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Contents

Cover photo: The political, legal, and economic relationships between the state of Arizona and the Navajo Nation are the subject of Kathryn Sweet's article in this issue. (Collection of the Ninth Judicial Circuit Historical Society)

The Chinese "Are a Race That Cannot Be Believed": Jury Impaneling and Prejudice in Nineteenth-Century California*

Chiou-Ling Yeh

On December 10, 1875, Ah Sue, alias Chin Mook Sow, was arrested and charged with murdering a fellow Chinese immigrant, Yee Ah Chin, in San Francisco. On March 27, 1876, in *People v. Chin Mook Sow*, held in the Fifteenth District Court in San Francisco, Judge Samuel H. Dwinelle questioned George Snook, a prospective juror: "Have you any prejudice against [the Chinese] as a race?" Snook answered, "Yes, sir." Dwinelle then asked, "What is the character of that prejudice?" Snook responded, "Well, they are a race that cannot be believed."[1] Many of the prospective jurors expressed similar racial prejudice toward Chinese immigrants during voir dire, a process to select qualified jurors.

Given the rare availability of impaneling transcripts, few scholars have been able to study the testimonies of prospective jurors closely. One legal historian, who examined over 2,500

*I dedicate this article to Clare (Bud) V. McKanna, Jr., who not only introduced me to the case but also taught me how to navigate legal history. Sadly, he did not live to see the article in print. An earlier version of this article was presented at the meeting of the Association for Asian American Studies in 2010. My gratitude also goes to Suzanne Bordelon, Sandra Campbell, Haiming Liu, and Lisa Mar for their comments and suggestions, and to David Vidal for his research assistance.

[1]*People v. Chin Mook Sow*, file no. 447, in Applications for Pardon, Historical Case Files, Prison Papers, Records of the Governor's Papers (Sacramento: California State Archives) (hereinafter *People v. Chin Mook Sow*, Governor's Papers), 153.

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homicide cases in five states in the American West, discovered that the Chin Mook Sow trial was the only murder case that included impaneling of the jury in the trial transcript. It is, indeed, an extraordinary case and a rare document in western legal history that provides insight into impaneling and the treatment of Chinese defendants.

The landmark case of *People v. Chin Mook Sow* has received the attention of scholars seeking to demonstrate the negative effect of the anti-Chinese movement on Chinese defendants.[2] An article by John Wunder uses the case to discuss the court's decision regarding admitting Chinese immigrants' dying testimony.[3] Elizabeth Dale examines this case more extensively in her book *Criminal Justice in the United States, 1789–1939.* According to Dale, the difficulty jurors had in comprehending different Chinese dialects hindered the trial. Chin Mook Sow, however, received court-appointed counsels, top lawyers in San Francisco, who vigorously defended him. Even after he was convicted, they appealed on his behalf and challenged the dying testimony of the victim and the citizenship requirement of jurors. Dale also used the case to illustrate the declining possibility of receiving a pardon and the public's fascination with hanging—several hundred people witnessed Chin Mook Sow's

[2]Kevin J. Mullen, however, uses the case to argue that Chinese criminals received fair treatment in the judicial system. Mullen, *Dangerous Strangers: Newcomers and Criminal Violence in the Urban West, 1850–2000* (New York, 2005), 73.

On the anti-Chinese movement, see Mary Roberts Coolidge, *Chinese Immigration* (New York, 1909); Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Urbana, IL, 1939); Gunther Paul Barth, *Bitter Strength: A History of the Chinese in the United States, 1850–1870* (Cambridge, MA, 1964); Stuart Creighton Miller, *The Unwelcome Immigrant: The American Image of the Chinese, 1785–1882* (Berkeley, CA, 1969); Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley, CA, 1971); Andrew Gyory, *Closing the Gate: Race, Politics, and the Chinese Exclusion Act* (Chapel Hill, NC, 1998); Robert G. Lee, *Orientals: Asian Americans in Popular Culture* (Philadelphia, PA, 1999).

On Chinese and American law, see Milton R. Konvitz, *The Alien and the Asiatic in American Law* (Ithaca, NY, 1946); John R. Wunder, "*Territory of New Mexico v. Yee Shun:* A Turning Point in Chinese Legal Relationships in the Trans-Mississippi West," *New Mexico Historical Review* 654 (July 1990): 305–18; Wunder, "Anti-Chinese Violence in the American West, 1850–1910," in *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West,* ed. John McLaren, Hamar Foster and Chet Orloff (Regina, Saskatchewan, and Pasadena, California, 1992), 212–36; Charles J. McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America* (Berkeley, CA, 1994).

[3]John R. Wunder, "Chinese in Trouble: Criminal Law and Race on the Trans-Mississippi West Frontier," *Western Historical Quarterly* 17:1 (January 1986): 34–35.

execution on the gallows, although public hanging was banned in California.[4]

Building on Dale's argument that the prevailing anti-Chinese sentiments motivated white Californians to suspect Chinese immigrants' oaths and testimony and hindered the court from securing unbiased jurors, this article seeks to study the voir dire procedure in detail and analyze prospective jurors' racial attitudes in depth. Because the impaneling process alone generated 204 pages of the court transcript, the *Chin Mook Sow* case provides an unusual glimpse at jury selection and a window of opportunity to examine ordinary white property owners' perceptions of Chinese immigrants. Given that *People v. Chin Mook Sow* was the first case after California law granted juries the right to determine the penalty in cases of first-degree murder, it is even more pivotal to study closely how the court determined the jury.[5] Indeed, on appeal, defense counsels challenged one juror's competency because of his racial prejudice against Chinese immigrants.

The impaneling transcript demonstrates how white prospective jurors perceived Chinese as a race and how they judged the veracity of Chinese testimony. Historians have studied popular culture to discover racial ideas, which nonetheless tend to reflect the opinions of politicians, union leaders, and other elite groups. The impaneling testimony in the court transcript, in contrast, reveals the voices of ordinary white citizens. Since the impaneled jurors were chosen randomly from across San Francisco, this precious evidence reflects the opinion of a wide spectrum of white citizens from all walks of life, except for the poor, who did not own property. Because defense counsels inquired specifically about white prospective jurors' racial assumptions toward the Chinese, the transcript gives us a unique chance to find out their ideas about race relations, since the majority of them seldom left records of such interactions behind. The interrogation regarding the preference between Chinese and white testimony clearly revealed the racial identity of white prospective jurors and how they drew distinctions between themselves and Chinese immigrants.

Finally, this article argues that the close examination of the voir dire process exposes incongruities in the judicial system. It discusses how the judge's intervention in impaneling that sanc-

[4]Elizabeth Dale, *Criminal Justice in the United States, 1789–1939* (Cambridge, MA, 2011), 73–77. For other discussions of the mixed jury, see Lewis H. LaRue, "A Jury of One's Peers," *Washington & Lee Law Review* 33:4 (September 1, 1976): 841–76; Niamh Howlin, "Fenians, Foreigners and Jury Trials in Ireland, 1865–1870," *Irish Jurist* 45 (2010): 51–81.

[5]"Mook Sow's Execution," *San Francisco Call*, May 5, 1877.

tioned racial prejudice contradicted his rhetoric of racial justice in the charge to the jury, when he instructed jurors about the law before they retired to consider the verdict. In the end, the court failed to secure an impartial jury for the defendant.

THE CASE, THE PRESS, AND ANTI-CHINESE SENTIMENTS

Both Chin Mook Sow and Yee Ah Chin, the murder victim, were immigrants from China. On December 10, 1875, around six o'clock in the evening, Chin Mook Sow allegedly stabbed Yee Ah Chin with a knife in a building formerly known as the Baptist church, located on Washington Street in San Francisco. Four men and two little girls—the victim's daughter and her playmate—either witnessed the stabbing or saw the defendant flee the scene.[6] The victim was transported to the prison hospital and died the following morning. On his death bed, Yee Ah Chin claimed that the attack was caused by a money dispute; he said he had lent funds to Chin Mook Sow before, but when he refused to lend more to him, Chin Mook Sow attacked him.

The defendant was arrested, charged with murder, and brought to trial. It is unclear whether the dispute involved tongs, fraternal organizations that sometimes participated in criminal activities in nineteenth-century California. The *Los Angeles Herald* reported that Chin Mook Sow's supporters attacked several persons who testified against him during the trial on April 5, 1876.[7] But no fellow Chinese visited him when he was incarcerated. During the trial, the prosecutor accused the defendant of murdering another Chinese in the San Mateo County jail ten years earlier. However, no witnesses, including Judge Dwinelle, who presided over both trials, could identify him as the same person.[8]

Newspaper coverage portrayed the case in sensational language. To increase newspaper sales and to fan the flames of anti-Chinese sentiments, the post-1865 "penny press" dramatized crime stories that involved Chinese immigrants to

[6]"The Murder of Yee Ah Chin," *San Francisco Chronicle*, Dec. 13, 1875; "Yee Ah Chin's Murder," *Daily Alta California*, Dec. 13, 1875; "Mook Sow's Execution" and "The Halter," *Daily Alta California*, May 5, 1877.

[7]"Latest Telegrams: Pacific Coast," *Los Angeles Herald*, April 6, 1876.

[8]"Mook Sow's Execution," *San Francisco Call*, May 5, 1877.

fit readers' negative perceptions of Chinese.[9] The press used derogatory words such as Mongolians, celestials, highbinders, and heathens to describe Chinese criminals.[10] Similarly, Chin Mook Sow was dubbed "the Chinese murderer," "bloodthirsty Mongolian," and "highbinder" in the press, which assumed his guilt even before the trial.[11] Many newspapers initially attributed his motive to a woman.[12] The *San Francisco Chronicle,* for example, sensationalized the story by suggesting that the woman chose "the uglier" one and that her arrogance infuriated the other to commit the deed.[13] In spite of the victim's death bed statement that the attack was motivated by a money dispute, most newspaper coverage attempted to feed into the expectations of white readers by repeating the all-too-familiar story of Chinese immigrant men's rivalry over Chinese prostitutes and of their violent ways of dealing with each other.

The anti-Chinese movement intensified in San Francisco in the 1860s. Between 1860 and 1870, the number of Chinese in the city rose significantly, from 2,719 to 12,022, then jumped to 18,508 in 1875.[14] The rise prompted politicians, union leaders, and journalists to dramatize the threat to white morality and the labor market. The tensions between upper-middle-class and working-class whites, as well as native Protestants and Irish Catholics, also led politicians, journalists, and labor leaders to use Chinese immigrants as scapegoats. They attributed white families' financial difficulties to Chinese immigrants' unfair labor competition. They equally questioned Chinese male immigrants' masculinity because of their distinctive long braids and traditional Chinese clothes, along with their concentration in cooking, laundry, and domestic service sectors, traditionally viewed in Western culture as women's work. They further claimed that Chinese prostitutes would endanger the health of the white race by spreading venereal diseases to

[9]Gordon Morris Bakken and Brenda Farrington, *Women Who Kill Men: California Courts, Gender, and the Press* (Lincoln, NB, and London, England, 2009, 9.

