking on the same issue. This comparison should be of interest to historians of the American West who challenge the old vision of the taming of the frontier as a triumph of individualism and self-

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[1]Thomas Lloyd Miller, *The Public Lands of Texas 1519–1970* (Norman, OK, 1972), vii; Wilson Elbert Doleman, "The Public Lands of Western Texas 1870–1900" (Ph.D. diss., University of Texas at Austin, 1974), 9.

determination. The West did not develop itself, they maintain. Rather its development was, to a great extent, determined by policies that the federal government adopted.[2] A question that remains is, What difference does it make? This paper, which is an account of the Texas Supreme Court's impact on the state's land policy, does not attempt to answer that question fully. Nevertheless, Texas's unique circumstance provides worthwhile insight.

Texas land policy, as it came out of the legislature, resembled the federal government's policy. It included plans to encourage immigration, build an infrastructure of Western society, increase the land's value, and use it to reduce public debt. Although early land policy vacillated, it is safe to say that elected officials tended to be generous when distributing public lands. There were exceptions, to be sure. But it was not until the middle of the 1870s that the thought began to settle in the minds of Texans that the public resource on which they had depended for so much was running out.

Perhaps for this reason, the Texas Constitution of 1876 and the debates of the constitutional convention paid significant attention to land policy. Most of the constitutional provisions directly dealing with distribution of the state's public domain reflected what might be called a populist model for land policy. The constitution granted small plots to homesteaders and allowed sale of public land to "actual settlers" only. It also dedicated one-half of the public domain to public education.

But the constitution also demonstrated that Texas public officials had other ideas about how to use the public domain. From the time it had become a state, Texas had often adopted policies based on what might be called a business venture model. This model proposed using public land to pay the debt and to build an infrastructure through grants to railroads and other corporations. Whether such grants of land represented good public policy and whether they resulted in a fair distribution of the public domain are matters of debate. But, to the extent that they removed from the public domain lands that would otherwise be available to settlers, these grants were in conflict with the populist model to use the land for homesteading and public education.

How much of the Texas public domain was actually used for homesteading, education, or other public purposes based on the populist model is also a matter of dispute. Texas legislators faced considerable temptation to use the lands to

[2]Karen R. Merrill, "In Search of the 'Federal Presence' in the American West" *Western Historical Quarterly* (Winter 1999): 449–73.

solve short-term financial problems. They also faced pressure from individuals and corporations that hoped to monopolize large sections of the public domain for private gain. Some of those companies sought direct grants of land. Others sought to lease cheaply or simply to use large expanses of public land without making a claim of ownership.

The conflict between these types of claims and the populist sentiment was often manifested in legal disputes involving specific parcels of land. Those cases, and the opinion that resulted, highlight the role that courts have played in shaping the American West. With respect to the public domain, the emphasis of past studies has been on the federal courts. But legal historians have begun to take a closer look at the role of the state courts in policymaking.[3] This paper is also about that role. Specifically, it emphasizes cases in the Texas Supreme Court from 1876, when Texas officials began to admit that the state's public domain was not inexhaustible, until 1898, when the court expressly declared it exhausted.

ACTUAL SETTLERS

The idea of settling the frontier with a class of yeoman farmers provided a strong undercurrent in American politics from the time of the framing of the Constitution.[4] For some people this naturally led to the belief that the nation's public domain should be granted or sold in small plots to homesteaders or "actual settlers," who were expected to cultivate and improve the land. Although the federal government never fully embraced this idea, it eventually became a part of federal land policy when Congress passed the Homestead Act of 1862. The alluring image of a nation settled by small farmers became so fixed in the American psyche that it remained a key part of public discourse long after land that could sustain a small farm was available.[5]

[3]Carol Chomsky, "Progressive Judges in a Progressive Age: Regulatory Legislation in the Minnesota Supreme Court, 1880–1925," *Law and History Review* 11 (1993): 383–440; Kyle T. Murray, "Looking for Lochner in All the Wrong Places: The Iowa Supreme Court and Substantive Due Process Review," *Iowa Law Review* 84 (1999): 1142–81.

[4]Roy M. Robbins, *Our Landed Heritage: The Public Domain 1176–1970*, 2d ed. (Lincoln, NE, 1976) and Daniel Feller, *The Public Lands in Jacksonian Politics* (Madison, WI, 1984).

[5]E. Louise Peffer, *The Closing of the Public Domain: Disposal and Reservation Policies 1900–50* (Stanford, CA, 1951).

Like the federal policy of the latter half of the nineteenth century, Texas policy regarding distribution and use of the public domain idealized homesteading. Pointing to statutes passed in 1838 and 1841, Texans like to claim that they had the nation's first homestead laws.[6] From that point until the 1870s, Texas policy encouraged actual settlers to take up small plots through pre-emption, which required payment of a small fee, or homestead, which was an outright grant. In 1876, Texans took a step further by making the right to a homestead a constitutional guarantee.

Texas's commitment to the populist model for land policy was evident in article XIV, section 6, of the Texas Constitution of 1876, which guaranteed to every head of a family a homestead right of one hundred sixty acres of public land, on condition that he occupy it for three years and pay a fee. Single men eighteen years and older, were guaranteed eighty acres.

Regardless of whether they required payment of a fee, all preemption and homestead laws required settlers to follow certain steps before they could claim full ownership of the property. Typically these laws required settlers to enter onto the land with the intent of making it their home. Either before entering or at some specified time soon thereafter, they would be required to file some sort of notice or survey. The laws then required that they cultivate the land or make improvements, stay on the land for a given time, and sometimes pay a fee. After satisfying these requirements, the settlers could file for a patent that transferred ownership to them from the state.

The Texas Supreme Court early established a rule that "actual settlers are favored by the law." By this it meant that homesteaders who had legally settled on a plot and had begun improvements had an equitable interest even if they had not yet complied with all the requirements of the applicable homestead or preemption statute.[7] The court consistently ruled that a settler's failure to file a survey within the time prescribed by statute did not invalidate the settler's claim to the land. Similarly, filing an incomplete or inaccurate survey did not defeat the claim. The court did not treat the time limits for filing as a deadline but rather as a device to protect the settler's claim from being located by others during the prescribed period.

[6]Ruben McKitrick, *The Public Land System of Texas, 1823–1910:* Bulletin of the University of Wisconsin, no. 905 (Madison, 1918): 47–52; Aldon Socrates Lang, *Financial History of the Public Lands of Texas:* The Baylor Bulletin, vol. XXXV, no. 3 (July 1932), 110–14; Miller, *The Public Lands of Texas,* 34–36.

[7]*Cannon's Adm'r v. Vaughn,* 12 Tex. 399 (Tex., 1854); *Summers v. Davis,* 49 Tex. 541 (Tex., 1878).

The Texas Supreme Court early established a rule that "actual settlers are favored by the law." Courtroom in temporary Capitol Building. (Courtesy of Center for American History, UT-Austin, CN 12101)

The Texas court's rule was unusual. By contrast, federal courts tended to strictly interpret federal homestead and preemption laws, holding that, until they had satisfied all the requirements of the law, homesteaders had no right, vested or equitable, to the property.[8]

The rule favoring actual settlers did not mean that anyone who settled on public land automatically gained an equitable interest in the land. Nor did it mean that actual settlers won most individual disputes over the ownership of land. What it did was create a presumption in favor of those who settled on plots of land and made improvements with the intention of making it their homestead. The impact of this presumption was fairly obvious in cases where neither claimant had received final title to the land. It favored an actual settler against another person who had simply fenced the land and claimed it as his own, for example, or against a person who had filed for a homestead but never occupied the land.[9]

[8]*Frisbie v. Whitney*, 76 U.S. (9 Wall.) 187 (1869); *Yosemite Valley Case (Hutchings v. Low)*, 82 U.S. (15 Wall.) 77 (1872).

[9]*Palmer v. Chandler*, 47 Tex. 332 (1877); *Poston v. Blanks*, 14 S.W. 67 (commissioner's decision, 1890); *Swetman v. Sanders*, 20 S.W. 124 (commissioner's decision, 1892).

Occasionally the presumption even worked in favor of a settler's claim against another who had full title of the land. *Gammage v. Powell* (1884) provides an example of how far the court was willing to go in recognizing the homesteader's equitable interest.[10] Facing a public debt left over from the Civil War, in 1879 the legislature passed a bill that provided for the sale, at fifty cents per acre, of unappropriated public domain in forty-four counties.[11] But a caveat provided that the act would not be construed as to prohibit the right of acquiring a homestead within the reservation the act had created. T.J. Powell settled on a homestead in Nolan County, one of the forty-four, on December 20, 1880. The homestead law then in force required that a settler make an application for the homestead within thirty days after entering the land. Powell failed to do so. On April 11, 1881, T.T. Gammage claimed, under a headright certificate, a block of land that included Powell's homestead. A headright was a form of land grant that Texas had used to encourage early immigration or as a reward for wartime services. It gave the recipient a right to claim a block of land but did not require that he or she settle on it. The result was a lively trade in headright certificates.

Gammage received a patent on October 18, 1881. Only after that, on October 28, 1881, did Powell file his homestead application. The court immediately recognized the long-standing presumption in favor of actual settlers and ruled that Powell's failure to file within the thirty days did not invalidate his homestead claim. After that time, he maintained an equitable right to the land that could still ripen into a complete legal title unless another person had, in the meantime, obtained superior legal title. A patent would usually be evidence of a superior legal title. In this case, however, the court ruled that the act of 1879 had set aside the land for two purposes, sale to reduce the public debt and settlement as homestead. A patent based on headright, it concluded, was invalid and created no barrier to Powell's homestead claim.

Cases like *Gammage v. Powell* involved persons who had clearly committed to settle on the land. But not every person who claimed a homestead right was an actual settler. In *Garrett v. Weaver* (1888), for example, the court ruled that a party that had filed a homestead claim but had never lived on the land lost all rights to the claim when they failed to file a timely

[10]*Gammage v. Powell*, 61 Tex. 629 (Tex., 1884); see also *Cravens v. Brooke*, 17 Tex. 268 (Tex., 1865).

[11]McKitrick, *The Public Land System of Texas*, 86, citing act of July 14, 1879. Civil Statutes 2: 681.

survey.[12] In a similar vein, it held that people who already owned a home could not claim another plot as a homestead.[13]

In closer cases, however, the court tended to be generous in determining who qualified as an actual settler. It did not require that a person settle on the land with the intention of claiming it as a homestead. Settlers who originally came as a purchaser or lessor could, on discovering that the land was actually public domain, repudiate the contract or lease and claim the land as a homestead.[14] Intent to stay on the homestead site seemed to be the key factor. If a settler sufficiently demonstrated that intent, the fact that he continued to farm other land as a tenant would not invalidate his homestead claim.[15]

In March 1888, Richmond Hubbard filed application for a homestead in Victoria County. He and one son went to the property, set some posts, and built a small shanty. After a week had passed, Hubbard left his son at the claim and returned to work his crop on land he was renting. He lived on the rental property with his wife and the rest of his family until July, returning to the claim every week or so to help his son with improvements on the homestead claim. In July the entire family moved to the homestead. In 1893, the Texas Court of Appeals had no difficulty in determining that Hubbard's actions were sufficient to demonstrate that he had settled on the land for the purpose of making it his homestead.[16]

About a month later, the court of appeals considered a similar situation. W.R. Lowrie and W.H. Cornelius filed homestead claims, went to the property, where they spent a day making improvements, returned to rented land to work their crops, then moved their families to the homesteads several months later. Although Lowrie and Cornelius had not left anyone to work on the homestead claim, in *Busk v. Lowrie* the lower court once again found their acts sufficient to validate their homestead claims.[17]

Although the statute implementing article 14, section 6 required that every application for homestead include "a statement under oath that [the applicant] has actually settled on the land he claims," the court of appeals believed that

[12]*Garrett v. Weaver*, 7 S.W. 766 (1888).