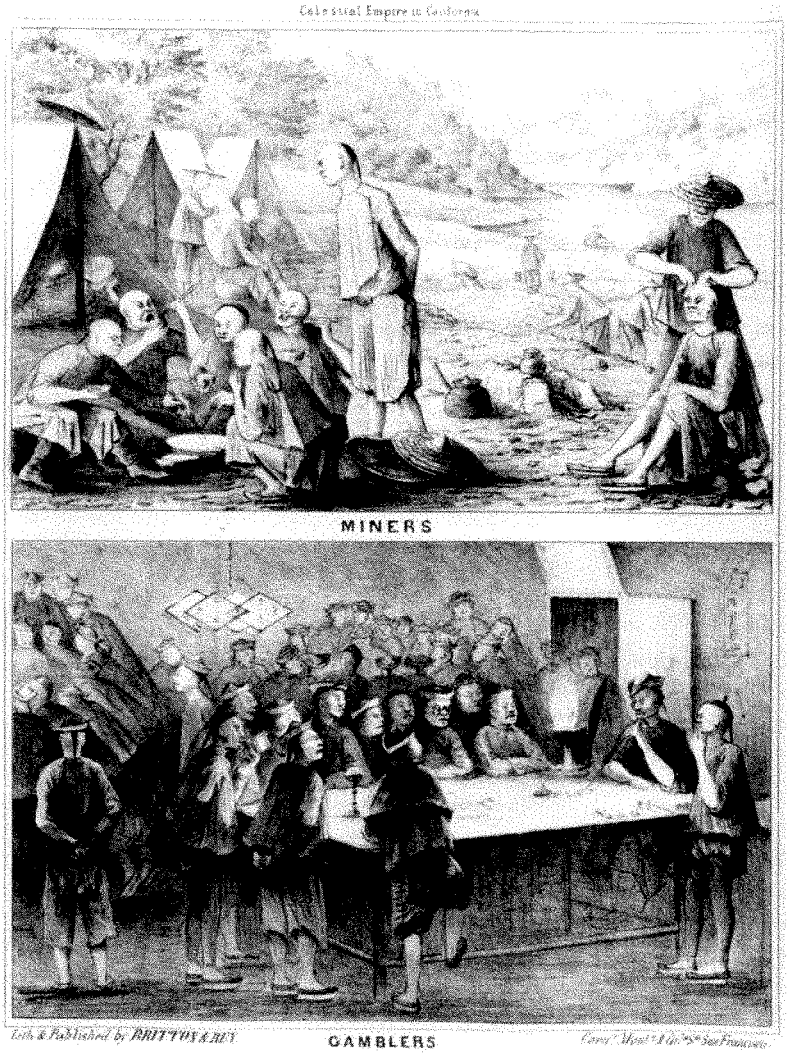
[10]Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910* (Chapel Hill, NC, 1981), 37.

[11]"The Halter," *Daily Alta California,* May 5, 1877; "Chinese Deviltry," *San Francisco Chronicle,* Dec. 11, 1875.

[12]"Latest Telegrams: San Francisco News," *Los Angeles Herald,* March 28, 1876.

[13]"Chinese Deviltry," *San Francisco Chronicle,* Dec. 11, 1875.

[14]Yong Chen, *Chinese San Francisco, 1850–1943* (Stanford, CA, 2000), 55.



The press used derogatory terms such as Mongolians, celestials, highbinders, and heathens to describe Chinese criminals. San Francisco, c. 1849–53. (Courtesy of Library of Congress, LC-DIG-PPMSCA-32181)

white men and boys.[15] The rhetoric of the "yellow peril" successfully inflamed anti-Chinese sentiments among ordinary Californians. In 1870, San Francisco passed its first ordinance that discriminated against Chinese street peddlers. It then followed with a considerable number of other anti-Chinese statutes. By the mid-1870s, the question of Chinese immigration had become a central political debate.

The trial of Chin Mook Sow took place during the height of the anti-Chinese movement. Two weeks previous to the impaneling, San Francisco Mayor Andrew Jackson Bryan formed a special committee of twelve to halt Chinese immigration and called for other cities and districts to act similarly. His agenda attracted huge crowds, including anti-coolie clubs from the city and nearby areas such as Oakland and South San Francisco. This was not the first attempt by Californians to stop Chinese immigration. California lawmakers had passed a law in 1858 to prevent Chinese from immigrating, but the U.S. Supreme Court struck it down because it intruded on federal powers. To stop Chinese immigration, white Californians then sought to win Congress' support. In 1875 they successfully urged Congress to pass the Page Law, which prohibited the entry of Chinese prostitutes, felons, and contract laborers. Chinese exclusionists saw an opportunity in the upcoming 1877 presidential election: they knew that both parties were in need of support from Californians. The prospect of getting Congress to restrict Chinese immigration prompted politicians and Anglo residents in San Francisco to take action. This occurred just four days prior to the impaneling of the jury.[16]

Agitators also threatened Chinese Americans with violence. Chinese had experienced fatal attacks since their arrival in the mid-nineteenth century. San Franciscans launched the first recorded violence against Chinese in 1852. Numerous deadly

[15]Hiroyuki Matsubara, "Stratified Whiteness and Sexualized Chinese Immigrants in San Francisco: The Report of the California Special Committee on Chinese Immigration in 1876," *American Studies International* 41:3 (October 2003): 32–59.

[16]"The Chinese Question," *Sacramento Daily Union*, March 23, 1876; "The Chinese Immigration Question," *Daily Alta California*, March 22, 1876; "The Chinese Question," *Daily Alta California*, March 23, 1876; "To the Public of the Pacific Coast," *Daily Alta California*, March 30, 1876; Alexander Saxon, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley, CA, 1971), 106–107; Charles McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America* (Berkeley, CA, 1994), 18.

outbreaks also occurred in other parts of the American West.[17] A few days into the trial, on April 5, 1876, in Union Hall, not far from Chinatown, 25,000 to 30,000 whites congregated to discuss strategies to rid the city of Chinese immigrants. During the day, ethnic leaders pleaded with the mayor for protection. They also took the matter into their own hands and barricaded Dupont Street to deter mob attack. Perhaps because of Chinese Americans' militancy or because the mayor sent in police to guard Chinatown, the day went by without bloodshed.[18]

Anti-Chinese sentiments also circulated widely in popular culture. Because most prospective jurors had little contact with Chinese immigrants, they were more likely to form their racial perceptions through print materials.[19] In the nineteenth century, "the anti-Chinese movement was an early example of what is now often called a 'culture war.' . . . The exclusionists published an enormous number of pamphlets, essays, articles, novels, political cartoons, and other literary products advocating the exclusion of Chinese immigrants from the United States."[20] The anti-Chinese rhetoric presented the image of Chinese as violent and evil. Newspaper articles were full of incidents showing that Chinatown was an unruly place filled with carnage. For example, three days after the *Chin Mook Sow* case, an article entitled "A Chinese Murder" declared that bloodshed took place in Chinatown almost every night.[21] Perhaps the sensational coverage of intra-Chinese mayhem can be attributed to the rising interest among white Americans who perceived the battles between Chinese immigrants as "a spectator sport."[22] This vicious representation of Chinese slaughtering each other likely contributed to the presumption by several prospective jurors that Chin Mook Sow was guilty. These anti-Chinese sentiments, as the defense counsels worried, would affect the impartiality of jurors.

[17]Wunder, "Anti-Chinese Violence in the American West, 1850–1910," in *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West*, ed. John McLaren, Hamar Foster, and Chet Orloff (Regina, SK, and Pasadena, CA, 1992), 218.

[18]"Latest Telegrams: Pacific Coast," *Los Angeles Herald*, April 6, 1876.

[19]Only seven prospective jurors admitted having some interactions with Chinese either through their business or their residence.

[20]K. Scott Wong, "Cultural Defenders and Brokers: Chinese Responses to the Anti-Chinese Movement," in *Claiming America: Constructing Chinese American Identities During the Exclusion Era*, ed. K. Scott Wong and Sucheng Chan (Philadelphia, PA, 1998), 3.

[21]"A Chinese Murder," *San Francisco Chronicle*, Dec. 13, 1875.

[22]Susan Lee Johnson, *Roaring Camp: The Social World of the California Gold Rush* (New York, 2000), 306.

SELECTING JURORS

A trial jury was selected from a list containing between 800 and 1,200 names. Potential jurors were "selected from the different wards or townships of the respective counties, in proportion to the number of inhabitants." People from certain professions, such as public officials, educators, physicians, railroad employees, and firefighters, could be exempted from acting as jurors.[23] The court would call in a panel of fifty prospective jurors at a time. The selection of the jury was based on "a system of challenges and additional disqualifications." Defense counsel and prosecutors could challenge any prospective jurors who "demonstrate[d] some actual or potential partiality to the case."[24] It was common to exhaust the first panel and call in additional panels, especially for criminal cases involving murder.

On March 27, 1876, the Fifteenth District Court began to examine prospective jurors on their voir dire, in which the judge, prosecutor, and defendant's attorneys would interrogate each potential juror about his qualifications. Judge Samuel H. Dwinelle presided, and district attorney Daniel J. Murphy served as the prosecutor. Four lawyers were appointed by the court to represent the defendant: Solomon A. Sharp, E.J. Pringle, E.F.B. Hartson, and R.Y. Hayne. For the defense, Sharp alone interrogated all of the prospective jurors during voir dire.

The racial attitudes harbored by the judge, the prosecutor, and the defendant's attorneys merit an examination, as they often determine the fairness of a trial. Samuel Dwinelle was born in Madison County, New York, in 1822, and followed the Gold Rush to Sonoma, California, in 1850. Later he relocated to San Francisco, where he changed professions from printer to lawyer. He became a judge on the Fifteen District Court in 1864 and served for fifteen years. In October 1876, a joint committee of the United States Senate and House of Representatives interviewed him about the impact of Chinese immigration on the country. Dwinelle voiced no immediate urgency to bar Chinese immigrants, since their small population did not produce a threat to white Americans. Further, he considered their cheap labor beneficial to railroads and other business ventures. However, although he declared that the state required a low-cost labor force to perform menial tasks, he regarded white

[23]E.F. Buttemer Harston, *Practice, Pleading, and Evidence in the Courts of the State of California in General Civil Suits and Proceedings* (San Francisco, 1877), 79–81.

[24]Ashton Wesley Welch, "Ethnicity and the Jury System," *Ethnic Studies Review* 24:1 (April 30, 2001): 1005.

laborers as more desirable, since "they assimilate more to our ways, our customs, and our religion." Finally, he insisted that Chinese testimony was unreliable and admitted that he held a strong prejudice against the Chinese.[25]

District attorney Murphy harbored even greater hostility toward Chinese immigrants. Born in Lowell, Massachusetts, he moved to San Francisco in 1855 and practiced law there. Elected district attorney of the city in 1871 and nicknamed a "thunderous prosecutor," Murphy served for three terms until he was elected superior judge in 1884. After retiring from the bench in 1900, he went back to private practice.[26] Before becoming district attorney, Murphy was hired in two different cases in 1869 to challenge the law that denied the admissibility of Chinese testimony after the landmark case, *People v. Hall*, in 1854. Interestingly, even after his election, Murphy challenged the same law in a robbery case in 1872. His attempts failed, however.[27] During the time of the Chin Mook Sow trial, one week after the impaneling, Murphy revealed his prejudice to a committee of California senators who investigated the problem of Chinese immigration. In the meeting, Murphy not only denounced Chinese testimony, but also asserted that the Chinese were "naturally vicious, dishonest, and untruthful." Declaring that 70 to 80 percent of Chinese belonged to the criminal class, he deemed Chinese "dangerous to the morals of the community" and claimed that there was "great danger to be apprehended from admixture with them."[28]

Little information is available about the racial assumptions of the defense counsel. Solomon Sharp, a native of Kentucky and a prominent, influential San Francisco attorney, was once a member of the California Senate.[29] E.J. Pringle, son of a prominent South Carolina family, graduated from Harvard in 1845. In

[25]"Death of a Jurist," *Daily Alta California*, January 13, 1886; "Two or One," *Sacramento Daily Union*, Oct. 15, 1873; U.S. Congress, *Report of the Joint Special Committee to Investigate Chinese Immigration* (Washington, DC, 1877), 747–51.

[26]"Judge Murphy, Widely Known Jurist, Is Dead," *San Francisco Chronicle*, April 27, 1919; "Daniel J. Murphy for District Attorney," *San Francisco Chronicle*, Nov. 1, 1898.

[27]McClain, *In Search of Equality*, 33–36, 42.

[28]California Legislature, *Chinese Immigration: Its Social, Moral, and Political Effect* (Sacramento, CA, 1878), 147–48.

[29]"The Legislature," *Sacramento Daily Union*, Jan. 7, 1861. His partners included James A. McDougall, who later became a U.S. senator for California. Oscar T. Shuck, "Men of the First Era," in *History of the Bench and Bar of California: Being Biographies of Many Remarkable Men*, ed. Oscar T. Shuck (Los Angeles, CA, 1901), 469.

1853 he relocated to California, where he became a renowned attorney and supreme court commissioner.[30] Little is known about defense attorney R.Y. Hayne, except that he once represented the city of Oakland in a suit challenging a water-rate ordinance and also served on the State Board of Railroad Commissioners. As for E.F.B. Harston, unfortunately, no information could be located.

The impaneling began when twelve prospective jurors were called and sworn in. The prosecutor first informed them about the case and then used Section 1074 of the California Penal Code to disqualify anyone who opposed the death penalty. Afterward, the defense attorney interrogated prospective jurors on their qualifications. At the time, the code of civil procedure in the courts of California required a juror to be an American citizen, a resident of the township for more than three months, an elector and voter, and a taxpayer on the last assessment roll.[31]

Even though many prospective jurors were disqualified, it took just two days for the court to select twelve qualified jurors for Chin Mook Sow's trial. For criminal cases such as this one, it usually took more time to select jurors. For example, in 1872, in the retrial of Laura D. Fair for the murder of A.P. Crittenden, it took eight days to form a jury.[32] For *Chin Mook Sow*, the court chose eight jurors on the first day and added a second panel the next day. A total of seventy-four prospective jurors were impaneled. Three were ineligible due to noncitizen status, while seven were dismissed because they owned no property. One was removed owing to his failure to meet the residency requirement, and eleven were eliminated for their opposition to the death penalty. One German immigrant was excused because of his limited English proficiency. Another four were discharged because, after reading newspaper coverage of the case, they already had determined that the defendant was guilty. Of the remaining forty-seven people whom the defense attorney interrogated about their perceptions of the Chinese, only three claimed that they harbored no prejudice.

"PREJUDICE AGAINST THE CHINESE RACE"

The most important task for the defense was to examine prospective jurors regarding racial prejudice and determine

[30]"Court Commissioner E.J. Pringle Seriously Ill in East Oakland," *San Francisco Chronicle*, April 21, 1899.

[31]*The Penal Code of the State of California, Approved February 14, 1872* (San Francisco, 1931), 273; Harston, *Practice, Pleading, and Evidence*, 78.

[32]Bakken and Farrington, *Women Who Kill Men*, 37.

whether to dismiss those whose racism might hinder them from providing the defendant with a fair trial. In the *Chin Mook Sow* case, the defense was concerned about the ethnic composition of jurors and their racial prejudices. Because Chinese immigrants were ineligible for citizenship, the defense attorneys challenged the citizenship requirement and requested that the defendant be tried by a mixed jury, consisting of one-half citizens and one-half non-naturalized immigrants. The request was denied because the law only allowed citizens to serve on juries.[33]

The 2nd Subdivision of Section 1073 of the California Penal Code provided the defense attorneys with ammunition to interrogate prospective jurors about their racial prejudice and to challenge their qualifications.[34] *People v. Reyes* (1855) set a precedent for questioning a potential juror's prejudice. The case involved Nestor Reyes, a Mexican citizen, accused of assault with intent to commit murder. Initially, the lower court barred the defendant's attorney from interrogating prospective jurors with questions that attempted to determine if a juror harbored bias against Catholic foreigners. The California Supreme Court reversed the lower court's decision and ordered a retrial. In the ruling, Judge J. Bryan wrote that "each and every juror who sits in a case should have a mind entirely free from all bias or prejudice of any kind whatsoever."[35]

At Chin Mook Sow's trial, only three prospective jurors in the impaneling declared that they held no prejudice against the Chinese. Acknowledging that he had had little contact with Chinese immigrants and had scant knowledge about them, Samuel Siulé asserted that a person's race should have no effect on the veracity of his testimony: "I have yet to learn that a man's color has anything to do with his testimony directly."

[33]*People v. Chin Mook Sow*, 51 Cal. 597 (1877). Defense counsel argued that the common law, the spirit of the Constitution, and Chinese language proficiency called for a mixed jury. Appellant's Brief in *People v. Chin Mook Sow*, California Supreme Court, case no. 10232, Oct. 25, 1875 (California State Archives, Sacramento), 30–32.

[34]The 2d Subdivision of Section 1073 of the California Penal Code stated, "For the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party, which is known in this code as actual bias." California, *The Penal Code of the State of California*, 273.

[35]*People v. Reyes*, 5 Cal. 347 (1855). In spite of this precedent, more than two decades later a trial court refused to allow Chinese immigrant Car Soy's counsel to examine potential jurors about their ability to evaluate Chinese testimony fairly. The California Supreme Court, however, overturned the decision and ordered a retrial. *People v. Car Soy*, 57 Cal. 102 (1880).

H.P. Donks held similar beliefs, and R.M. Black claimed that he would weigh the testimony of a Chinese witness equally with that of his white counterpart.[36]

Statements from the remaining forty-four prospective jurors, though, expose the pervasiveness of racism. Most of them summarily admitted their racial bigotry when defense counsel Sharp asked them if they had "any prejudice against the Chinese race." Some, however, initially denied their prejudice because hostility toward the Chinese had become so widespread that they did not consider their racism a hindrance to the trial. For example, when Sharp first questioned Hugh Duffy about whether he had "any bias or prejudice against the Chinese as a race," he answered, "No, sir, nothing biased." When Sharp pressed him again, he then admitted, "Nothing more than general principles."

By 1867, many white Californians had already woven anti-Chinese sentiments into their white identity. [37] Many thus regarded racism toward the Chinese as part of "general principles." Indeed, when prosecutor Murphy asked Duffy if he was "opposed to the Chinese as a race," Duffy answered, "Yes, sir." [38] Interestingly, the court eventually would dismiss those prospective jurors who refused to accept Chinese witnesses.

Because of the nature of the interrogation, only a few prospective jurors were given a chance to explain the cause of their racism. Two objected to Chinese immigration and the settlement of Chinese in San Francisco. One disliked their prominent presence, and another feared the impact of Chinese immigrants on "the political interests of our state and its general welfare."[39] Most prospective jurors placed Chinese in a lower racial hierarchy than whites. Interestingly, none specified job competition as a factor, a common justification used by anti-Chinese agitators to exclude Chinese immigrants. Only one impaneled juror attributed the undesirability of Chinese to class. As Thomas Cantrell declared, "I do not like them as a class."[40] Because Cantrell's statement was very short, it is hard to know what he meant by class. He may have been referring to Chinese as a racial group or an economic group. If it was the latter, he may have seen the Chinese as an economic threat.

[36]*People v. Chin Mook Sow*, Governor's Papers, 123, 169–70, 198–99.

[37]Alexander Saxon, *The Rise and Fall of the White Republic: Class Politics and Mass Culture in Nineteenth-Century America*, 2d ed. (London, England, 2003), 294–99.

[38]*People v. Chin Mook Sow*, Governor's Papers, 18–19, 21.

[39]Ibid., 45, 57.

[40]Ibid., 7.

Others, however, perceived no job threat from Chinese immigrants. Because the impaneled jurors were property owners, they faced little job competition from Chinese immigrants, most of whom worked, at this time, in unskilled and low-paid manufacturing and domestic sectors.[41]

"[THE CHINESE] ARE A RACE THAT CANNOT BE BELIEVED."—PROSPECTIVE JUROR GEORGE SNOOK

Many jurors preferred to believe white testimony over that of Chinese. The California Supreme Court ruled, in 1854, against allowing Chinese witnesses to testify in court, but California's Civil Procedure Code repealed that decision in 1872. Even though the court accommodated Chinese witnesses, they faced broad suspicion from jurors, judges, prosecutors, and law enforcement.[42] After interrogating potential jurors for their racial attitudes toward the Chinese, defense attorney Sharp then examined them to see if they bore any prejudice against Chinese testimony under oath. The majority admitted that their hostility against Chinese as a race would extend to their suspicion of Chinese testimony. Among those forty whom Sharp interrogated about their preferences between Chinese and white witnesses, thirty-three readily replied that they preferred to believe a white witness over a Chinese one. All except two regarded the white race, as a whole, as a trustworthy group.[43] One prospective juror, H. Harmon, credited his preference for white witnesses to his ability to understand them better.[44] His attitude reflected the perception of those whites who considered Chinese immigrants inscrutable. Another attributed his preference for white witnesses to his white identity. As George Head claimed, "Well, I have a preference to my own race, the white men and should therefore prefer them to Chinaman."[45]

The testimony demonstrates the entrenched white supremacist attitudes that Chinese immigrants encountered. According

[41]The defendant's attorney interrogated only some of the prospective jurors about their occupations, which included business, insurance, furniture, grocery, dry goods, and produce.

[42]Clare V. McKanna, Jr., "Chinese Tongs, Homicide, and Justice in Nineteenth-Century California," *Western Legal History* 13:2 (Summer/Fall 2000): 209.

[43]The two prospective jurors believed that some white men were at the same level as Chinese men. *People v. Chin Mook Sow*, Governor's Papers, 29, 72.

[44]Ibid., 158.