[13]*Gambrell v. Steel*, 55 Tex. 582 (1881); *Garrison v. Grant*, 57 Tex. 602 (1882).

[14]*Palmer v. Chandler*, 47 Tex. 332 (1877); *Swetman v. Sanders*, 20 S.W. 124 (commissioner's opinion, 1892).

[15]*Thomas v. Porter*, 57 Tex. 59 (commissioner's opinion, 1882).

[16]*Traylor v. Hubbard*, 22 S.W. 241 (Tex. Civ. App., 1893).

[17]*Busk v. Lowrie*, 22 S.W. 414 (Tex. Civ. App., 1893).

construing that language literally would be exceedingly harsh and inequitable. Following the tendency of Texas courts up to that time, in *Hubbard* and *Busk* it broadly defined the statute to mean that individuals who filed a claim and sufficiently demonstrated an intent to settle on the land obtained an equitable interest in the property.

In 1895, the Texas Supreme Court seemed to signal a reversal of course when it overruled the court of appeals in *Busk v. Lowrie.* The statute requires the applicant to swear that he has actually settled, and not that he would settle on the land sometime in the future, wrote Justice Brown. It was clear to him that the actions taken by Lowrie and Cornelius did not constitute actual settlement and, therefore, gave them no rights to the land. "If it is harsh," Brown concluded, "it is nevertheless the law, and the courts cannot change it."[18]

There are several possible explanations for the court's reversal. One possibility is that it may not have been signaling a reversal of direction at all. The high court may have merely interpreted the facts of *Busk v. Lowrie* differently from the court of appeals and thought that Lowrie and Cornelius acted more as if they were staking a claim than settling on the land. One problem with this idea is that the high court's language indicated a more fundamental disagreement. Another possibility is that the change in direction resulted from a change in the makeup of the three-member court. Thomas J. Brown joined the court in 1893, and Leroy G. Denman joined in 1894. A weakness of this explanation is that Governor Jim Hogg, a progressive-leaning Democrat, originally appointed both of the new judges to vacant seats. It therefore seems unlikely that they were philosophically in favor of making it harder for Texans to claim a homestead. A third possibility is that the economic depression of 1895 played a role in changing the court's attitude toward homestead laws.

There is, perhaps, a better explanation for the court's apparent change of sentiment. Although it is tempting to portray land cases as conflicts between populist and business venture models, the constitution's provision setting aside one-half of the public domain for public education makes the issue more complex. The one-half designated for education was not surveyed and set aside. It was an abstract figure rather than a physical place. Consequently, the impact of the school land was not immediately obvious. By 1895, however, virtually everyone in Texas, including justices of the state supreme court, realized that the state was simply running out of land to

[18]*Busk v. Lowrie,* 23 S.W. 983, 985 (Tex., 1895).

give away. Homesteaders, like railroads and cattlemen, were demanding land that did not exist or had to come from the percentage of the public domain that the constitution designated for public schools. In 1898, the Texas Supreme Court ruled in *Hogue v. Baker* that the vacant public domain available for homestead had been exhausted.[19]

RAILROADS AND THE PUBLIC DOMAIN

It is interesting that article 14, section 3 of the constitution of 1876 was written in the form of a restriction of legislative authority. It begins, "The Legislature shall have no power to grant any of the lands of this State to any railway company except on the following restrictions and conditions." One of those conditions limited railroad grants to sixteen sections per mile of track laid and required that ten miles of road be completed and operational before any land could be transferred. Another required that railroads alienate—that is transfer or sell—the land within twelve years or forfeit their rights and return the land to the public domain. Perhaps most importantly, article 14 provided that the legislature could grant land to railroads through general laws only. It could not pass special legislation that would grant land to one specific company or for one specific line. The language of article 14, section 3 reflects ambivalence regarding the venture capital model of land policy, an ambivalence that was borne out both in the history of the state's use of railroad land grants and during debates of the constitutional convention.

A short overview of the history of railroad land grants in Texas before 1876 will illustrate that state policy fluctuated wildly over time. The first of these grants occurred in 1852 when the legislature created nine railway companies by special charter and granted to those companies the right to eight sections of land per mile of track completed. In 1854, the legislature passed a general law granting to any railway in the state sixteen sections of land per mile of road completed. In the meantime, motivated by a desire for a railroad traversing the state, the legislature developed an incredible scheme that created the Mississippi and Pacific Reserve. This plan, enacted in 1853, offered to any company that undertook the task a three-hundred-foot right-of-way across the state and twenty sections of land per mile of road completed. What made the

[19]*Hogue v. Baker*, 45 S.W. 1004 (1898).

plan remarkable, however, was that it cut out a massive chunk of the public domain and gave the railroad an exclusive right to choose its land from within that area. Until the railroad completed construction and chose its land, no one else could make a claim within this reserve.[20] In 1856, the Memphis, El Paso, and Pacific Railroad Company received a charter to build the railway. It started but did not complete the project within the time period specified in the statute.

As might be expected, Texas citizens, especially those who held land certificates, deeply resented the existence of this reserve. Under pressure from that element, state policy took a 360-degree turn in 1856, when the legislature passed a new law that opened the Mississippi and Pacific Reserve to general claims, the same as any other portion of the public domain.[21] Then, in another turnaround, the legislature passed two laws extending the time for the railroad company to complete the line. The last of these, passed in 1866, gave the company ten more years.[22] Policy flipped once again when the constitution of 1869 prohibited grants of land for internal improvements and provided that all public lands previously reserved for the benefit of railway companies should be withdrawn and open to general claim.[23] A bankruptcy trustee for the Memphis, El Paso, and Pacific Railroad Company challenged this provision in federal court. In *Davis v. Grey* (1872), the U.S. Supreme Court ruled that the state's attempt to repeal the Mississippi and Pacific Reserve violated the prohibition of article I, section 2 of the U.S. Constitution that "no state shall pass any law impairing the obligation of contract."[24] Subsequently, in 1873, the state passed a constitutional amendment allowing the legislature to pass individual bills granting railroads twenty sections of land per mile of road completed. The constitution of 1876 allowed the legislature to pass a general law respecting land grants but limited the grants to sixteen

[20]Lang, *Financial History*, 102; McKitrick, *The Public Land System of Texas*, 63–67; Miller, *The Public Lands of Texas*, 99; Doleman, "The Public Lands of Western Texas," 15. Article 14, section 3 of the constitution of 1876 also prohibited the legislature from setting aside public lands as a reserve like the Missouri and Pacific Reserve.

[21]Lang, *Financial History*, 103; McKitrick, *The Public Land System of Texas*, 69; Law of August 26, 1856, art. 2577; John Sayles and Henry Sayles, eds., *Early Laws of Texas: General Laws from 1836 to 1879*, vol. 2 (St. Louis, MO, 1888), 386.

[22]See *Davis v. Grey*, 83 U.S. (16 Wall.) 203, 206–207 (1872).

[23]Tex. Const. of 1869, art. 10, secs. 5 & 7; Lang, *Financial History*, 102–103.

[24]*Davis v. Grey*, 83 U.S. 203 (1872).

sections per mile and provided that no portion of the public domain could be reserved for grants to railroads.[25]

Debates in the 1875 constitutional convention reveal the same ambivalence. The underlying premise favoring a policy of land grant to railroads was roughly "if you build it, they will come." Railroads, supporters said, would encourage immigration which, in turn, would push up land values and increase commerce and prosperity. A policy of continuing land grants would allow the state to avoid the debt that would otherwise result from issuing government bonds to support railroad building. It would reduce the rate of taxation on individual citizens and increase the value of public lands.

One interesting aspect of the debate was that it included an element of sectionalism. Railroad lines, some of which had been built before the Civil War, connected many towns in the eastern part of the state. Despite plans for a great trunk line across the state, the western frontier had been left out. Urging that a policy prohibiting land grants to railroads would be unfair to them, westerners sometimes made slightly exaggerated claims about the benefits of railroads. Henry C. King, the delegate from Kendall County, emphasized the advantages railroads offered in enhancing property values, increasing population, "and all the innumerable elements of development and civilization that follow in their train." He then put a different twist on the argument observing that "there is not a citizen of the thousand miles of frontier who has not been for years looking to the iron horse as his best and only secure hope of deliverance from the scalping knife of the Comanche, the Kiohwa [sic], and the Apache."[26]

Easterners had the advantages of railroad transportation. But many Texans apparently came to believe that the state had paid too much for its whistle. They complained about fraud. They complained about cost. And they complained that many railroads had not been held to the restrictions of their charters or had failed to complete the routes they had promised. The most important points made against land grants for railroads, however, were that they reduced the amount of public domain that would be available to support education and that they reduced the amount of free or cheap land available for actual settlers. Mr. Robertson, a delegate from Bell County, stood the

[25]Tex. Const., art. 14, sec. 3; Lang, *Financial History*, 105; Doleman, "The Public Lands of Western Texas," 15; McKitrick, *The Public Land System of Texas*, 68.

[26]S.S. McKay, *Debates in the Texas Constitutional Convention of 1875*, 123. For other examples of these arguments, see pp. 116, 119–27, 405.

"if you build it, they will come" argument on its head. "Railroads do not bring our broad acres into cultivation and will not do so," he said. "Railroads will not populate the country. You must give advantages to the tillers of the soil to do that. Increase your commerce and the railroads will come."[27]

The new constitution's provisions regarding land grants to railroads thus appeared to be a compromise between the competing models for land policy. The legislature did not have authority to enact special laws that would give both a charter and a grant of land to a given railroad company. But it did have the authority to grant charters giving a company the right to build a certain line. It now also had restricted authority to enact a general law providing grants of land to any railroad that built a line. It immediately exercised that authority with the enactment of a general railroad land grant law in 1876.[28] Subsequently, the legislature approved 126 new charters, and railroads built three thousand miles of track. The new law allowed the state to be generous with its public domain. Between 1873 and 1882, Texas gave more land to railroads than in any other time in history. Realizing that public domain was running out, however, the legislature in 1882 reversed course and repealed the act of 1876.[29]

Repeal of the land grant system did not end railroad efforts to claim public lands, however. The Texas Supreme Court faced a number of cases involving the efforts of a variety of railroads to continue to claim free public land after the 1882 prohibition. In these cases, the Texas Supreme Court of the late 1880s and 1890s tended to be extremely protective of the public domain.

In *Thomson v. Baker* (1896), a railroad's receiver tried to claim 872 sections of land granted to the railroad under an 1879 statute. That statute provided that the governor was to inspect the line and, when satisfied that it was complete, direct the commissioner of the general land office to issue certificates for the land. The governor inspected the line in

[27]Ibid., 411–12. For other examples of these arguments, see pp. 116, 124, 131, 408–12.

[28]Law of August 16, 1876, art. 4242; Sayles, *Early Laws of Texas*, vol. 3, 449; Lang, *Financial History*, 105.

[29]Reed, *A History of the Texas Railroads*, 154–55; McKitrick, *The Public Land System of Texas*, 68; Lang, *Financial History*, 106, citing Revised Civil Statute of 1895, p. 457. Commentators have noted that the state had actually issued certificates for eight million acres more than it possessed. Charles S. Potts, *Railroad Transportation in Texas*; Bulletin of the University of Texas no. 119 (Austin, 1909), 101; McKitrick, *The Public Land System of Texas*, 68; Lang, *Financial History*, 105.