[45]Ibid., 130.

to Robert Lee, the American public in the 1850s constructed California as "a free-soil Eden, a place where small producers, artisans, farmers, and craftsmen might have a second chance to build a white republic, unstained by chattel slavery or proletarian labor."[46] Chinese immigrants entered an unequal, multiracial society, which stratified various groups along racial lines, with white Americans on top of African Americans and Native Americans. While citizenship and other legal, political, and economic privileges were afforded to whites, often considered as their entitlements, these very rights were denied to nonwhites. The racial status of Chinese immigrants was similar to that of African Americans, and they went through what Najia Aarim-Heriot has referred to as "Negroization," evident in their ineligibility for citizenship.[47] The depression in the 1870s, compounded with the fear that Chinese immigrants might gain the same political rights (i.e., citizenship and suffrage) as African Americans, provoked a new wave of anti-Chinese agitation in California in the 1870s.[48]

This deep-seated white supremacist thinking helps to account for the reasons why white prospective jurors dismissed Chinese testimony. In general, because they perceived Chinese as untrustworthy, they discounted Chinese testimony in court. As noted earlier, prospective juror George Snook declared that "[the Chinese] are a race that cannot be believed." P.H. Canavan further explained that his skepticism was not due to the skin color but "the general character of the people. I think they are a lying people by nature."[49] Attempting to deny his racism by disassociating "skin color" from judging a group, Canavan nonetheless coupled race with behaviors.

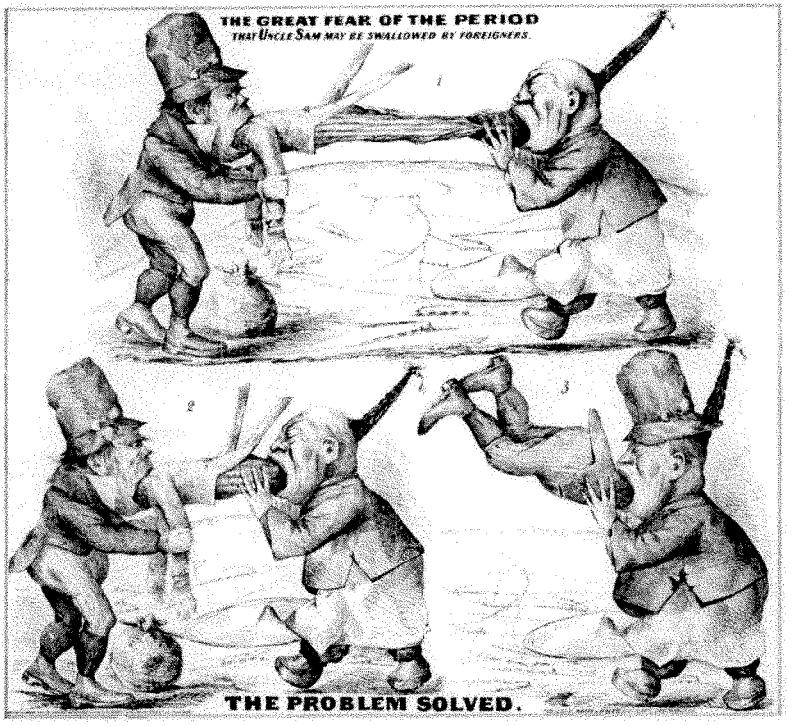
Prospective jurors also doubted the ability of Chinese immigrants to uphold an oath. According to scholar John Wunder, "the question of whether a Chinese witness could be bound by an oath was one of several issues that predominated in crimi-

[46]Lee, *Orientals*, 9.

[47]Najia Aarim-Heriot, *Chinese Immigrants, African Americans, and Racial Anxiety in the United States, 1848–82* (Urbana, IL, 2003), 110.

[48]The naturalization of the Chinese first became a central political issue in 1867. In 1875, federal codifiers left out the phrase "being a free white person" in the naturalization provision, which encouraged some Chinese immigrants to file declarations of intention to become citizens. This alarmed the white community and prompted newspapers to alert the public about the issue. Sandmeyer, *The Anti-Chinese Movement in California*, 46. "Coast Items," *Daily Alta California*, Jan. 2, 1876; "Chinese Naturalization, and the Chinese Question," *Sacramento Daily Union*, Jan. 15, 1876; Saxon, *The Rise and Fall of the White Republic*, 295.

[49]*People v. Chin Mook Sow*, Governor's Papers, 145–46.



The great fear of the period was that Uncle Sam might be swallowed by foreigners. San Francisco, 1860–69. (Courtesy of the Library of Congress, LC-DIG-pga-03047/LC-USZ62-22399)

nal law in the trans-Mississippi West during the Gilded Age and oftentimes prevented Chinese defendants and witnesses from achieving equal treatment from the Anglo-American legal system." Because religious beliefs determined a person's ability to take an oath (tell the truth or face God's wrath), non-Christians and nonwhites were most vulnerable in the legal system, because white Protestants questioned their ability to deliver truth. As a result, Wunder observed, "the Chinese as a group were not summarily allowed to take an oath. . . . Chinese witnesses had to be examined with reference to religious beliefs in all trans-Mississippi West jurisdictions before they were allowed to testify."[50]

Prior to the admission of the dying testimony of the victim, Yee Ah Chin, the court likewise investigated Chinese reli-

[50]Wunder, "Chinese in Trouble," 27, 31, 33.

gious beliefs. Moreover, seven prospective jurors believed that Chinese immigrants failed to comprehend the importance of an oath. Only prospective juror S.H. Little affirmed that some Chinese understood its solemnity. Fred Vanghou articulated the prevailing view: "I do not believe the Chinese are sufficiently educated to understand our laws in regard to an oath. They are not sufficiently versed in our laws."[51] Others simply considered Chinese witnesses untrustworthy. As John White claimed, "My belief is this, that they all come into court to swear to anything that will suit their purpose."[52] A.C. Springer further declared that the Chinese were unreliable even in their own beliefs: "Perhaps, if you cut off the head of a chicken they can tell the truth a little better, but it would not make much difference."[53] Certain California courts, for a short time, accepted an alternative form of oath, based on perceived Chinese religious rituals. Such a practice, however, was quickly discontinued, because the legal system concluded that it not only was "a disgrace to the court," but also would not lead to more genuine Chinese testimony.[54] Interestingly, none of the prospective jurors attributed their distrust of Chinese testimony to the Chinese's non-Christian beliefs.[55]

"DO YOU THINK YOU COULD GIVE THE MAN A FAIR, IMPARTIAL TRIAL NOTWITHSTANDING YOUR PREJUDICE AGAINST THE RACE?"—JUDGE SAMUEL H. DWINELLE[56]

A closer look at the testimony of the selected jurors discloses the failure of the U.S. legal system to afford a Chinese defendant a fair trial, since the majority of the jurors harbored racial prejudice and did not view Chinese witnesses as credible. Of the twelve jurors, nine admitted their prejudice against Chi-

[51]*People v. Chin Mook Sow*, Governor's Papers, 74, 112.

[52]Ibid., 111.

[53]Ibid., 105.

[54]U.S. Congress, *Report of the Joint Special Committee to Investigate Chinese Immigration*, 188, cited in John C. Lammers, "The Accommodation of Chinese Immigrants in Early California Courts," *Sociological Perspectives* 31:4 (October 1988): 458–59.

[55]Some jurors who were impaneled in August 1875 for a case that involved an Italian who had killed a Chinese immigrant claimed that Chinese were untrustworthy because they were heathens. "Equality Before the Law," *Daily Morning Call*, August 12, 1875.

[56]*People v. Chin Mook Sow*, Governor's Papers, 11.

nese, although some initially denied it. [57] Among these nine jurors, I will analyze closely the testimony of three to reveal the racial discrimination that existed in the judicial system.

Juror Samuel Steele's testimony best exemplifies those jurors who believed that their ability to serve on the jury would not be undermined by their trusting white witnesses over Chinese ones.[58] When defense counsel Sharp asked Steele if he bore racial prejudice against Chinese, he replied, "I do not think I have anything that would disqualify me from being a juror." Sharp probed him again, "Does your prejudice extent [sic] to their veracity?" Steele answered, "Yes, sir." Here Steele admitted that his racism led to his distrust of Chinese testimony, but he believed that this assumption would not compromise his ability to be a juror. Sharp followed by asking his preference between white and Chinese witnesses. Steele responded, "The white witness." Sharp repeated, "The white man?" Steele confirmed, "Yes, sir." Sharp then pressed him about whether he would always prefer to give credibility to "an American or white man" over "a Chinaman," if all other things were the same. Steele replied, "Yes, sir, everything being equal, it would." Sharp rephrased the question, and the answer again was "Yes, sir." Sharp subsequently asked him if his judgment would be weakened because he always preferred to believe a white man over a Chinese. Steele replied, "Well, I do not think it would." Because his testimony was contradictory, Sharp then reminded him of his statement that he would always believe a white witness. Steele confirmed, "I think I would give the white man the preference." When Sharp affirmed again that race was the only difference, Steele again answered, "I would give preference to the white man." Hearing this, Sharp used Section 1073 to challenge Steele's qualification.

Contesting the challenge, prosecutor Murphy then examined Steele regarding his view of Chinese testimony. He began with this question: "Do you think all things would be equal between a white man and a Chinaman?" Steele replied, "I hardly think they could." When Murphy asked Steele if his bias would deter him from believing a Chinese witness if the latter told a plausible story, Steele answered, "No, sir." Murphy then questioned Steele about whether his bigotry would color his trust of

[57]These selected jurors included Thomas G. Cantrell, E.B. Holmes, T.D. Matthewson, Samuel B. Steele, L.C. McAffee, Phillip H. Kraner, E.F. Ohm, Samuel Siulé, Henry Winkle, R.M. Black, H.P. Donks, and L. Auerbach.

[58]In addition to Samuel Steele, the following jurors also preferred to believe a white witness over a Chinese one: Thomas Cantrell, Phillip Kramer, E.F. Ohm, and Henry Winkle. *People v. Chin Mook Sow*, Governor's Papers, 7, 10, 83–84, 94–95, 148.

a Chinese witness when the latter voiced a reasonable account. He responded, "No, sir." Murphy then pressed him again about his racism. "This opinion you entertain as to the Chinese race, would it prevent you giving credit and full weight to the Chinese witness where he got up to the stand and told a story probable of itself and where other facts and circumstances corroborated it?" The answer again was "No, sir." Sharp then withdrew his challenge to Steele.[59]

This interrogation reveals the flaw inherent in the impaneling process: Steele's preference for a white witness over a Chinese one would undoubtedly undermine his judgment, although he insisted that it would not compromise his belief in Chinese credibility. Because there were sixteen Chinese and fifteen white witnesses, Steele's partiality toward a white witness would surely weaken his ability to deliver an impartial decision if Chinese and white witnesses contradicted each other.[60]

The following questioning during impaneling reflects the views of those jurors who would accept only verified Chinese testimony.[61] When asked by defense counsel Sharp if he had "any prejudice against the Chinese in regard to their oath," L. Auerbach answered, "I would believe them perhaps if the testimony was corroborated by other facts and circumstances; otherwise I would not." Sharp rephrased the question: "You would place no confidence in what Chinamen testified to under oath?" The answer was "I do not." Sharp then asked him, if both Chinese and white witnesses under oath gave two plausible accounts, which one he would believe. Auerbach replied, "Well, I would weight [sic] the testimony. I would not tell exactly at first which I would believe." Because Auerbach contradicted his statements, Sharp questioned him again about his racial prejudice: "Color wouldn't make any difference whether white or black or copper colored?" Auerbach responded, "No, the color wouldn't make any difference." Sharp then asked him directly if he had "any prejudice at all against the Chinese race." He retorted, "I have," but added, "I would not believe a white man sometimes more than I would a Chinaman." These two statements contradicted each other, thereby prompting Sharp to probe him with the same question again. This time, the answer was "No, sir." Satisfied with the answer, Sharp

[59]Ibid., 77–80.