1882, but the legislature enacted the repeal of all laws granting lands to railroads before the certificates were issued. Fourteen years later, the railroad's successor asked the court for a writ of mandamus directing the land commissioner to issue the certificates for the land. The court refused. The 1882 repeal, it said, specifically took away from the commissioner the power to issue certificates. The railroad also claimed that the statute violated the contract clause of the U.S. Constitution. To this the court responded only that the state could not be sued without its permission. The company's remedy, it concluded, was in the legislature.[30]

In the early 1890s, Governor Jim Hogg and Attorney General Charles Culberson began a campaign to return to the state ownership of lands they believed were illegally and fraudulently obtained by railroad companies.[31] Culberson instituted several lawsuits to recover land that some companies had claimed as successor to even older charters. Interestingly, in 1893 the legislature passed a bill that would have validated many of these claims and rendered the cases moot. But Hogg vetoed the legislation, and the cases remained in the court.

One case involved the Houston & Texas Central Railroad. This company, controlled by railroad magnate Collis P. Huntington, acquired the Washington County Railroad, which had received a land grant in 1856. Then, in 1870, the Houston & Texas Central prevailed on the legislature to recognize it as the owner of the Washington County line, extend the 1856 charter, and include an additional right to build a line from Brenham to Austin. The company claimed it had a right to sixteen sections of public land. Its right was not based on the extension of its charter in 1870, the company argued, but rather on the basis that it was the successor of the Washington County Line's 1856 charter. This was important because the constitution of 1869, which was in force when the legislature extended the Houston & Texas Central charter, prohibited land grants to railroads. The Texas Supreme Court disagreed with the company's argument. The 1870 charter gave the company new rights, it reasoned, and was in essence an unlawful attempt to grant land to the company. The land, it concluded, belonged to the state.[32]

[30]*Thomson v. Baker*, 38 S.W. 21 (Tex. 1896).

[31]Cotner, Robert Crawford, *James Stephen Hogg: A Biography* (Austin, 1959), 343–45.

[32]*Houston & T.C. Ry. Co.*, 40 S.W. 402 (Tex., 1897). See also *Quinlan v. Houston & T.C. Ry. Co.*, 34 S.W. 738 (Tex., 1896).

As Texas's attorney general in the late 1880s, James Stephen Hogg, above, 1889, gained a reputation as a watchdog over the railroads. (Courtesy of Center for American History, UT-Austin, CN 12100)

In a similar case, the Galveston, Harrisburg, & San Antonio Railway purchased the rights granted to another railroad under an 1854 charter. By special legislation in 1870, the legislature recognized the Galveston, Harrisburg, & San Antonio as successor to the Buffalo Bayou, Brazos & Colorado, and revised the route of the 1854 charter, but provided no grant of land. The Galveston, Harrisburg & San Antonio then claimed land as successor to the 1854 charter. The court rejected this claim as well. The legislature had the right to authorize a change in the route, the court held. But it could not, under the 1869 constitution, transfer the privilege of acquiring lands by the construction of one well-defined line of route to another not contained in the previous grant.[33]

Ratification of the constitution of 1876, enactment of the general railroad land grant law that same year, and repeal of the law in 1882 continued a historic pattern of ambivalence and vacillation toward grants of public land to railroads. It is not surprising, therefore that, even after the repeal, the court would face situations in which railroads attempted to claim public land. In these cases the supreme court, more often than not, sided with the state. One factor that may have swayed the justices was that, by the time these cases came before them, it looked more and more like railroad claims to public land were in direct conflict with the state policy of using its land to support public education.

THE PERMANENT SCHOOL FUND

One historian of Texas land policy remarked that "back in the early days the chief indoor sport of the Texas legislature seemed to be giving away the public land of the state."[34] There is no doubt that Texas gave away vast expanses of land to railroads and other businesses under the theory that the land would provide incentive and financing for internal improvements. Some of these legislative giveaways may have produced little other than speculation and profit. In the "early days," however, it mattered little. Giving away public land for internal improvements became a problem only when Texans began to realize that the resource was not inexhaustible.

The realization began partly as a result of the legislature's decision in 1873 to set aside half of the remaining public lands

[33]*Galveston, H. & S.A. Rwy. Co. v. State*, 34 S.W. 746 (Tex., 1896).

[34]G.H. Hazel, *Public Land Laws of Texas* (Austin, 1938).

for a permanent school fund.[35] Three years later, with ratification of the constitution of 1876, this provision became a constitutional requirement.[36] This version of the populist model of land policy had a long history in Texas. It began with the 1836 Texas Declaration of Independence, which charged that Mexico had failed to establish any system of public education, even though it possessed almost boundless resources in the form of public domain. Subsequently, both the republic of Texas and the state of Texas continually had in place a plan that used public land as a resource to finance education.[37]

The 1876 provision had a dramatic impact, however. When this unidentified half of the existing public domain was dedicated to the permanent school fund, it in essence became appropriated. The new law reduced by one-half the amount of unappropriated public domain available for the legislature to give away. It thus intensified the conflict between the populist model and the venture capital model for land policy. Fear that land dedicated for public education was running out partially explains why the supreme court tended to be tightfisted when railroads developed strategies to claim public lands.

The conflict was illustrated even more dramatically in a case that the state lost. When he was Texas's attorney general in the late 1880s, Jim Hogg developed a reputation as the watchdog over railroads. The future governor used the power of the attorney general's office to assure that railroads maintained their lines and conformed to the terms of their charters, and he instituted lawsuits to recover land from railroads that did not.[38]

In *Galveston H. & S. Ry. Co. v. State* (1888), Hogg proposed an imaginative theory to maximize the amount of land that railroads contributed to the permanent school fund.[39] His idea hinged on a literal reading of article 7, section 2 of the constitution of 1876, which provided,

> All funds, lands, and other property heretofore set apart and appropriated for the support of public schools; all the alternate sections of land reserved by the state out of grants heretofore made or that may hereafter be made to

[35]Miller, *The Public Lands of Texas*, 112; act of March 18, 1873, H. Gammel, *The Laws of Texas: 1822–1897*, vol. 7 (Austin, 1898), 467–68.

[36]Tex. Const., art. 7, sec. 2.

[37]Miller, *The Public Lands of Texas*, 108–12.

[38]Cotner, *James Stephen Hogg*, 126–30, 140–46, 155–67, 176–87.

[39]*Galveston, H & S Ry. Co. v. State*, 12 S.W. 988 (Tex., 1888); Chief Justice Stayton's dissent can be found at 13 S.W. 619.

> railroads, or other corporations, of any nature whatsoever; one-half of the public domain of the state; *and* all sums of money that may come to the state from the sale of any portion of the same,— shall constitute a perpetual school fund.[40]

Hogg maintained that the third clause should be read as giving the school fund an undivided one-half interest of all the unappropriated public domain within the state on April 18, 1876, the day the constitution came into effect. It was self-executing and required no action on the part of the legislature. Almost everyone could agree with that. Under Hogg's interpretation, however, the second clause's requirement that alternate sections of lands reserved by the state out of grants to railroads and other corporations created a separate and additional contribution to the school fund. The attorney general intended to make the Galveston, Harrisburg, and San Antonio Railway the test case for his theory. In 1878, the company had surveyed eighty sections of land, reserving forty for itself and providing forty to the state. A decade later, Hogg filed a trespass to try title suit, in which he maintained that the school fund owned a one-half undivided interest in the forty sections the company had reserved for itself. In effect, he was claiming that the school fund had a right to three-fourths of the land surveyed.

Hogg's theory may have been a literal interpretation of the constitutional language, but it did not conform to standard practice with respect to railroad grants. In the twelve years since the constitution had gone into effect, the state had never claimed an undivided one-half interest in the alternate sections of land that railroads had reserved for themselves.

There was a plausible logic to Hogg's interpretation. Everyone could agree that the third clause of this section set aside for the permanent school fund more than thirty-two million acres of public domain. But that acreage existed in the abstract only.[41] It was not located and surveyed. For its part, the legislature was rather cavalier about identifying or defining the grant to the school fund. The practice of requiring grantees to survey and set aside alternate sections of land was the legislature's only plan for locating and surveying the school fund lands. Since the constitution also provided for other uses of the public domain such as headrights and homesteads, the

[40]Tex. Const., art. 7, sec. 2. (emphasis added).

[41]The majority calculated it at 32,403,434, 12 S.W. at 434. The dissent calculated it at 33,980,610, 13 S.W. at 610.

legislature's reliance on the alternate sections was destined to produce a shortfall for the school fund. In practical terms, the attorney general's approach to fulfilling the purpose of this provision of the constitution was at least as sensible as the legislature's.

Nevertheless, in a 2-1 decision, the court refused to adopt it. If the framers of article 7 had wanted three-fourths of grants for internal improvements to go to the state, they would have expressly said so, wrote Justice John L. Henry for the majority. Besides, he said, the attorney general's interpretation, taken to its logical extreme, produced an unintended result. Emphasizing that the rule would apply to homesteaders as well as corporations, he reasoned that Hogg's theory meant that, from the time the constitution was adopted, "there has been no spot in Texas upon which a man could set down his foot without placing it on appropriated land."[42]

That the court rejected Hogg's theory was not as surprising as the fact that the attorney general got one vote. The conclusion of Chief Justice John W. Stayton's dissenting opinion captured the real dispute in this case. Both parties agreed that, in 1888, when Hogg brought suit against the Galveston, Harrisburg, and San Antonio Railway, the public domain was exhausted. Everyone also agreed that the amount of land located and surveyed for the school fund at that time was short by more than five million acres of what the constitution required.[43] The underlying debate in *Galveston H. & S. Ry. Co. v. State* was over how the shortfall was going to be made up.

Chief Justice Stayton was not a hard-line opponent of railroad land grants. As a member of the 1875 Constitutional Convention, he once spoke forcefully against a proposal to prohibit such grants. But now he had determined that the legislature had simply given away more land to railroads and other corporations than was available as unappropriated public domain. The solution, he reasoned, was to "compel every person or corporation who has received two acres of land when only entitled to receive one to restore one. . . ."[44] Stayton would place the burden of making up the shortfall on the railroad. Where the majority would put it was not so clear. "If a wrong to the school fund has been committed in this respect," wrote Justice Henry, "it is still in the power of the legislature to repair it."[45] Twelve

[42]12 S.W. at 990.

[43]Either 5,282,153, 6,109,058, or 16,592,267 acres, depending on what calculation one employed. 12 S.W. 434; 13 S.W. 610.

[44]13 S.W. at 633.

[45]12 S.W. at 994.

years later, after it too had agreed that the public domain had been exhausted, the legislature admitted that the amount of land actually transferred to the school fund was about 17,189 acres short of what the constitution required. Estimating that the land was worth $1.00 per acre, it then attempted to balance the ledger by paying into the school fund $17,180.[46]

The majority opinion in *Galveston H. & S. Ry. Co. v. State* demonstrates that the Texas Supreme Court of the 1880s and 1890s recognized the importance of railroads to the state's economy and was willing to follow the constitutional and legislative mandate regarding granting public land to encourage railroad building. "There have always existed, with the people of this state, three prominent objects, which through their constitutions and laws, they have worked to accomplish by means of the public domain," wrote Justice Henry. "These objects were to secure immigration, promote education, and encourage the construction of railroads."[47] Despite Justice Henry's words, however, the cases of the era also indicate the court's strong inclination to prevent corporations and other landholders from controlling or profiting from large segments of the public domain at the expense of the permanent school fund.

THE GRASS LEASE FIGHT AND THE TEXAS SUPREME COURT

The Texas high court demonstrated the same sentiment in cases that grew out of the free grass and fence cutting wars of the 1880s. Up to that time, most of the public land in western Texas was used as free range. Early cattlemen grazed herds on the land without concern about ownership. As one historian put it, in those days the lands of west Texas "seemed so vast and their ranchmen occupants so few and far between that the question of ownership was of little concern to anyone."[48]

The character of the west Texas cattle industry began to change in the late 1870s and the 1880s, however. "[A] new day was dawning for the Texas cattle industry," one commentator explained, "a day of foreign investments, improvement in breeds, artificial watering facilities, barbed-wire fencing, and permanent ranges owned in fee."[49] The exploits of the famous

[46]Miller, *The Public Lands of Texas*, 114.

[47]*Galveston H. & S.A. Rwy. Co. v. State*, 12 S.W. 988, 991 (Tex., 1889).

[48]Cotner, *James Stephen Hogg*, 108–109.

[49]J. Evetts Haley, *Charles Goodnight: Cowman & Plainsman* (Norman, OK, 1936), 316.

Texas cattleman Charles Goodnight reflected these changes, and Goodnight himself became a major force in shaping the future of the industry. Although Goodnight was already known as a cattleman and frontiersman, his influence grew in 1877 when he entered into partnership with British financier John George Adair to develop the JA Ranch in north Texas. With Goodnight's knowledge and Adair's money, the JA soon became a prototype of a new corporate style of ranching that featured large herds of prize cattle grazing on fenced pastureland.

The key to this style of ranching lay in gaining control over vast expanses of land. According to his biographer, the wily Goodnight accomplished this by purchasing smaller ranches and cheap land certificates on the open market. But buying the rights to relatively small and unconnected plots did not provide enough land for Goodnight's purposes. Goodnight admitted that the result was an "old crazy quilt," and bragged that he tried to purchase watered lands and other good plots in order to make the surrounding acres virtually worthless. By 1883, Goodnight claimed that he had fenced 1,335,000 acres.[50] He did not worry too much about whether he actually owned the land he fenced, however. In addition to that which he had purchased, the area he fenced included 600,000 acres of the public school lands of the state and an additional 14,000 acres of the public domain.[51]

Goodnight was not the only one, nor even the first, of the west Texas cattlemen to fence the open range. By the late 1870s and throughout the 1880s, there were constant battles fought on the plains of west Texas, in the news media, and in the Texas legislature over the issue of fencing. The heart of the fencing dispute in Texas was a battle between free-range cattlemen and those who wanted to fence, and thereby control, vast expanses of ranchland. Members of Goodnight's Panhandle Stock Association did not take the position that they had the right to fence public lands. Rather they sought to legitimize their acts with legislation that would give them long-term leases at cheap prices. They wanted the right to lease public lands for twenty years at a maximum price of four cents per acre.[52] In 1883, however, the legislature passed a statute that allowed ten-year leases based on competitive bids, at a minimum of four cents per acre. The1883 statute also created the State Land Board, consisting of the governor,

[50]Haley, *Charles Goodnight*, 302–304, 325.

[51]*State v. Goodnight*, 11 S.W. 119 (Tex., 1888).

[52]Lang, *Financial History*, 192, citing "Proceedings of the Stockmen's Convention, in *The Galveston News*, Feb. 7 and 10, 1883.

By 1883, Texas cattleman Charles Goodnight claimed that he had fenced 1,335,000 acres on his ranch, above. (Courtesy of Center for American History, UT-Austin, CN 04895)

attorney general, comptroller, treasurer, and commissioner of the General Land Office. It gave the land board the power to regulate the sale and lease of school lands.[53] This set in motion a series of events that would become a part of frontier Texas legend. Less well known is that the act would eventually land in the Texas Supreme Court.

By requiring competitive bids, the Texas legislature hoped to maximize the amount paid to the school fund, but it failed to anticipate the degree of cohesiveness and power of the west Texas stockmen who had already laid claim to their vast ranges. They ran their herds on them, made improvements, and fenced them. These ranchers definitely possessed the land, even if they did not own it. Consequently, when the land board put out the call for bids, the cattlemen refused to compete with each other. In most cases, each rancher simply bid the minimum four cents for the land he already possessed.

As soon as it recognized the conspiracy, the land board issued resolutions that set the minimum price for leasing school lands at eight cents per acre for dry land and twenty

[53]Act of April 12, 1883, H. Gammel, *Laws of Texas*, vol. 9 (1898), 391–95; Miller, *The Public Lands of Texas*, 186; Lang, *Financial History*, 192.

cents for watered.[54] Some ranchers paid the board's minimum or compromised, but most refused. Some, like Goodnight, attempted to tender to the land board the amount they would owe under the statutory minimum of four cents. The story has it that he and two other men, Austin lawyer Buck Walton and W.B. Munson, put more than $100,000 in cash into a wheelbarrow and had a porter push it up Congress Avenue to the capitol. When they attempted to tender the money, State Treasurer Francis R. Lubbock refused to accept it.[55]

The events did not do much for the cattlemen's image. In 1887, the state had leased 6,427,966 acres of public land, but it was reported that 3,500,000 were still illegally fenced.[56] Hostile Texas newspapers portrayed Texas cattle barons as "bullionaires" who were getting rich at the state's expense. Separate bills in the 1887 session of the legislature proposed an eight cents minimum, complete prohibition on leasing of the school lands, and stronger criminal prohibitions on illegal fencing.

The cattlemen sought not only to kill the unfavorable bills that were pending before the session, but also to pass a bill to continue the lease term of ten years and fix the price at four cents per acre. To that end, Goodnight hired lobbyist George Clark at what he thought to be the outrageous fee of five thousand dollars. When later asked about the status of the cattlemen's bill, Goodnight responded, "The session of the legislature has not ended but our lease bill will pass, I have paid for it and should know. . . ."[57]

Goodnight's prediction was only partially accurate. Clark had managed to kill the most hostile proposals before the legislature. The Texas Legislature did pass the Leasing Act of 1887, which set a flat rate of four cents per acre. The new law also gave a guarantee that grazing lands could not be sold to others, including homesteaders, during the term of the lease. The bill provided for five-year leases rather than the ten-year term that Goodnight preferred. But the Leasing Act of 1887 did contain one bonus for Goodnight: it abolished the State Land Board. Instead, the new statute gave the commissioner of the

[54]Miller, *The Public Lands of Texas*, 186, citing Report of the State Land Board to the Nineteenth Legislature, January 1, 1885, 1; Lang, *Financial History*, 192–93.

[55]Haley, *Charles Goodnight*, 393.

[56]Miller, *The Public Lands of Texas*, 188.

[57]Haley, *Charles Goodnight*, 401. For differing versions of the grass-lease battle in the Texas legislature, see Haley, *Charles Goodnight*, 381–401 and Cotner, *James Stephen Hogg*, 107–17.

General Land Office jurisdiction over the lease and sale of public lands.[58]

Although the state continued to tinker with rules regarding the leasing of public lands, most accounts have the grass lease fight ending with the Leasing Act of 1887. It may have ended in the legislature, but the issue remained very much alive in the Texas Supreme Court for at least another year, when the court issued a series of stunning decisions.

In *State v. Day Land & Cattle Company* (1888), a case involving the company's refusal to pay rent for the use of public lands, Justice Ruben Gaines provided a strong indication of the court's leanings in the matter. The policy of the state, Gaines wrote, is to permit the public lands that are not surveyed and set apart for the benefit of the state's institutions of learning and public charities to remain open as commons for the use of the people in general.[59]

A little more than one week later, the court issued another opinion regarding illegal fencing. The Texas attorney general had sought an injunction to force Charles Goodnight to remove fences he had constructed around public land and to restrain him from constructing additional fences. Goodnight's lawyers did not deny the state's allegations that their client had fenced more than 600,000 acres of school lands and 14,000 acres of other unappropriated public domain. They responded instead with a variety of ancillary defenses. Injunction was the wrong remedy, they argued; the state should have sought criminal penalties. The court rejected this argument. Noting that the state would have to prove unlawful intent under the criminal statute, it ruled that the existence of criminal penalties does not rule out the state's right to seek injunction. Next, Goodnight's lawyers argued that the proper remedy should be trespass to try title. The court rejected this argument as well. Trespass to try title is an ejectment proceeding, it said. It would be the appropriate proceeding to remove a trespasser. The state's petition did not allege that Goodnight had erected fences on state land. Rather, it alleged that Goodnight's fences enclosed the lands of the state. Injunction was therefore a proper remedy.

In an era when the formalities of pleadings were much more important than they are today, the Texas Supreme Court was

[58]An Act Providing for the Sale and Lease of School and Other Public Lands, April 1, 1887, H. Gammel, *Laws of Texas*, vol. 9 (1898), 881–89; Doleman, *The Public Lands of Western Texas*, 27. Cattlemen would have to wait until 1895 for the ten-year lease on grazing lands. Lang, *Financial History*, 194.

[59]*State v. Day Land & Cattle Co.*, 9 S.W. 130 (Tex., 1888). *State v. Taylor et al.*, 9 S.W. 132 (Tex., 1888) was also decided on the same issue.

unwilling to be sidetracked by such technicalities. This enclosure was something more than an interference with rights of the state as a body politic, Gaines wrote; it is also an interference with individual rights to public property. "The enclosure of public lands for private use, whether viewed as a wrong merely to the body politic, or as an infringement of the privileges of its citizens, is a nuisance...," he concluded, "[A]n injunction is a well organized and appropriate remedy." It did not matter to Justice Gaines that Goodnight might not have full ownership or control over all the fences. "Having created the nuisance, [Goodnight] should be compelled to remove it—when this can be done without trespassing on the property of third persons. And where he be part owner of the lands upon which fences are found, either as partner or co-tenant, and has been instrumental in creating the nuisance, he should be compelled to abate it, whether or not the other partner or co-tenant is a party to the suit."[60]

State v. Day Land & Cattle Co and *State v. Goodnight* demonstrated the court's inclination to protect the public domain. Another series of decisions, handed down about the same time, demonstrate that it was also inclined to maximize profits to the state when school fund lands were leased. All of these decisions came after the effective date of the Leasing Act of 1887, which abolished the land board and set a fixed rate of four cents, but they involved leases that came into existence under the act of 1883.

The first of these cases, *Smisson v. State*, involved five leases covering sixty sections of school lands. Smisson and the land board entered into these leases on different dates between June 1884 and October 1885. The first three agreements covered thirty-nine sections at eight cents per acre and two sections of watered land at twenty cents per acre. The remaining land was leased for six cents per acre. Smisson, at various times, tendered a sum equal to the rental at four cents per acre but declined to pay more.

Smisson maintained that by requiring a minimum rental higher that the minimum that the legislature had set, the State Land Board had exceeded its authority. He reasoned that the board regulations that set the higher minimum were an exercise of legislative power that could not be delegated. Chief Justice Stayton agreed with this reasoning. "We are of the opinion that the land board had no right to prescribe a minimum rental other than that fixed by the legislature," he agreed. "It had the power to make regulations as were neces-

[60]*State v. Goodnight*, 11 S.W. 119 (Tex., 1888), decided July 1, 1888.

sary to carry out the law under which it existed, but it had no power to make regulations inconsistent with the law, and, thereby, in effect, for a time, to render the law inoperative."[61] Apparently seizing on this language, Charles Goodnight's biographer concluded, "The cowmen carried their case to the courts and the Board was finally whipped into compliance with the law."[62] At least one other historian agreed.[63] But they should have read on. "It does not follow from this, however, that the leases secured by [Smisson] are not binding on him," Chief Justice Stayton continued. The land board does not have the power to set a new minimum rate, he admitted, but it does have the authority to lease at a price higher than the minimum the legislature had set. Observing that Smissen had entered into the contracts voluntarily, Stayton concluded that the board had the power to accept the prices he offered. "[W]e do not see on what grounds he can be relieved of the obligations voluntarily assumed by him."[64] The court took this reasoning one step further when it ruled in a later case that the land board had authority "to make a regulation reserving the right to reject bids *in order to secure fair competition and thereby protect the rights of the state.*" [65]

The Texas Supreme Court decided *Smisson v. State* on June 19, 1888. By then the Leasing Act of 1887, which set a fixed rate of four cents per acre, had superseded the 1883 statute under which these contracts had been made. But the decision was not moot. It held Smisson to the higher prices for the full term of his leases, which ran to 1890 and 1891. On the same day, the court decided ten other cases in the same fashion.[66] These decisions did not determine the final outcome of the land lease battle, but they did maximize the amount of money that corporate-style ranchers paid to the school fund for leasing public land.