[60]The number of Chinese witnesses could be seventeen because one of them was listed as recalled, but the first name differed from the one that appeared in the list. *People v. Chin Mook Sow*, Governor's Papers, no pagination.

[61]The other selected juror, E.F. Ohm, also thought that Chinese testimony needed to be verified. *People v. Chin Mook Sow*, Governor's Papers, 94.

changed the course of the questions. Afterwards, the juror was sworn in.[62] This example reveals that although a juror suspected Chinese testimony, the judicial system still trusted his ability to evaluate evidence impartially.

The following interrogation further demonstrates the fundamental problem in the legal system—the failure to acknowledge the effect of racism on due process. During his examination of Thomas Cantrell, defense counsel Sharp questioned him regarding his perception of the Chinese: "Have you any feeling or prejudice towards the nationality to which the defendant belongs—the Chinese race?" Cantrell responded, "Yes, sir." Sharp then asked him if he could trust a Chinese witness the same as a white one. Cantrell answered, "[T]hat would depend upon whom the Chinaman was and [whom] the white person was." When Sharp clarified that Cantrell would not know either, the prospective juror declared, "I should be governed by the circumstances, I think." Although his statement showed no favor to white witnesses, he soon disclosed his prejudice against Chinese in an answer to the next question, "What is the nature of your feeling of prejudice against the Chinese?" Cantrell replied, "Well, sir. I do not like them as a class." When asked about his preference between Chinese and white witnesses, he testified that he preferred the latter. Hearing this, Sharp used Section 1073 of the penal code to challenge his qualification.[63]

Opposing Sharp's challenge, district attorney Murphy asked Cantrell to explain further his racial attitude and his view regarding Chinese and white testimony. Cantrell responded, "I have had very little to do with [the Chinese]. Chinamen never came in contact with me, in business in any way. Still I have a prejudice against them as a class." Murphy subsequently questioned Cantrell about whether he had any prejudice against the defendant. He answered, "None whatever, no, sir." When Murphy asked Cantrell if his racism would undermine his judgment to evaluate Chinese testimony fairly, his response was "I would not do injustice to anybody if I knew it." Murphy then reminded Cantrell of his statement against the Chinese as a race. Cantrell confirmed, "That is it exactly." Murphy pressed him again, "That is just about the way you stand, is it not?" Cantrell reconfirmed, "Yes, sir." Murphy then asked him if his prejudice would lead him to distrust a Chinese witness, even though the latter gave a reasonable and verified story.

[62]Ibid., 205–206.

[63]Ibid., 6–8.

Here Cantrell denied that his prejudice would hinder him from believing Chinese testimony.[64]

Because Cantrell's testimony failed to establish his trustworthiness to be an impartial juror, defense counsel Sharp took over the interrogation for a second time. He once again examined Cantrell about whether he held prejudice against the Chinese as a race. Cantrell confirmed, "Yes, sir." Sharp subsequently asked him if he could distinguish the defendant from the other Chinese. Cantrell then asked, "Which is the prisoner?" Neither Sharp nor Cantrell answered the question verbally. They may have responded to it through body language. Sharp then questioned Cantrell's ability to give the defendant a fair trial: "Would not your prejudice extend to him the same as to the rest of the race?" Cantrell confirmed, "Yes, sir, exactly." Cantrell reaffirmed that his racism would influence his judgment toward the defendant. Here Sharp assured him that nobody would accuse him of being unjust to anybody. He then asked Cantrell if he would prefer to believe a white witness over a Chinese one, when both of their testimonies appeared to be reliable. Cantrell answered, "Yes, sir, under such circumstances, I would give credence to the white person."[65] His statement once again reveals his inability to give the defendant an impartial trial, because he favored white witnesses.

Dissatisfied, the judge took over the examination. As noted earlier, Judge Dwinelle bore racial prejudice toward the Chinese. During the interrogation, he first asked if Cantrell had "any actual bias against this defendant." The latter responded, "No, sir, nothing more than he is a Chinaman." Although Cantrell admitted his racism, Dwinelle ignored it and proceeded to question him about whether he could evaluate the evidence and give a verdict based on the instruction of the court in spite of his racial prejudice. Cantrell declared, "Yes, sir. I surely would not hang a man because he was a Chinaman." Dwinelle probed him again about whether he could give the defendant "a fair, impartial trial notwithstanding your prejudice against the race."[66] Cantrell answered, "Yes, sir." Dwinelle then denied the challenge made by the defense attorney and accepted Cantrell as a juror. At this juncture, Sharp declared that he reserved an exception, signifying his objection to the decision of the court and a possibility of an appeal.[67]

[64]Ibid., 8–9.

[65]Ibid., 10.

[66]Ibid., 10–11 (emphasis added).

[67]Ibid., 11.

The close examination of this lengthy interrogation exposes the defects in the legal system. Although the impaneled juror repeatedly admitted that his racial prejudice would hinder him from trusting Chinese witnesses, Judge Dwinelle deliberately set aside the juror's racial bigotry and included him in the jury. The judge's assumption that a juror could provide a fair, impartial trial in spite of his racial prejudice demonstrates institutional racism that resided deep within the judicial system. Moreover, Judge Dwinelle's racist courtroom action contradicted the rhetoric about racial justice in his charge to the jury.

Other jurors also shared this assumption that a juror's racial prejudice bore no effect on his ability to provide a fair trial. They asserted that they could ignore their racism when evaluating evidence.[68] As juror L.E. McAffee explained, "I don't think [my prejudice] would influence me from giving due weight to [a Chinese witness], of course I would have to weigh my prejudice in the scale at the same time [and] would try to get a true view of the condition of the case."[69] Juror Samuel Steele similarly believed that his distrust of Chinese testimony would have no impact on his capability to provide justice to the Chinese.[70] These statements betray the limitations of the legal system in regards to giving Chinese defendants due process. Although the goal of voir dire was to obtain impartial jurors, it actually galvanized the jury's bias, since the judge and the prosecution shared similar racial prejudice.[71]

FINAL OBSERVATIONS

The above analysis of the impaneling transcript and the related court documents discussed below further reveal the contradiction between rhetoric and actual practice in the court system. Defense counsels later used the racial bias demonstrated by Cantrell during the impaneling as one of the challenges

[68]In addition to L.C. McAffee and Samuel Steele, Philip Kramer shared the same view. *People v. Chin Mook Sow,* Governor's Papers, 83–85.

[69]Ibid., 82.

[70]Ibid., 80.

[71]Hiroshi Fukurai et al. also found that voir dire increases jurors' partiality because "the prosecution tends to look for prospective jurors with certain characteristics." Fukurai et al., *Race and the Jury: Racial Disenfranchisement and the Search for Justice* (New York, 1993), 69.

to appeal for a new trial.[72] District attorney Murphy, however, argued in a respondent's brief that Cantrell showed no "actual bias" because he "had no opinion as to the guilt or innocence of the defendant, and no prejudice against him in any manner . . . and could and would give the defendant a fair trial, and be governed entirely and solely by the evidence." He further contended that Cantrell would determine his confidence in testimony based on "who the white and Chinese persons were," and "he would give credence to Chinese if they appeared honest and told a reasonable story." Murphy, however, admitted that Cantrell would "believe a white person under oath in preference to a Chinaman."[73]

To further demonstrate that Chin Mook Sow had received a fair trial, Murphy argued that the district court judge, in his charge to the jury, even advised them to "avoid all prejudice against the appellant on account of race and nationality." Murphy then quoted Judge Dwinelle's statement to show his alleged impartiality toward the Chinese. In the speech, Dwinelle reminded jurors of the prejudice Chinese immigrants encountered even though they should have received the same protection as American citizens as stipulated in the treaty between the United States and China.[74] However, he failed to follow his own advice. As noted earlier, he disregarded impaneled jurors' racial prejudice and included these people in the jury. A close examination of the court documents betrays the contradiction between the Judge Dwinelle's instructions to the jurors and actual practice. The judge's own racial prejudice led the court to select nine out of twelve jurors who held racial bias against Chinese. By allowing jurors who preferred to believe the testimony of white witnesses over Chinese to serve on the *Chin Mook Sow* case, the court made a fair trial impossible.

Beginning in the late 1860s, the rapid growth of the Chinese population in San Francisco produced increasing hostility toward Chinese. Chinese exclusion became a political cause that solidified and consolidated white identity. The study of voir dire in the case of *People v. Chin Mook Sow* confirms that racial prejudice toward Chinese immigrants existed among ordinary property owners in California, a group often ignored by historians examining anti-Chinese sentiments in the

[72]Unfortunately, the defense counsel failed to include their challenge to the qualification of juror Thomas Cantrell in the appellant brief. I was able to find only prosecutor Murphy's response to the challenge in the respondent brief. Respondent's Brief in *People v. Chin Mook Sow*, California Supreme Court, case no. 10232, 1876 (Bancroft Library, University of California, Berkeley), 2.

[73]Ibid., 2 (italics in original).

[74]Ibid., 31–32; see also *People v. Chin Mook Sow*, Governor's Papers, 1058–60.

nineteenth century. Because prospective jurors were chosen randomly from across San Francisco, the attitudes exhibited in their testimony serve as a barometer to measure contemporary views toward Chinese immigrants among a wide spectrum of San Francisco property owners.