Another series of decisions continued in the same vein. The act of 1883 also gave the land board authority to sell school lands. It provided that no individual could purchase more than one section of agricultural land or six sections of pastureland.

[61]*Smisson v. State*, 9 S.W. 112, 115–17 (Tex., 1888), decided June 19, 1888.

[62]Haley, *Charles Goodnight*, 385.

[63]Lang, *Financial History*,192, specifically states that the board was overruled in *Smisson*.

[64]*Smisson, supra*, at 118.

[65]*Coleman v. Lord*, 10 S.W. 91, 92 (Tex., 1888). Emphasis added.

[66]*Gannon v. State*, 9 S.W. 119 (Tex., 1888); *Moody v. State*, 9 S.W. 119 (Tex., 1888); *McGee v. State*, 9 S.W. 119 (Tex., 1888); *Arnold v. State*, 9 S.W. 120 (Tex., 1888).

The act also prohibited corporations from purchasing more than one section of any kind of land in any county.[67] In December 1883, the Wichita Land & Cattle Company devised a simple scheme to circumvent the law. The corporation arranged for three individuals to purchase seven sections each in their own names, then transfer it to the company. Two of the individuals were "cow-boys" in the company's employ. The other was a blacksmith. In December 1885, the state brought three separate lawsuits to set aside the sales on the grounds that they were in violation of the act of 1883. The company filed exceptions to the suit on the grounds that it had been filed in the wrong court and that the statute of limitations had passed. The trial court agreed and dismissed the suit. What makes this case interesting is that the company's defenses, though technical, fit neatly into the more formal rules of practice and procedure of the time. It would have been easy for the supreme court to accept one of the defenses, if it were so inclined.[68]

In *State v. Wichita Land & Cattle Company*, however, Justice Gaines demonstrated that the court was not so inclined. The original purchasers bought the land in December 1883. By May 10, 1884, all of them had sold it to the company. The state filed suit on October 10, 1885. The act of 1883 expressly provided that the state could bring suit to set aside unlawful purchases of school lands but that such a suit must be filed within one year of the time of purchase. Using either of the conveyances as the starting point, the state had missed the deadline imposed by the act's one-year statute of limitations. But the court decided not to use either of those dates as the starting point. The company had not filed its deeds in the county records until February 1885. Noting that that was the first time the state should have reasonably suspected that the law had been violated, Justice Gaines ruled that the statute of limitations did not begin to run until that time.

In one way, there was nothing surprising about this conclusion. Gaines stated that he was applying a standard rule that, in cases of fraud, the statute of limitations will be tolled until discovery of the fraud. But the company maintained that this was not a case of fraud. The state, it argued, had sued under a theory that the company violated provisions of the act of 1883.

[67]An Act to Provide for the Classification, Sale and, Lease, April 13, 1883, sec. 6, H. Gammel, *Laws of Texas*, vol. 9 (1898), 391–95.

[68]I have recreated the facts of this case from the text of two opinions involving the same event. *State v. Wichita Land & Cattle Co.*, 11 S.W. 488 (Tex., 1889) and *Wichita Land & Cattle Company v. State*, 16 S.W. 649 (Tex., 1891).

It had never specifically alleged fraud. It may not have expressly alleged fraud, Justice Gaines conceded, but the state's petition charged that the original purchasers were "the hireling and tool" of the company. For him, that language was sufficient enough to imply a charge of fraud. Finally, the company argued that the state was suing the wrong party. The targets of this suit, it argued, should have been the initial purchasers of the land. Rejecting this argument as well, the supreme court overruled the dismissal of the suit and remanded the case to the trial court.[69] In an era when decisions often turned on formalities of law, the court was surprisingly willing, in *State v. Wichita Land & Cattle Company*, to look at the reality of the circumstances. It continued to do so in other cases involving public lands. [70]

CONCLUSION

In the last quarter of the nineteenth century, the Texas Supreme Court was skeptical of attempts of railroad companies and corporate-style ranchers to monopolize large blocks of the public domain. Its decisions also demonstrated a tendency to protect the perpetual school fund, and, at least until 1895, it favored a public policy that encouraged the sale of that land in small amounts to actual settlers. It is important to recognize that these cases involved the court in a complex task of juggling constitutional principles, statutory details, and common law rules. Nevertheless, the court's record, taken as a whole, shows a fairly strong sentiment in favor of the populist model for land policy.

This is somewhat surprising because the last part of the nineteenth century is traditionally thought to be an era in which courts tended to favor business interests. Judges of the time were said to have shaped the law so as to facilitate economic growth through capitalism, at the expense of poorer or weaker elements of society, if necessary. Critics complained that judges relied too heavily on archaic formal rules and applied them in a manner that ignored the real issues and problems of the day.

[69]*State v. Wichita Land & Cattle Co.*, 11 S.W. 488 (Tex., 1889); see also *Wichita Land & Cattle Co. v. State*, 16 S.W. 649, 650 (Tex., 1891).

[70]For other examples, see *Cunningham v. State*, 11 S.W. 871 (Tex., 1889); *York v. State*, 11 S.W. 869 (Tex., 1889); *Cunningham v. State*, 12 S.W. 217 (Tex., 1889); *Caswell v. State*, 12 S.W. 219 (Tex., 1889); *Randolph v. State*, 11 S.W. 487 (Tex., 1888).

Some legal historians have challenged the conventional view. Peter Karsten, for example, maintains that judges of the era often molded rules of law in a way that actually favored weaker elements of society.[71] What is interesting for this study is that Karsten also argues that judges did not always blindly adhere to traditional, formal, and technical rules. Instead, he says, they often molded the rules so as to take into account the changing social and economic conditions of the time. In this respect, the experience of the Texas Supreme Court in public domain cases lends weight to Karsten's thesis. On this particular issue, the Texas court appeared to be struggling with a very real problem—the distribution of a valuable but dwindling public resource—in a very realistic manner. The extent to which Texas judges rejected technical or formal legal arguments in these cases is striking. Whether they continued to walk this path of legal realism in cases involving other subjects would be an interesting focus for a more general study of the Texas Supreme Court.

The federal government controlled most of the public domain in the nineteenth-century West, and federal courts resolved many of the most important legal disputes involving public land. Outside interests that hoped to monopolize large portions of the public domain unquestionably received a warm reception in the federal courts.[72] If this is true, a direct comparison between the public domain cases in the federal court and similar cases in the Texas court would be a fruitful addition to several areas of study.

Some recent studies maintain that state courts were more receptive to reform than were federal courts.[73] The focus of such studies tends to be on laws that directly regulated business activities and social conditions. The Texas cases involving the public domain are different in this respect but may suggest a reason why state courts would be more receptive to reform. Justices of the U.S. high court were appointed for life and sat thousands of miles away. It was relatively easy for the federal justices to view distant public domain in the abstract. Combining this with the U.S. Supreme Court's abiding concern for individual property rights might very well explain the federal high court's sentiment in favor of large landholders.

[71]Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill, NC, 1997).

[72]See Paul Gates, *Land and Law in California: Essays on Land Policy* (Ames, IA, 1991).

[73]Chomsky, "Progressive Judges in a Progressive Age"; Murray, "Looking for Lochner in All the Wrong Places."

The Texas Supreme Court was, and still is, an elected body. The public domain may have been distant and abstract to federal justices, but it certainly was not abstract to their Texas counterparts. Rather, the state high court was dealing with a tangible public asset, one that was the subject of intense debate in political campaigns, the legislature, and the media. The significance of this asset became even more apparent when the Constitution of 1876 dedicated one-half of the public domain to the permanent school fund.[74]

Comparing the Texas and the federal courts may also be of interest to those who study the role of the federal government in the nineteenth-century frontier. New Western historians have challenged the standard notion that settlement of the West was a triumph of individual enterprise. Karen R. Merrill has aptly pointed out that these scholars maintain that "the story of the West is not about individual enterprise at all; it is about federal subsidies."[75] And, what could be a more obvious subsidy than a grant of land?

Recognition of the importance of federal subsidies in development of the West has, in turn, stirred a debate over the extent of federal presence and control in the West. New Western historians argue that the federal government acting as a promoter of economic development is proof enough of Washington's control in the development of the West.[76] Even more traditional studies of federal policy regarding forest and grazing lands recognize the additional role of the federal government as a manager and a regulator. While admitting that the federal government had a presence in the West as promoter, manager, and regulator, other recent studies question whether development of the region was characterized by a flow of power from Washington westward.[77] With this debate in mind, Merrill notes that it is important to ask whether it matters if funding or grants come from the state or the federal government. A similar question would be whether it mattered that disputes wound up in state or federal courts. The story of treatment of the public domain in the Texas Supreme Court provides one indication that it did.

[74]Chomsky, "Progressive Judges in a Progressive Age," 438–39, offers a similar observation of the Minnesota Supreme Court.

[75]Merrill, "In Search of the 'Federal Presence' in the American West," 456.

[76]Ibid.

[77]Donald J. Pisani, "Federalism and the American West, 1900–1940," in *Frontier and Region: Essays in Honor of Martin Ridge*, ed. Robert C. Ritchie and Paul Andrew Hutton (Albuquerque, NM, 1997) 83–108.

PATRIOTISM: DO WE KNOW IT WHEN WE SEE IT?

A REVIEW ESSAY

A. WALLACE TASHIMA[1]

Free to Die for Their Country, by Eric L. Muller. Chicago: University of Illinois Press, 2001; 229 pp., $27.50.

In a small, triangular plot, a shore distance north of the Capitol in Washington, D.C., is the recently dedicated "National Japanese American Memorial to Patriotism." One of the primary purposes of the memorial is to recall publicly the forced removal of Japanese Americans from the Pacific coast at the beginning of World War II and their imprisonment in government internment camps for the duration of the war.[2] The incident is worth recalling, of course, if for no other reason than as a constant reminder that we must not let a similar tragedy befall any other group of Americans. But one is at a loss to know why it is called a "Memorial to Patriotism."[3] Is it patriotic to be stripped of all of one's dignity and earthly possessions and forced into exile/imprisonment solely because of one's race or ethnicity? Is it patriotic for a citizen of this country to be regarded as the enemy based on one's race alone? Is it an act of patriotism to bow to the command of the Presi-

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[2]Executive Order 9066, the legal authority for the internment, was issued by the President on February 19, 1942. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

[3]The memorial also honors the 800 Nisei soldiers killed in action in World War II, pp. 197–98, and certainly to that extent, it is a fitting memorial to patriotism.

dent, literally enforced by the U.S. Army, when there is no apparent alternative? That many Japanese Americans evacuated by force from the West Coast choose to call their obedience to that unconstitutional act patriotic sixty years later highlights the schism within the Japanese-American community that Professor Eric Muller[4] explores in his book.

This modest volume that expands on a footnote to history can be read on several different levels. It tells the story of a small group of Japanese American men of draft age who, out of their understanding of patriotism, defied the draft and of the consequences they knowingly faced. The evacuation and internment of all persons of Japanese ancestry, citizens as well as aliens, from the Pacific coast at the start of World War II is a well-known episode of our recent past. Professor Muller does not go into detail, but he provides some of that background and the historical context of the evacuation and internment.[5] He then launches into his tale.