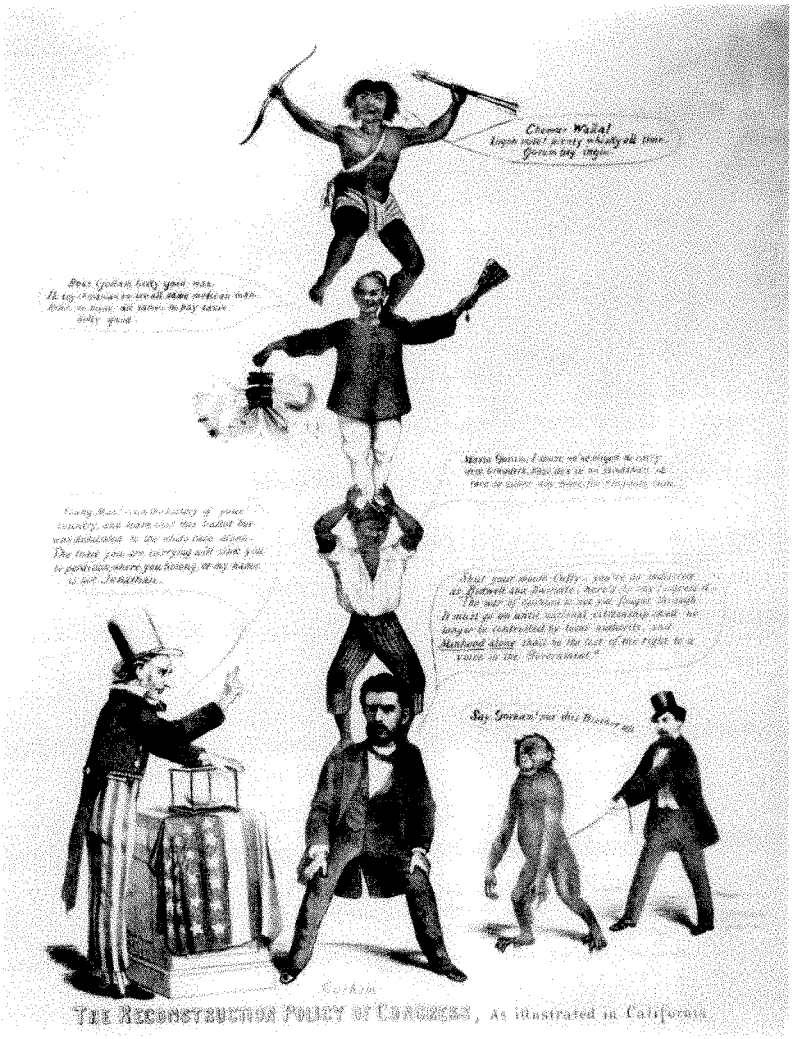
Seventy-four prospective jurors were impaneled. Of these, twenty-seven were disqualified before questioning. Among the forty-seven who were questioned, only three claimed to have no racial bias toward the Chinese. The other forty-four admitted their prejudice against Chinese as a race. Their statements indicate the broad suspicion held by white citizens toward Chinese witnesses; whereas some attributed their suspicion to the ignorance of the Chinese regarding the importance of the oath, the majority regarded Chinese people as untrustworthy in general.

In addition, the testimony of the prospective jurors demonstrates that the prejudice toward the Chinese rarely was founded on economics. Although contemporary politicians and labor leaders linked the alleged menace of Chinese immigration to job competition, most prospective jurors did not. As property owners, they more likely worked at jobs that were different from those of Chinese immigrants, who were confined to manufacturing, domestic, and service industries. Therefore, they faced little job competition from the Chinese. Their anti-Chinese sentiments instead were based on racial antipathy and a belief in white supremacy.

The prejudice demonstrated against Chinese immigrants during the *Chin Mook Sow* case was by no means isolated. Six months prior, in a case that involved an Italian accused of murdering a Chinese immigrant, prospective jurors voiced similar, profound hostility toward Chinese.[75] Afterward, securing an unbiased jury for Chinese defendants continued to be difficult into the early twentieth century. In July 1907, for example, the police court in Los Angeles needed to examine 780 prospective jurors in order to get an unbiased twelve-member jury for a Chinese herb doctor accused of practicing medicine without a license.[76] The racial prejudice inherent in the judicial system likewise deprived other non-white defendants of a fair trial. Native American and African American defendants also faced hostile white jurors who refused to provide them with legal justice. Consequently, they, along with Chinese defendants,

[75]"Equality Before the Law," *Daily Morning Call*, August 12, 1875.

[76]"Doctor Chan Talks Fight," *Los Angeles Times*, July 31, 1907.



Native American and African American defendants also were denied justice by hostile white jurors. Reconstruction Policy of Congress, 1867 (Courtesy of the Library of Congress, LC-USZ62-702)

tended to have higher conviction and death penalty rates than their white counterparts.[77]

Chin Mook Sow was found guilty of first-degree murder and sentenced to death. After he was convicted, his defense counsel appealed for a new trial, but the California Supreme Court denied their appeal and upheld the decision of the lower court. His attorneys then sought a commutation of sentence to imprisonment for life from California governor William Irwin. That request also was denied. Chin Mook Sow was hanged on May 4, 1877, the second Chinese executed in San Francisco.[78]

[77]See, for example, John C. Dill, "Criminal Procedure: Jury Prejudice after Wounded Knee: The Sufficiency of Federal Voir Dire," *American Indian Law Review* 2:2 (Winter 1974): 81–88; Edward Ayers, *Vengeance and Justice: Crime and Punishment in the 19th-Century American South* (New York, 1984), 176–77, 179, 223–24; on the racial prejudice inherent in the court-martial system toward Native Americans, see McKanna, *Court-Martial of Apache Kid: The Renegade of Renegades* (Lubbock, TX, 2009), 130–36.

Some scholars, however, have argued that minority defendants could enjoy a fair trial in the areas that had few white settlers during the frontier period. Patrick J. Jung, "To Extend Fair and Impartial Justice to the Indian: Native Americans and the Additional Court of Michigan Territory, 1823–1836," *Michigan Historical Review* 23:2 (Fall 1997): 25–48; Laura E. Gómez, "Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico," *Law & Society Review* 34:4 (2000): 1129–1202.

[78]"The Halter," *Daily Alta California*, May 5, 1877; "Mook Sow's Execution," *San Francisco Call*, May 5, 1877.

Political Negotiation and Jurisdiction of the Navajo Nation, Arizona, and Public Law 280

Kathryn L. Sweet

On Valentine's Day in 1912, the territory of Arizona became the state of Arizona on equal footing with the previous forty-seven states. It was the culmination of a long process of negotiation by territorial leaders with federal government begun in 1872. That year, the second territorial governor, Richard C. McCormick,[1] a Lincoln appointee, received the news that the federal government had rejected Arizona's first bid for statehood, citing three reasons: in today's terms, a too "ethnically diverse" population; the high number of Roman Catholic and Mormon settlers; and the state's progressive political leanings.[2] In this political landscape, Arizona and

[1]During his tenure as territorial secretary, territorial governor, and territorial delegate for Arizona, McCormick played a crucial role in the political development of Arizona; he advocated for the Gadsden Purchase, resolved the legal issues concerning Mexican settlers' citizenship, and pushed for the formation of Indian reservations, as well as pushing for road development and economic development.

[2]Progressivism, during this period, was a social and political reform movement that placed emphasis on the role of the government to protect the interests of the people, which included regulating business and business practices.

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the Native nations within its borders began the process of negotiating their political, legal, and economic relationships.

From the early days of the republic, the federal government's relationship with Native peoples has been complex. Following the British colonial example, American leaders initially made treaties with Native peoples and recognized Native groups as separate sovereign entities.

The first of 374 ratified treaties made with Native people was the Treaty of 1778 with the Delaware, which declared and recognized the sovereignty of both the United States government and the Delaware.[3] Treaties were negotiated contracts between Native leaders and the U.S. federal government concerning land concessions, peace, debt payment, and other specific concerns of the time and people. As the United States expanded westward, increasingly encroaching on Native peoples and their homelands, treaties became a means of control by the federal government. As federal power grew, the national government redefined its relationship with Native nations, considering them as quasi-sovereign entities and domestic dependent nations and having a ward-like status.[4] The relationship between the U.S. and Native nations, as defined by legal doctrine, treaties, and tradition, was essentially about power and jurisdiction over people, property, and land.

Arizona's history of prior conquest led to its diverse population. With each transition, from Spanish to Mexican to American, each successive government acquired the current inhabitants as citizens. Prior to the American acquisition of the New Mexico Territory, in 1848, which at that time included Arizona, at the end of the Mexican War in the Treaty of Guadalupe Hidalgo, Native people such as the Navajo claimed guardianship and ownership of the land.[5] By the terms of this treaty, all Mexican citizens inhabiting the annexed territory were made U.S. citizens, including Native people. On February 24, 1863, the U.S. Congress separated Arizona from New Mexico Territory, gaining its own territorial status.

[3]"Treaty with the Delawares," September 17, 1778, *Statutes at Large of the United States of America, 1789–1873* 7:13, in *Indian Affairs: Laws and Treaties, Treaties*, ed. Charles J. Kappler (Washington, DC, 1929), 2:3–5.

[4]In essence, Native nations were deemed unfit for self-government, and therefore needed guidance.

[5]"Treaty of Guadalupe Hidalgo," February 2, 1848, *Stats at Large of USA* 9:922, and "Gadsden Purchase Treaty," December 30, 1853, *Stats at Large of USA* 10:1031(1855).

In 1910, with Arizona's increased in population, the federal government could no longer ignore the territory's bid for statehood, and Arizona drafted its state constitution.[6] In a state constitution, a territory establishes a contract between its citizens and the federal government, so the Republican-controlled federal government remained hesitant to adopt the progressive territory of Arizona as a state.[7]

Arizona has long had an aversion to federal oversight. The reason is complex, but in some measure it stems from its forty-eight years as a territory, the Southern roots of many of its Anglo residents, and more recently its conservative political orientation. Increasing the tension between the federal government and Arizona is that approximately 70 percent of state land currently is under the federal government's control, of which 28 percent is Indian trust land.[8] The complexity of the political relationships in Arizona provides a unique case study both of political negotiation and of jurisdiction-sharing between governments—state, federal, and the Navajo Nation.

As this paper will argue, Arizona and other disclaimer states intentionally interpreted Public Law 83-280 for their own benefit and not for the benefit of Native nations or according to the original purpose of the law. P.L. 280 allows states to accept criminal and civil jurisdiction over reservations within their borders. When a state accepts jurisdiction, its legislation concerning civil and criminal matters is applicable on reservations, so state courts have the right to hear related cases. Civil cases occur between individuals—for example, small claims, divorce, or probate—and criminal cases, such as murder, theft, and tax evasion, occur when a law is broken. P.L. 280 does not invalidate the Major Crimes Act, under which the federal government reserves jurisdiction over fifteen crimes, including

[6]Arizona drafted its first proposed state constitution in 1872.

[7]The specific issue President William H. Taft had with Arizona's proposed constitution was the clause that would allow Arizona's residents to recall judges. The president approved Arizona's constitution only after the clause was removed. After statehood, the clause was reinserted by voter approval during the following election.

[8]In general, Indian trust land is managed by the U.S. government for the benefit of a tribe or individual; these lands are exempt from state law, unless otherwise authorized by Congress.

murder, kidnapping, robbery, and arson.[9] For its part, in 1967, Arizona accepted jurisdiction over air and water pollution. While the specifics of why Arizona accepted jurisdiction over air and water pollution are not clear, arguably it did so because water is a precious commodity in Arizona's dry climate.[10]

DINÉ BIKÉYAH

The heart of the Navajo homeland, *Diné Bikéyah*, is Canyon de Chelly, located near Chinle in northeastern Arizona. The traditional borders of Diné Bikéyah are four sacred mountains: the San Francisco Peaks (near Flagstaff, Arizona), Mount Blanca (near Alamosa, Colorado), Mount Taylor (near Laguna, New Mexico), and Mount Hesperus (the La Plata Mountains, Colorado). Although the modern-day Navajo Nation's territory does not encompass the four sacred mountains, it is located within them. A mixture of mesas, mountains, and canyons formed by sandstone and basalt; open ranges that stretch to every horizon, surrounded by mesas and mountains; piñon trees and a variety of shrubs, wildflowers, and grasses; red, pink, and tan soil; small towns and isolated homes, Diné Bikéyah is beautiful and

[9]18 U.S.C. §§1153, 3242. The act states, "(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States. (b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense."