Shortly after World War II started, all draft-age Japanese-American men were reclassified into draft category 4-C, the category reserved for enemy aliens and other undesirables, with the consequence that, despite their American citizenship, these men became ineligible to be drafted into the armed forces. The leading "civil rights" organizations for Japanese Americans was (and still is) the Japanese American Citizens League ("JACL").[6] After it became inevitable that Japanese Americans would be removed from the Pacific Coast, the JACL, instead of protesting the evacuation as unconstitutional, urged full cooperation with the government.[7] It also lobbied the War Department to permit Japanese Americans to serve in the military, believing that such service was the best

[4]Professor of Law, University of North Carolina, Chapel Hill.

[5]The historical background and legal basis of the evacuation are treated in some detail in the Supreme Court cases which considered the constitutionality of various aspects of the evacuation and internment, and the curfew that preceded it. See *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); In coram nobis proceedings more than 40 years later, the factual basis of the order excluding all persons of Japanese ancestry from the Pacific Coast, as represented to the Supreme Court by the Solicitor General in the government's brief, was called into serious question. See *Hirabayashi v. United States*, 627 F.Supp. 1445 (W.D. Wash. 1986), *aff'd in part, rev'd in part*, 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal 1984).

[6]See http://www.jacl.org (JACL's website).

[7]To its credit, the JACL did support the legal challenges to the evacuation and internment in the form of amicus curiae briefs in both the *Korematsu* and *Hirabayashi* cases before the Supreme Court, as well as in *Yasui v. United States*, 320 U.S. 115 (1943).

available vehicle for Japanese Americans to regain their rights as citizens (p. 42). As one Pentagon official put it, the JACL "has been a good influence. It has pursued a policy of full cooperation with the War Department and other federal agencies" (p. 63). Indeed, Professor Muller goes so far as to characterize Mike Masaoka, one of the wartime leaders of the JACL, as a "collaborator. . .with many of the wartime government's anti-Nikkei policies. . ." (p. 198).

The JACL was successful in these efforts and Japanese Americans were again reclassified, this time as draft-eligible. It was, however, unsuccessful in its efforts to have Nisei soldiers placed in "general assignments," that is, assigned throughout the army, in the same manner as any other soldiers, as the need arose. After a long internal struggle within the War Department, the government determined that Nisei would serve in segregated combat units, rather than being integrated into existing units. One of the important considerations, of course, was the difficulty of explaining how the army could "possibly integrate the Nisei while simultaneously segregating black soldiers" (p. 62). As one general observed, the "general assignment of the Nisei would inevitably draw attention to the continued segregation of blacks in the army" (pp. 60–62). Those young Japanese-American men who answered their country's call by serving distinguished themselves on the field of battle. The segregated, all-Japanese 442nd Regimental Combat Team compiled a record of heroism unmatched in the annals of American military history by any unit of comparable size. As President Truman stated in his address to the returning soldiers of the 442nd:

> You fought not only the enemy, but you fought prejudice—and you won. Keep up the fight, and we will continue to win—to make this great republic stand for just what the Constitution says it stands for: the welfare of all the people all of the time. (p. 198)

A few young men, however, concluded that it was unjust for them to be drafted into the military to protect American democracy while they and their families were being held under armed guard, behind barbed wire, their status as prisoners resting on nothing less (and nothing more) than a purely racial classification (pp. 83–84). They either refused to report for their pre-induction physical examinations or refused to step forward to report for induction into the armed forces of the United States, in violation of the Selective Service Act.[8]

[8]Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885 (1940) (expired 1947).

After giving us an account of the turmoil within the internment camps on the issue of serving in the army,[9] Professor Muller takes us through several of those trials. His chronicle of those trials richly demonstrates the rampant racism that was the order of the day in America at that time, a much-lowered expectation of the meaning of "due process," again consistent with the times, and the power that a United States district judge exercises over the case before him.

The Heart Mountain, Wyoming Relocation Center draft resisters were tried in the United States District Court for the District of Wyoming, in Cheyenne. After waivers of jury trials, all 63 draft resisters were tried en masse before Judge T. Blake Kennedy. On a well-documented basis (pp. 104–107), Professor Muller brands Judge Kennedy as an out-and-out racist (p. 104). On the first day of trial, Judge Kennedy referred to the defendants as "you Jap boys" (p. 104). Unsurprisingly, all 63 defendants were convicted and each was sentenced to a three-year term of imprisonment (p. 113). Judge Kennedy's personal afterwords help explain his justification for those harsh sentences:

> Personally this Court feels that the defendants have made a serious mistake in arriving at their conclusions which brought about these criminal prosecutions. If they are truly loyal American citizens they should, at least when they have become recognized as such, embrace the opportunity to discharge the duties of citizens by offering themselves in the cause of our national defense.[10]

The cases of the Minidoka, Idaho Relocation Center draft resisters were tried in the United States District Court for the District of Idaho, in Boise. If Judge Kennedy was an out-and-out racist, the xenophobia of the district judge who presided over the Minidoka cases was even more pronounced. Chase A. Clark had been the governor of Idaho before his appointment to the district court two years earlier. As governor, shortly after the outbreak of World War II, Clark's suggestion of what to do about the Japanese in America—what he called the "Jap problem"—was to "[s]end them all back to Japan, then sink the island" (p. 125; alteration in original). At a conference of western governors, called by the then-director of the War Relocation Authority, Milton Eisenhower, Governor Clark

[9]Pp. 41–99. The navy continued to refuse to accept Japanese Americans into its ranks. P. 47.

[10]*United States v. Fujii*, 55 F. Supp. 928, 932 (D. Wyo. 1944).

engaged in a vicious diatribe against Japanese Americans, admitting right from the start "that I am so prejudiced that my reasoning might be a little off. . . ." He concluded his remarks by urging that any "Japanese who may be sent [to Idaho] be placed under guard and confined in concentration camps for the safety of our people, our State, and the Japanese themselves" (p. 33; alteration in original). No one fully realized then the accuracy of his foreboding prediction. It apparently never crossed Judge Clark's mind that he ought to recuse himself for bias and prejudice against the defendants, or even for the sake of the appearance of impartiality (pp. 126–27).

Other shortcomings pervaded the trial. The level of representation afforded the defendants by court-appointed counsel, as demonstrated by Muller, fell woefully short of even the most crabbed definition of the Sixth Amendment right to the effective representation of counsel. Some of the appointed defense counsel refused even to consult with their clients (pp. 125–26). Judge Clark also instituted his own version of a "rocket docket," in which justice itself was the victim of speed and efficiency. Judge Clark conducted 33 jury trials over an 11-day period. He was able to do so only by having the same 34 jurors serve in "slightly different configuration[s] of twelve" for all 33 cases. As Professor Muller states, "by the time all of the trials were completed, virtually all of the jurors had served on at least ten separate juries" (pp. 128–29). The longer jury "deliberations" lasted all of a few minutes; some juries merely filed out, turned around, and returned with their guilty verdicts (p. 128). Any semblance of an impartial jury, open-mindedness, and lack of prejudgment was abandoned. Challenges to the venire on account of possible prejudice fell on deaf ears (p. 129). All but one of the defendants were convicted.[11] Those that went to trial (a few others had entered pleas of guilty) were sentenced to three years and three months of imprisonment (p. 129).

Similar trials and ensuing convictions were repeated throughout the western states where the internment camps were located. Only the trial in the Northern District of California ended with unexpected results. The draft resisters from Tule Lake, California Segregation Center were tried before Judge Louis E. Goodman, at the Eureka Division of the United States District Court for the Northern District of California. The defendants had moved to quash the indictment on the

[11]The single acquittal was because the defendant had never received an induction notice. He also was later convicted, after having been given notice to report for induction. Pp. 129, 213 n. 63.

ground that they were deprived of their liberty without due process "by virtue of the circumstances" of their confinement at Tule Lake (p. 143). Concluding that "[i]t is shocking to the conscience that an American citizen be confined on the ground of disloyalty, and then, while so under duress and restraint, be compelled to serve in the armed forces, or be prosecuted for not yielding to such compulsion," Judge Goodman granted the motion to quash and dismissed the proceedings.[12] In further justification of his ruling, Judge Goodman observed:

> The issue raised by this motion is without precedent. It must be resolved in the light of the traditional and historic Anglo-American approach to the time-honored doctrine of "due process." It must not give way to overzealousness in an attempt to reach, via the criminal process, those whom we may regard as undesirable citizens.[13]

As Professor Muller rightly points out, although long on equity and fairness, Judge Goodman's opinion is woefully short on citation to precedent or then-accepted norms of American constitutional doctrine (p. 151). The opinion rested uneasily on the then-untested, and even unrecognized, notion of substantive due process (pp. 146–48). It antedated the Supreme Court's widespread introduction into constitutional law of the "shocks the conscience" doctrine by eight years.[14]

For reasons lost in history, the Department of Justice did not appeal *Kuwabara*.[15] If it had been appealed, it surely would have been reversed. In *United States v. Takeguma*,[16] which involved an appeal from the draft-resisting convictions originating in the Poston, Arizona Relocation Center, the Ninth Circuit made short shrift of *Kuwabara*, noting tersely that "[w]herein the reasoning of the *Kuwabara* opinion differs with that of this opinion, it may be taken that we are not in accord therewith."[17]

[12]*United States v. Kuwabara*, 56 F. Supp. 716, 719 (N.D. Cal. 1944).

[13]Id.

[14]Pp. 149–50; see *Rochin v. California*, 342 U.S. 165, 172 (1952).

[15]Professor Muller engages in some speculation regarding the reasons for the decision not to appeal *Kuwabara*, but grants that "it is impossible to know the full story" because the Department of Justice's files of the case no longer exist. P. 157.

[16]156 F.2d 437 (9th Cir. 1946) (en banc).

[17]*Takeguma*, 156 F2d. at 441.

Professor Muller suggests that Judge Goodman's free-lancing efforts to do justice are part of a long line of cases in which conscientious judges struggled with the tension between their sworn duty to uphold the law and the injustice of enforcing an unjust law.[18] In this country, that struggle goes back at least as far as the Fugitive Slave Act, which required northern judges to order the return of runaway slaves to their owners. The problem persists through the present day, however, with federal judges who oppose capital punishment wrestling with their own consciences as they enforce what they believe to be unjust laws that require the imposition of the death penalty (p. 153).

These young men were motivated by a somewhat-inchoate, but nonetheless deep-rooted, sense of injustice. The burden of their cases, and their cause, in their own words, as quoted by the Ninth Circuit, was simple: "Although American citizens by birth, the defendants [appellants] because of claimed war emergency have been treated as alien enemies, interned as prisoners of war, solely because *we* have been at war with the government where *their* ancestors were born."[19] The Tenth Circuit's summary of the defendant's contention stated similarly:

> Appellant's entire appeal is predicated on the argument that his removal from his home and his confinement behind barbed wire in the relocation center without being charged with any crime deprived him of his liberty and property without due process of law, and that therefore he ought not be required to render military service until his rights were restored.[20]

We do not have to label these acts of resistance as "courageous" to recognize that they were acts of conscience, committed with the knowledge and acceptance of their harsh consequences. But these individual acts of conscience take on a dimension of courage when one pauses to reflect on the widespread approbation the drafter resisters faced within the Japanese-American community. The culture of the Japanese-American community, instilled by the first-generation elders, was obedience and submission to and respect for authority.

[18]See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 Harv. L Rev. 616 (1949).

[19]*Takeguma*, 156 F.2d at 439 (alteration in original) (quoting appellants' opening brief).

[20]*Fuji v. United States*, 148 F.2d 298,299 (10th Cir. 1945).