[10]In 1967, Arizona's legislature passed two statutes, *Arizona Revised Statute (ARS)* 36-1865 and 36-1801, which assumed jurisdiction over air and water pollution in Indian Country within its borders. On August 13, 1986, 36-1865 was repealed. Also in 1986, 36-1801 was renumbered as *ARS* 49-561, only to be repealed in 2003. Unlike with 36-1865, the reason behind Arizona's repeal of 49-561 has a clear explanation—Arizona lost its jurisdiction over air pollution due to an act of Congress. In 1990, Congress passed the federal Clean Air Act (Public Law 101-549) which defined Native nations as states in Title III, sec. 301(d), preempting any regulatory power Arizona had claimed over Native nations in this regard. Similar to 36-1865, Arizona repealed 49-561 without then seeking official retrocession, but with the federal Clean Air Act removing air pollution from all states' jurisdictional possibilities, perhaps official retrocession was not necessary.

The heart of the Navajo homeland, *Diné Bikéyah*, is Canyon de Chelly, pictured above, located in northeastern Arizona. (Collection of the Ninth Judicial Circuit Historical Society)

inspiring. The beauty and openness of the land lend a sense of both the stillness of time and the movement of time. The extremes of the environment—winter lows and summer highs, minimal rainfall, and sparse vegetation—require people to live in balance with nature. Further, the realities of living in an arid environment require the inhabitants to live in balance and harmony with themselves and each other.

The Navajo principles of *k'e*, *k'ei*, and *hózhó* are at the center of Navajo cultural practices and serve as the foundation for Navajo legal philosophy.[11] Hózhó is at the heart of Navajo culture; it directs all aspects of Navajo life. The term does not directly translate into English. In general, it encompasses all that is positive and good, referring to both the tangible and the intangible.[12] It is a condition, a state of affairs, a concept, and a relationship; it is beauty, happiness, good social relations, good health, and acquisition of knowledge. K'e is translated as "kinship unity through positive values." Implicit in k'e is the

[11]Ray Austin, "Navajo Law Seminar—Dine Fundamental Law Panel," *Navajo Law Seminar: Reflections from Within and Without, 10th Annual* (2007), 1.

[12]Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Government* (Minneapolis, 2009), 54.

interconnectedness of all beings, as well as the natural world.[13] Hózhó is maintained through good (harmonious) relationships. K'ei is more specific than k'e, referring to relationships between clan relatives.[14] These three doctrines, which serve as the foundation of Navajo philosophy and are incorporated into Navajo common law, are used in litigation and court rulings. In contrast, the foundations of English and American common law are the principles of private property, natural rights, and retribution as justice.

THE NAVAJO RESERVATION

On September 9, 1849, nearly twenty years before the 1868 treaty, Marino Martinez and Chapitone signed a treaty with the federal government. Although neither of these men—only minor headmen—had the authority to represent the Navajo people,[15] Congress still ratified the treaty on September 9, 1850.[16]

In 1863, Colonel Christopher "Kit" Carson and the U.S. Army hunted down, starved out, and rounded up 8,500 Navajo people in northeastern Arizona.[17] Once the Navajo were detained, the army marched them by force across New Mexico to Bosque Redondo at Fort Sumner, on the Pecos River in eastern New Mexico. In this inhospitable land, the army and the government expected the Navajo to survive by farming in its poor soil with limited water. Held captive for four years, more than two thousand people died from illness (such as pneumonia and dysentery) and starvation.[18] As stated by Navajo leader Barboncito,

> The bringing of us here has caused a great decrease of our numbers, many of us have died, also a great number of our animals. Our Grand-fathers had no idea of living in any other country except our own and I do not think it is right for us to do so as we were never taught to. . . . It was told to us by our forefathers, that we were never to move east of the Rio Grande or west of the San Juan rivers and I

[13]Ibid., 84.

[14]Ibid., 137.

[15]David E. Wilkins, *The Navajo Political Experience* (Boulder, 2003), 73–74.

[16]"Treaty with the Navahos," September 9, 1849, *Stats at Large of USA* 9:975, in Kappler, *Indian Affairs: Laws and Treaties* 2:583–85.

[17]Austin, *Navajo Courts and Navajo Common Law*, 5.

[18]Ibid., 3.

> think that our coming here has been the cause of so much death among us and our animals.[19]

Desiring to return to their homeland, the Navajo leaders, *Naachid*, who were chosen to speak for the people in the treaty negotiations with the U.S. were Delgadito, Barboncito, Manuelito, Largo, Herrero, Chiqueto, Murerto de Hombre, Hombro, Narbono, and Armijo.[20] In exchange for being allowed to return to their homeland and retain the right to hunt in traditional areas external to their reservation, they agreed to maintain peace, to send their children to school, to refrain from interfering with the railroad, and other provisions.[21]

After signing the 1868 treaty, the Navajo were allowed to return home to the reservation created in article II of the treaty. The northern boundaries of the reservation were Arizona's and New Mexico's borders with Utah and Colorado; the eastern border was defined by a line that, if extended past the northern reservation border, would intersect with Fort Lyon (located east of Pueblo, Colorado); the western border ran through Chinle, Arizona; the southern border was defined by an east-west line drawn through Fort Defiance (located near Window Rock, Arizona). The Naachid who negotiated the treaty with federal officials required that any sale or cession of land was not valid "unless agreed to and executed by at least three-fourths of all adult male Indians occupying or interested in the same."[22] The original reservation, as defined in the 1868 treaty, has since been expanded twenty-five times and now encompasses the majority of the Navajo traditional homeland. Specifically, the Navajo Nation's territory increased from the original 3.5 million acres to 18 million acres (25,351 square miles).[23]

In 1922, an ad hoc three-member business council was formed to grant an oil lease, but, since the Treaty of 1868 required three-fourths of all male Navajos to consent, the lease was invalidated. So, in 1923, to avoid future problems, the U.S.

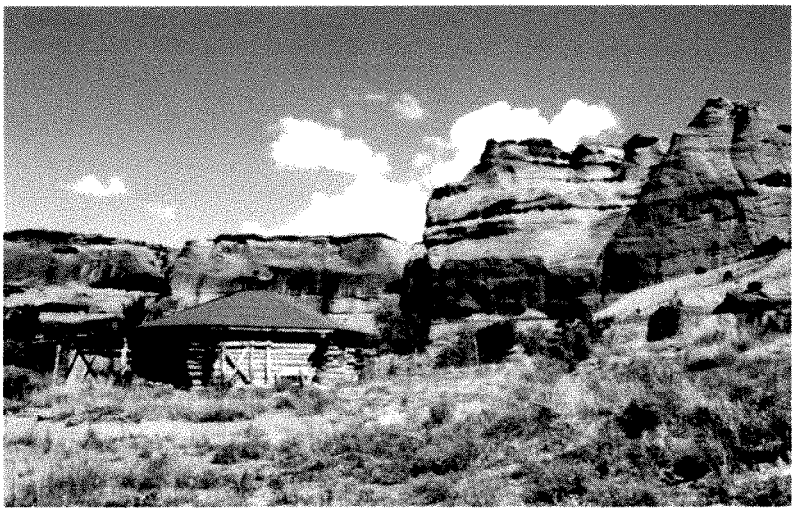
[19]Barboncito, *Treaty Between the United States of America and the Navajo Tribe of Indians with a Record of the Discussions That Led to Its Signing* (Wickenburg, AZ, 1968), 1–2.

[20]At this time the Navajo people were not a single political entity but were organized in autonomous groups, united by culture and language.

[21]"Treaty with the Navahos," June 1, 1868, *Stats at Large of USA* 15:668, in Kappler, *Indian Affairs: Laws and Treaties*, 2:1015–20.

[22]Ibid., 1018. The Navajo are traditionally matriarchal, meaning the women, in a sense, own the land and other resources. Thus, by denying women the right to vote, the federal government demonstrated its continuing ignorance of Native cultures and its desire to reshape these cultures in an American patriarchal image.

[23]Peter Iverson, *Dine: A History of the Navajos* (Albuquerque, 2002), 72.



The harsh, arid environment of the Navajo reservation requires the inhabitants to live in harmony with nature and each other. (Collection of the Ninth Judicial Circuit Historical Society)

secretary of the interior, Albert Fall, and special commissioner to the Navajo tribe, Herbert J. Hagerman, established a twelve-member Navajo Tribal Council.[24] Prior to the restructuring of the Navajo government in 1989, the Navajo used a two-branch system—the tribal council and chairperson, and the court system. Beginning in 1989, the Navajo Tribal Council, now the Navajo Nation Council, underwent a complete reorganization, emulating the U.S. federal government in its structure while functioning under a culturally based tribal code.[25] While the federal government's involvement in creating the Navajo Nation Council could be considered a form of interference, the tribal council also provided a stronger means for the Navajo Nation's fight to maintain its sovereignty.

The establishment of the current Navajo Nation court system has a similar history. In 1892, Bureau of Indian Affairs agent to the Navajo, David L. Shipley, established the Navajo Court of Indian Offenses and based the court system largely on an American court model.[26] Founded on non-Navajo principles, the newly established court was unable to incorporate Navajo

[24]Austin, *Navajo Courts and Navajo Common Law*, 13.

[25]Ibid., 16.

[26]Ibid., 21.

philosophy adequately. This colonial oversight by the BIA continued until 1959, when the Navajo Tribal Council established the Navajo Tribal Court. After the creation of the Navajo court system, the BIA transferred control of law enforcement to the tribe.[27] In 1982, the Navajo Tribal Council institutionalized traditional means of dispute resolution by establishing the Navajo Peacemaker Court (now the Navajo Peacemaking Division).[28] Then, in 1985, the council adopted the Judicial Reform Act, which encouraged the use of Navajo common law in tribal court decisions and established the Navajo Supreme Court.[29] This forward-looking act enabled the concepts of k'e, k'ei, and hózhó to be integrated into the Navajo Nation Code of Judicial Conduct.[30] As the Navajo Nation refines its judicial branch and court system, Navajo values and practices will be strengthened.

A problematic feature of the Treaty of 1868 is that it annexed Navajo territory to New Mexico while placing the Navajo people under U.S. protection and jurisdiction. This treaty language has implications for P.L. 280. Indeed, since article III initially placed the Navajo Nation under the jurisdiction of the New Mexico territory, when both Arizona and New Mexico became states, both states disclaimed their rights over Navajo lands, thus losing any jurisdiction granted in article III. Undoubtedly, under article I and through the 1868 treaty, the Navajo Nation continues under the exclusive jurisdiction of the federal government. Paradoxically, because exclusive federal jurisdiction was a treaty provision, the U.S. government violated the terms of the treaty by transferring jurisdiction via P.L. 280 without the consent of the Navajo Nation.

TRIBAL COURTS

P.L. 280 addresses the problem of which court system has ultimate jurisdiction to adjudicate a case. If the U.S. truly respected the sovereignty of Native nations, the answer to the jurisdiction question would be quite simple: all civil disputes and all crimes committed within a Native nation, no matter who is involved, are subject to a tribal court system. But the federal

[27]Ibid., 28.