This culture of conformity was reinforced by the JACL's policy of cooperation with the government in carrying out the evacuation and internment and its express pro-draft stance. These acts of resistance also antedated the rise of the modern notion of passive resistance, popularized by Mahatma Gandhi a decade later. They also preceded the acceptance of civil disobedience that Dr. Martin Luther King, Jr. impressed upon the American conscience a generation later. Nonetheless, these young men persisted.

Judge William Denman, of the Ninth Circuit Court of Appeals, confronted the morally-troubling dilemma that these convictions posed for some judges of conscience in his concurring opinion in *Takeguma*, which affirmed the Poston Relocation Center draft-resister convictions. Judge Denman's short, concurring opinion is worth quoting in full:

> I concur in the opinion and its reasoning.
>
> In addition, I feel that these young men should be considered by the executive as the subject of its clemency. They were United States citizens and only attempted to give up their citizenship after continued illegal imprisonment by the Federal Government in barbed-wire enclosures, guarded by armed soldiers, under conditions of great oppression and humiliation. *Ex parte* Endo, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243.
>
> Had any one of us been so wrongfully imprisoned in our youth because our parents had emigrated to this country from, say, Germany, England, or Ireland, with which there might be a war, it cannot be said that our exasperation and shame would not have caused us to prefer the citizenship of our parents' homeland. It was because the United States first cruelled wronged us by an illegal if not criminal imprisonment that our renunciation came. Even if, in our justifiable resentment, we committed acts adverse to the continuance of the war against our fatherland, it is for the United States, the first and greater wrongdoer, to be merciful.
>
> Because our skins are white and our origin is European, is no ground for a distinction between our youth and that of these appellants.[21]

[21] *Takeguma*, 156 F.2d at 442 (Denman, J., concurring).

Apparently, none of the other judges of the Ninth Circuit, sitting en banc, felt a sufficient sense of moral outrage to join in Judge Denman's opinion.

The following year, a presidentially established amnesty board, headed by retired Supreme Court Justice Owen J. Roberts, recommended, inter alia, that the Japanese-American draft resisters be granted pardons, including the full restoration of their civil rights. President Truman accepted that recommendation and, on December 24, 1947, granted the recommended pardons.[22]

Still, these men could not gain acceptance in their own community. For years running into decades, the JACL struggled with reconciling its own part of collaborating with the government's efforts and the antithetical acts of the draft resisters, which undermined the JACL's position. It repeatedly turned down efforts from its more progressive members, including a proposal from the 442nd Veterans Club of Oahu, Hawaii, that a formal apology be extended to the draft resisters. It was not until 2000, more than a half century later, that the JACL finally formally apologized to the draft resisters for the manner in which it had treated them (pp. 182–86). But the schism remains. As Professor Muller notes, "[s]adly, even as the Nisei generation that fought on the battlefields of Europe and in the courtrooms of the American West now dies out, the rancor and bitterness of their own internal disagreement live on" (p. 186).

Given this history, Senator Daniel K. Inouye's acknowledgement that "it took just as much courage and valor and patriotism to stand up to our government and say 'you are wrong,'" as it did to volunteer for military service, is an important step toward reconciliation (p. xi). Senator Inouye, himself a highly decorated veteran of the 442nd Regimental Combat Team,[23] is a revered figure among Nisei veterans of World War II, particularly those who served with him in the 442nd. Thus, his Foreword to Professor Muller's book is, itself, an important statement. Perhaps, reflection on Senator Inouye's Foreword, particularly his closing thought, will help bring closure to both sides of this debate: "I am glad that there were some who had the courage to express some of the feelings that we who volunteered harbored deep in our souls" (p. xi).

[22]Pp. 181–82, 216 n.5 (citing, inter alia, Proclamation No. 2762, 12 Fed. Reg. 8731 (Dec. 23, 1947).

[23]Senator Inouye was awarded the Congressional Medal of Honor, the nation's highest military decoration, for his battlefield actions in Italy.

Professor Muller's book is not only a worthy record of these little-remembered events, but make an important contribution towards reconciling the Japanese-American community, as well as the larger community, with its past.

This book is also worth reading on another level, in light of the legal problems that are likely to come to the forefront in this post-9/11, war-against-terrorism, world. Professor Muller's account reminds us of the crucial role that federal district judges play as the first line of defense of our Constitution. We see that the federal district court is the stage upon which both the majesty of the Constitution and the failures of the rule of law are vividly displayed.

Federal trial judges exercise almost unchallenged power over the cases pending before them. In these draft-resister cases, the judgments ranged from acquittals to sentences of a few months to five years' imprisonment. In one case, the draft resisters, upon conviction, were sentenced to pay a fine of one cent (p. 192, n.14). As one of the leaders of the draft-resister movement commented, "Gee, what in the hell is the matter with this justice system? It doesn't make sense. The charge is the same, identical" (p. 192).

The federal judges who presided over these trials likely represented a fair cross-section of the federal judiciary of the day. Some were so biased and prejudiced that, by any objective measure, they should have recused themselves from participating in the cases. Others strove to conform their judgments to a higher ideal than that embodied in the positive law they were sworn to uphold. All surely saw themselves as fair-minded judges who applied the law fairly and evenhandedly.

But all were the product of their time and place. And, at that time, overt racism was an accepted part of American life and law, and nativism and xenophobia played an important part in the politics of the American West. It is no wonder then that, for most of these draft resisters, their convictions and harsh sentences were a foregone conclusion. These "Jap boys" got exactly what they deserved, and what the public expected, under the standards of justice that then prevailed in the American West. It is to their credit that a few judges rose above their time and place to see the injustice of the strict and harsh application of the criminal sanctions of the Selective Service Act to these young men and recognized that, if not acquittal, mitigation and clemency were called for.

Today the cast in the federal courtroom has changed, but, like the stage itself, the scenarios remain familiar. In this post-9/11 world, many of the themes played out in this book will surely be played out again. The federal judiciary will

again be called upon to protect the values embodied in our Constitution from overreaching government attempts to run roughshod over them.

Professor Muller's book is also worth reading in this light, as a thoughtful examination of one of those interstices where the rule of law struggles to coexist with morality and justice, and federal judges struggle to uphold their sworn duty *and* to do justice. It is a revisit worth making.

Book Reviews

Eat What You Kill: Ethics, Law Firms, and the Fall of a Wall Street Lawyer, by Milton R. Regan, Jr. Ann Arbor: University of Michigan Press, 2004; 416 pp., illustrations, notes; $29.95, cloth.

Law is both a profession and a business. Unfortunately, in law practice, professional ethics and business ethics do not always coexist peacefully. This is the central thesis of Milton C. Regan, Jr.'s book on the law profession and legal ethics. Regan posits that an "eat what you kill" business mentality in many large law firms—a mentality holding that firm profits should be apportioned to partners according to the amount of profits each partner generates—causes some lawyers to cut corners on professional ethics in order to generate business.

Regan traces the development of giant American corporations and the giant law firms that service them, and how the "eat what you kill" corporate mentality came to replace the "nobody starves" professional mentality in many of those law firms in the 1970s and 1980s. In the traditional "nobody starves" model, a lawyer who works hard and performs well becomes a partner and is guaranteed tenure and a decent share of firm profits. With a shift to the "eat what you kill" model, partners must jockey for the best clients, associates must vie for work on the biggest-paying cases, underperforming partners are asked to leave the firm, and partners with big books of business feel little loyalty to their firms and are easily lured from firm to firm on the promise of ever-higher incomes.

To illustrate the consequences that may result when the business model overwhelms the professional model in law practice, Regan recounts the sad tale of John Gellene, an intelligent, hard-working partner at a prominent Wall Street law firm, Milbank Tweed. Gellene joined the firm in the 1980s just as the business model of law practice was taking hold. He was a talented bankruptcy lawyer, but not an adept business-getter, so he aligned himself with Larry Lederman, a partner who brought a large book of business with him from another firm. Lederman assigned Gellene a case involving representation of Bucyrus-Erie, a large equipment manufacturer, in a Chapter 11 bankruptcy reorganization. Gellene repeatedly lied under oath to a Wisconsin bankruptcy judge

about Milbank Tweed's potential conflicts of interest in the bankruptcy proceeding; the truth could have jeopardized Gellene's opportunity to represent Bucyrus-Erie. As a consequence, Gellene was the first lawyer ever charged with criminal violation of bankruptcy disclosure laws. At his trial, Gellene attributed his errors to "bad judgment" and called himself "stupid, but not criminal." The jury did not accept his excuses and concluded Gellene must have known that lying under oath is morally wrong and a criminal offense. He was convicted of perjury, sent to prison, and disbarred.

Regan attempts to reconstruct from circumstantial evidence what may have led to Gellene's ethical lapses and professional and personal downfall. Along the way, he analyzes the problem of situational ethics in the law. He shows that different fields of law practice may have different ethical standards, and that even within the same field of practice, different courts in different geographical and subject-matter specialities may recognize different standards. For example, in a bankruptcy reorganization, the debtor, the secured creditors, and the unsecured creditors may find themselves in ever-changing alliances and adversarial positions. The potential conflicts of interest are so rampant that large law firms representing large debtors will almost certainly face them in every case, a situation quite different from most ordinary litigation, where there are just two clear-cut sides. Thus, for very practical reasons, courts that oversee major bankruptcy reorganizations in New York or Delaware—frequented by these large corporations and law firms—can be quite tolerant of the firms' potential conflicts of interest as long as the conflicts do not actually impede zealous representation of the debtors.

This perceived tolerance could have influenced Gellene to believe that even if he were caught lying about potential conflicts of interest, it would not matter. If so, he was very wrong. The Wisconsin judge who presided over the Bucyrus-Erie bankruptcy had warned Gellene early on that "New York is different from Milwaukee." When Gellene's and Milbank Tweed's undisclosed conflicts were discovered, the judge forced the firm to disgorge all of the more than $2 million in fees earned in the bankruptcy proceeding.

Professor Regan occasionally tells us more than we really need to know about the numerous players and play-by-play of the Bucyrus-Erie bankruptcy, and he repeats some facts and conclusions more often than seems necessary. Still, he chronicles an interesting tale of a lawyer who lost his way in an ethical minefield. He writes lucidly about difficult legal concepts and issues, and he offers important historical back-

ground and context. This book is a valuable addition to the literature of the law profession and legal ethics.

Marc J. Poster
Los Angeles

Defending Rights: Law, Labor Politics, and the State in California, 1890–1925, by Thomas R. Clark. Detroit: Wayne State University Press, 2002; 297 pp., notes, index; $39.95, cloth.

A fundamental tenet of American history holds that the labor movement was different from its European counterparts. Passionately rejecting politics—so this argument goes—Samuel Gompers and other leaders of the American Federation of Labor feared the state and the legal system, both of which seemed stacked in favor or employers and against workers. As a consequence, they largely rejected politics and government-sponsored social reform. Stressing mainline trade union approaches aimed at winning direct concessions from employers rather than third party or socialist politics, "business unionism," as it was known, became a trait that Louis Hartz and other defenders of the "liberal tradition" identified as essential components of American "exceptionalism."

I doubt that this view of Gompers and the AFL actually holds up. Subjected to close scrutiny, American labor politics were far more complicated and less stereotypical, especially at the grassroots level. As Thomas Clark shows in this clearly written revision of his UCLA doctoral dissertation, between 1880 and 1920 police violence against strikers in California, as well as mass arrests of members of the Industrial Workers of the World, sham trials that sent union members to prison and blamed them for violence they did not commit, criminal syndicalism laws, the use of the judicial injunction to defeat boycotts and strikes, and gains made under federal intervention during World War I all pushed the state labor movement in the opposite direction of the AFL. The California labor movement engaged in extensive, prolonged political action not only in strong labor cities like San Francisco—where labor elected a mayor and dominated politics—but also in bastions of the open shop such as Los Angeles.

An early component of this activity was the largely unsuccessful flirtation with third-party politics and periodic alliances with socialist politics. A far more important element of labor movement political activity and interest group politics was the realization that the only way to combat police suppression and hostile court actions, particularly the use of the injunction

to stop strikes, was to organize, lobby, and build coalitions. Surprisingly successful, this political activity became an important element in Progressive Era politics. Although it has become common for revisionist historians to dismiss Progressive Era politics as a meaningless construct full of ambiguities and contradictions, Clark shows that, for the labor movement, it had very real meaning. A wide array of social and labor legislation, including regulation of employment agencies, minimum wage, child labor laws, and much more all emerged from the state legislature at this time. But the most important component of organized labor's political activity—legislation aimed at ending the use of injunctions against labor unions—failed completely, due in no small part to the ambiguities, tortured logic, and conflicted loyalties of Progressive Era politicians.

Although largely an institutional history that could easily have entangled readers in legalese, *Defending Rights* is a concisely structured presentation that has huge implications. First, it reveals a very complex picture of organized labor in the Golden State. Hardly monolithic, the California labor movement emerges as a nuanced entity with shifting and changing alliances, leaders who could at once be "progressive" and racist, and members who often jumped boundaries between mainstream and radical elements, with the two frequently overlapping simultaneously.

Another implication is that, when examined in such detail, the history of labor and law in California during what historian Leon Fink labeled "the era of the injunction" emerges less as a case study of an apolitical labor movement diverging from its European counterparts than as one long, parallel struggle to free organized labor from employer domination by whatever legal means possible. Contrary to mainstream labor law history, these years in California hardly constitute a dismal preliminary round to the Wagner Act of 1935. Caught halfway between the liberal approach of New York courts that recognized the legitimate purposes of strikers and sanctioned peaceful picketing and the conservative decisions of Massachusetts courts that restricted legitimate interests to wages and hours and prohibited picketing, the California labor movement struggled through a legal twilight zone where law recognized the right to strike while severely restricting the means to do so.

Fighting against that status, labor leaders worked toward government policies that promoted trade unionism, curbed the repressive powers of the courts, and protected the right to strike and bargain collectively with employers. Scholars interested in questions of change and continuity will find in Clark's book—despite his claims to sidestep the debate over

the origins and effects of New Deal labor policy (p. 227)—ample evidence that the legal battles and political activism of the California State Federation of Labor and various urban labor councils during the Progressive Era anticipated many of the main components of New Deal labor law.

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Miranda: The Story of America's Right to Remain Silent, by Gary L. Stuart. Tucson: University of Arizona Press, 2004; 210 pp., notes, bibliography, index; $24.95, cloth.

After the police in *In the Heat of the Night* discover that Virgil Tibbs (Sidney Poitier) is not the murderer but instead is a crack Philadelphia (Pennsylvania, not Mississippi) detective, Sheriff Bill Gillespie (Rod Steiger) arrests a new suspect and brings him to the station. There Poitier examines him but becomes skeptical that the new suspect is the murderer. "Did he confess?" Poitier asks. One of the officers breaks into a smarmy smile. "Well," he chortles, "I believe he will. Yessirree, I believe he will."

The movie opened in 1967. A year earlier, the United States Supreme Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966), that most famous of custodial interrogation cases, designed to deal with just such situations by creating the now familiar rules. Every peace officer in the country now knows the cant: you have a right to remain silent; anything you say may be used against you; you have a right to an attorney; if you cannot afford an attorney, one will be appointed for you. Back in the 1960s, however, those rules were uncommon, followed only by agencies such as the FBI, and certainly not in most communities like that featured in *In the Heat of the Night*. There interrogations often proceeded in derogation of what we since have come to believe are a suspect's rights.

Gary L. Stuart's *Miranda:The Story of America's Right to Remain Silent* discusses a myriad of issues related to *Miranda*, but of course in this he is not alone; as he freely acknowledges, hundreds of commentators have analyzed the case and its impact. What Stuart seeks to bring that is new is the perspective of people who were actually involved in the case. The book contains anecdotes and quotes from many of the participants, both at the time and retrospectively. The book does more, too: it details *Miranda*'s antecedents, discusses the continuing evolution of doctrine concerning custodial interrogation, and offers assessments by practitioners and academics.

Stuart dedicates the book to John P. Frank, the well-respected Phoenix attorney who, together with his partner John J. Lynch, handled the case in the Supreme Court.

Perhaps the most interesting part of the book, however, is not the anecdotes and reminiscences, but the description of the evolution of the argument that became the foundation of the Supreme Court's opinion. Traditionally, a confession was voluntary if the totality of the circumstances made it so, and if so, it therefore was admissible in evidence. This concept drew from the Fourteenth Amendment's proscription against state deprivation of liberty without due process of law. Furthermore, the right to counsel lay within the Sixth Amendment; two years earlier in *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Court had used that amendment in declaring that a felony suspect had such a right and could not be denied counsel if he asked.

The *Miranda* opinion changed those orientations, locating the question of voluntariness instead in the Fifth Amendment's prohibition against self-incrimination and lassoing the right to counsel to the right to remain silent, by providing that a suspect had to be advised of his right to counsel when taken into custody, in order to protect his right to remain silent. This was new: not the question of whether a suspect enjoyed a right to counsel, but the question of when he did so and what he had to be told about the right. It fell to Justice Harlan, in dissent, to label this transformation as a *"trompe l'oeil."* *Miranda*, 384 U.S. at 510 (Harlan, J., dissenting).

Stuart intimates that the transformation occurred in oral argument, when John Flynn responded to a question from Justice Potter Stewart (who ultimately would join the dissent in *Miranda*) about whether a right to a lawyer exists when the adversary process focuses on a particular person as a suspect. Flynn responded that a suspect had a right to a lawyer and could claim the right "if he's rich enough, and if he's educated enough to assert his Fifth Amendment Right, and if he *recognizes* that he has a Fifth Amendment Right to request counsel" (emphasis in original).

Although refocusing on the Fifth Amendment may well have been, if not a trompe l'oeil, a brilliant *pas de deux*, it is unlikely that the mere force of the oral argument carried the day. Long gone are the days when advocates like Daniel Webster argued for hours over a single case and the Court relied on the arguments to determine the outcome. In modern times, appellate judges rely far more on written than oral argument, and *Miranda* was one of five cases argued together where a full range of issues was discussed. Miranda's brief did not address the Fifth Amendment at all but, as Stuart points

out, one of the briefs in support of another petitioner did, and evidently the American Civil Liberties Union weighed in with an *amicus curiae* brief addressing the Fifth Amendment as well. It is far more likely that the written material provided the grist for decision and that Flynn recognized the potential of a position that he himself had not briefed, and used that argument to full advantage. When the justices retired after oral argument, however, they had the briefs to fall back on, however powerful the oral argument might have seemed.

This doctrinal evolution is not what galvanized the debate over *Miranda*, however. Rather, passions flowed over whether the Supreme Court was impeding the solution of crimes. The majority opinion bespeaks a distrust of law enforcement, and the criticism of its ruling has been both that law enforcement in fact *is* to be trusted and that confessions often are the only or best evidence; thus, by imposing these strictures on law enforcement, guilty defendants will go free, because lawyers of course will tell them not to say anything. Sometimes, however, the culture adapts to a change so that what once excited passion becomes accepted norm. In the 1930s, a fierce debate raged over whether the government should provide its citizens with a social security; that debate belongs to another era, and the debate now is over how to protect Social Security. So, too, with *Miranda*; where once passions raged, now, as Chief Justice Rehnquist held in *Dickerson v. United States*, 530 U.S. 428 (2000), "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," 538 U.S. at 443, and there is no doubt that the warnings are constitutionally based. *Miranda* may have freed some criminals, and Stuart includes evaluations by some suggesting that it has. But *Miranda* no doubt also increased professionalism among law enforcement agencies, as Stuart also points out.

There is much insight in Stuart's book and much even treatment. There is not, however, much attention to editing. Stuart set out to write a book accessible to both the lay reader and the professional attorney, but the product is a confusion and a book that is not particularly readable to either. The actual facts behind Miranda's arrest are told completely but dryly, as are the facts behind each of the other cases that were heard at the same time as *Miranda*, the earlier case of *Escobedo* and the later case of *Dickerson*. Not only does drama remain submerged, but the author does not know when to quit. Each of the various oral arguments is summarized, as are the oral arguments in the later case of *Dickerson*. Anecdotes and reminiscences are not grouped by theme, but are simply set out *seriatim*, an unhelpful way to implement the

author's desire to provide a broad sense of *Miranda's* social, political, and historical legacy. The book cannot decide whether it is narrative or analytic, folksy or erudite, critical or descriptive. The book is worth reading, but it is not an easy read.

Still, one ends with a sense that the author, at least, believes that *Miranda*'s legacy does, as John Lynch had argued to Justice Stewart, protect the poor and uneducated who may not know their rights, as well as the rich and educated who do. Those who need *Miranda* do not have to depend on the fortuity of a Virgil Tibbs to guard against an involuntary confession. Now embedded in the national culture and embraced across political and social divides, *Miranda* serves that function. In telling the "story behind American's right to remain silent," Stuart makes a useful contribution to understanding this seminal decision.

Hon. Ralph Zarefsky
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Articles of Related Interest

Below we list articles recently published in journals of history, law, political science, and other fields that we believe may be of interest to readers. Although comprehensive, the list is not definitive, and the editor would appreciate being informed of articles not included here.

Allen, Cain. "Replacing Salmon: Columbia River Indian Fishing Rights and the Geography of Fisheries Migration." *Oregon Historical Quarterly* 104 (Summer 2003).

Bakken, Gordon Morris. "Becoming Progressive: The California Supreme Court, 1880–1910." *The Historian* 64 (Spring/Summer 2002).

Baumgart, Howard D. "Ellensburg's Tree of Justice." *Columbia: The Magazine of Northwest History* (Winter 2001–2002).

Beaudoin, Ryan M. "Federal Ownership and Management of America's Public Lands through Land Exchange." *Public Land and Resources Law Digest* 38 (2001).

Blaisdell, Lowell L. "Anatomy of an Oklahoma Lynching: Bryan County, August 12–13, 1911." *Chronicles of Oklahoma* 79 (Fall 2001).

Bricker, Jennie L., and David E. Filippi. "Endangered Species Act Enforcement and Western Water Law." *Public Land and Resources Law Digest* 38 (2001).

Brooks, Karl. "'Powerless No More': Postwar Judges and Pacific Northwest Hydroelectrification, 1946–1967." *Idaho Yesterdays* 45 (Winter 2001).

California History 81:3 & 4 (2003). Special issue, "Taming the Elephant: Politics, Government, and Law in Pioneer California."

Cohen, Deborah. "Caught in the Middle: The Mexican State's Relationship with the United States and Its Own Citizen Workers, 1942–1954." *Journal of American Ethnic History* 20 (Spring 2001).

Cosens, Barbara A. "The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication." *Natural Resources Journal* 42 (Fall 2002).

Diamond, Sari Seidman, et al. "Juror Discussions during Civil Trials: Studying an Arizona Innovation." *Arizona Law Review* 45:1 (2003).

Escobar, Edward J. "Bloody Christmas and the Irony of Police Professionalism." *Pacific Historical Review* 72:2 (May 2003).

Gartner, Rosemary, and Jim Phillips. "The Creffield-Mitchell Case, Seattle, 1906: The Unwritten Law in the Pacific Northwest." *Pacific Northwest Quarterly* 94 (Spring 2003).

Gordon, Sarah Barringer. "The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America." *Journal of Supreme Court History* 28:1 (2003).

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