[28]Ibid., 59.

[29]Ibid., 31.

[30]Kenneth Bobroff, "*Dine Bi Beenahaz'aanii:* Codifying Indigenous Consuetudinary Law in the 21st Century," *Tribal Law Review* 5 (2004–2005): 1–13.

government respects neither Native sovereignty nor Native jurisdiction. For example, in *Ex Parte Crow Dog*, the Supreme Court found, in a unanimous decision, that Indian tribes retain exclusive judicial jurisdiction over Indian affairs on the reservations, although the decision did not deny Congress the power to limit tribal governments' jurisdiction.[31] Congress responded to *Ex Parte Crow Dog* like a colonial power by enacting the Major Crimes Act in 1885, claiming unilateral and arbitrary jurisdiction over seven crimes.[32] Passing the Major Crimes Act further defined and solidified the federal government's criminal and civil jurisdiction over Native nations—federal infringement that had begun with the General Crimes Act in 1817 and the Assimilative Crimes Act in1825.[33]

This colonial web of jurisdiction became more complicated as states gained some degree of jurisdiction in Indian Country. Indeed, states that have civil and criminal jurisdiction over Indian Country do not have exclusive jurisdiction, but instead share jurisdiction with tribal courts and the federal government for crimes committed and civil disputes arising on the reservation. A Native person who is not on a reservation is subject to state jurisdiction. When a Native person resides on a reservation, the jurisdiction remains murky. Lost in the midst of this murkiness is the ability of tribal courts to prosecute offenders for crimes committed within their boundaries.

Prior to European invasion, the Navajo had no formal courts in the Western sense. They relied on the principles of k'e, k'ei, and hózhó to maintain societal/national harmony and peace. Before it was written down and later codified, Diné bi beehaz'áanii, translated as Navajo law, was passed between generations orally.[34] According to the Navajo Nation Code, the four laws "provide sanctuary for the Diné life and culture, our relationship with the world beyond the sacred mountains, and the balance we maintain with the natural world. . . . Respect for, honor, belief, and trust in

[31]*Ex Parte Crow Dog*, 109 U.S. 556 (1883).

[32]Since 1885, with subsequent amendments, the Major Crimes Act has included fourteen offenses (as defined by 18 U.S.C sec. 1153): murder, manslaughter, kidnapping, maiming, felony under chapter 109A, incest, assault with intent to commit murder, assault with a deadly weapon, assault resulting in serious bodily injury (as defined by in 18 U.S.C. sec. 1365), assault against a minor under sixteen years old, arson, burglary, robbery, felony crimes under 18 U.S.C. sec. 661.

[33]The General Crimes Act is codified in 18 U.S.C. §1152 and the Assimilative Crimes Act in 18 U.S.C. §13.

[34]Navajo law includes traditional, customary, natural, and common law. Bobroff, *Dine Bi Beenahaz'aanii*, 5.

the Diné bi beehaz'áanii preserves, protects and enhances [specifically named] inherent rights, beliefs, practices, and freedom."[35] The words of former Navajo Nation Supreme Court justice Raymond Austin best encapsulate the Navajo experience in creating their judicial system: "The Navajo people took an institution that was established to destroy their culture and spirituality, and gradually reshaped it to fit their needs and eventually used it to establish a highly regarded and efficient modern Navajo Nation Court System."[36] The Navajo courts' use of Navajo common law, along with the establishment of the Peacemaking Court, reinforces Navajo traditions, language, and customs and provides an example for other indigenous peoples to model their own culturally based court systems.

DISCLAIMERS

After 1881, in constitutions and enabling acts, new states renounced any legal claim or right over Indian reservations within state boundaries. These disclaimers are a direct result of the U.S. Supreme Court ruling in *U.S. v. McBratney* (1881).[37] In *McBratney*, the U.S. Supreme Court, in an opinion written by Justice Horace Gray, ruled that Colorado, and not the federal government, had jurisdiction over crimes committed on reservations within the state's boundaries. The case deals with the murder of a white man by another white man on the Ute Reservation in southwestern Colorado. The Ute Treaty of March 2, 1868, set the boundaries of the reservation and also created a guideline for how crimes on the reservation would be handled, similar to the Navajo Treaty of 1868.[38] In the Court's opinion, Colorado's constitution did not include language recognizing the exclusive jurisdiction of the federal government over Indian reservations. Justice Gray wrote,

> Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. . . . The State of Colorado, by its admission into the Union by

[35]Ibid.

[36]Austin, *Navajo Courts and Navajo Common Law*, 26.

[37]*U.S. v. McBratney*, 104 U.S. 621 (1881).

[38]Ibid., 622.

> Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States.

The Court noted that the Ute Treaty of 1868 did not address crimes committed by white men against other white men. In order to maintain sole and exclusive jurisdiction over Indian reservations, the federal government inserted disclaimers in all future enabling acts and state constitutions.

Arizona is one of the eight states that have disclaimers in their constitutions and enabling acts.[39] Created in part through negotiation, a disclaimer sets up a state's relationship with the Native nations within it, as allowed by the federal government. Furthermore, the disclaimer also protects Native nations from states' interference in their internal affairs without federal consent. The eight states' disclaimers are similar and recognize that absolute jurisdiction and control over Indian reservations remains with Congress unless given by Congress to that state. For example, Arizona's disclaimer language states,

> The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.[40]

In the eyes of Congress, these disclaimers prohibit states from accepting jurisdiction through P.L. 280. Therefore Congress added section 6 to the act in order to allow states a path by which they could amend their constitutions, since Congress

[39]States with a disclaimer clause include Arizona, Washington, South Dakota, North Dakota, Montana, Utah, New Mexico, and Alaska.

[40]Arizona Constitution, art. 20, sec. 4.

was unwilling to extinguish Indian title by nullifying the disclaimers. In many cases, the federal government forced disclaimers on states as a requirement for statehood, and the act of revising state constitutions could be a move toward strengthening, or at least upholding, states' rights.

PUBLIC LAW 280

The 1930s and early 1940s were decades of reform for federal Indian policy—a shift from assimilation policies, such as the Indian Citizenship Act of 1924, to reconstructionist policies, such as the Howard-Wheeler Act/Indian Reorganization Act of 1934.[41]

With the death of FDR and the end of the New Deal, federal Indian policy again began to change. Progressive reformers like John Collier and Secretary of the Interior Harold Ickes gave way to conservatives like William Zimmerman and Dillon S. Meyer. The overall political mood of the country shifted to the right, too, with the rise of McCarthyism and the anti-Communist crusade. Then, in 1952, Republican Dwight Eisenhower defeated Democrat Adlai Stevenson for the presidency in a landslide, and the Republicans took control of Congress. The stage was set for the major acts intended to terminate Indian sovereignty in 1953: House Concurrent Resolution 108 and P.L. 280.

On August 15, 1953, the 83d U.S. Congress enacted P.L. 280 to provide states with a legal method to gain both civil and criminal jurisdiction over Native reservation lands.[42] The intent of this act was to relieve the federal government of its responsibility to Native people, decrease federal spending, and reduce alleged "lawlessness" on Indian reservations. The opportunity for states to gain jurisdiction over all people and lands within their boundaries was appealing, but, in practice, they were dissatisfied with Congress' refusal to provide additional funds for the states' expanded role while still maintain-

[41]The Indian Citizenship Act made all Native Americans U.S. citizens. By 1924, about two-thirds of Native people were already U.S. citizens due to acts such as the 1887 General Allotment Act. The Indian Reorganization Act (IRA) allowed consenting tribes to form tribal governments with constitutions created under the guidance and continuing oversight of the BIA. The newly created tribal councils did not reflect the traditional values of the tribes, which undermined traditional forms of governance. While the Citizenship Act sought to assimilate Native people by absorbing them into the U.S. citizenry, the IRA sought to maintain the distinctive qualities of Native nations through the creation of tribal councils, providing a means of tribal self-government and self-determination.

[42]Public Law 280, 83d Cong., 2d sess. (August 15, 1953).

ing federal presence and authority.[43] Although P.L. 280 gave states jurisdiction over reservation lands, it did not terminate the trust status of Indian land, nor did it eliminate federal trust responsibilities, treaty obligations, or Native nations' rights of self-governance.

P.L. 280 created three categories of states: mandatory, option-disclaimer, and optional (sections 2, 6, and 7, respectively). Mandatory/Section 2 states received full criminal and civil jurisdiction upon enactment of P.L. 280, with some exceptions.[44] The five original mandatory states are California, Minnesota, Nebraska, Oregon, and Wisconsin; in 1958, Alaska became the sixth mandatory state. Congress mandated this transfer of jurisdiction with the consent of state governments but without the consent or input of the Native nations residing within them.[45] Ironically, transferring these new responsibilities to state governments increased lawlessness, because state funds were insufficient to increase police enforcement.[46]

States classified as optional/section 7 can accept civil and criminal jurisdiction through state legislative action. Prior to 1968, "optional" states wishing to assume jurisdiction could do so by passing a state statute. With the passing of the Indian Civil Rights Act in 1968 (ICRA),[47] Congress amended P.L. 280 to require that states assuming jurisdiction would first have to gain the consent of the Native nations in question. The 1968 amendment to P.L. 280 also allowed states to accept partial jurisdiction and retrocede jurisdiction back to the federal government. Prior to the ICRA, only Florida (1961) accepted full jurisdiction, while nine states assumed partial jurisdiction: Arizona (1967), Idaho (1963), Iowa (1967), Montana (1963), Nevada (1955), North Dakota (1963), South Dakota (1957 and 1961), Utah (1971), and Washington (1957 and 1963).

Section 6 refers to Arizona, Washington, North and South Dakota, Utah, and Nevada, whose constitutions and enabling acts contain disclaimers. Section 6 was added to provide "disclaimer" states with a path to amending their constitutions, because Congress was unwilling to extinguish Indian land title

[43]Carole Goldberg-Ambrose, *Planting Tail Feathers: Tribal Survival and Public Law 280* (Los Angeles, 1997), 46–47 and 50.

[44]Exceptions include Red Lake Reservation (Minnesota), Warm Springs Reservation (Oregon), and Metlakatla Indian community on the Annette Islands.

[45]The states listed as mandatory were willing to receive jurisdiction assuming they would also receive tax jurisdiction or funding from the federal government to help with the cost of their new responsibilities.

[46]Goldberg-Ambrose, *Planting Tail Feathers*, 12.

[47]Indian Civil Rights Act of 1968, 25 U.S.C. §1301–1303.

to nullify the disclaimers.[48] Washington State indicated its willingness to accept full jurisdiction under section 2, but was rejected because it had a constitutional disclaimer.[49] In the eyes of Congress, these disclaimers prohibit states from accepting jurisdiction through P.L. 280.

Navajo experience with the transfer of civil and criminal jurisdiction from the federal government did not begin with P.L. 280, but in the original draft of the Navajo-Hopi Long Range Rehabilitation Act of 1950, Public Law 81-474.[50] The original language of this act transferred civil and criminal jurisdiction over the Navajo Nation to Arizona. After a visit by a Navajo delegation objecting to the transfer of jurisdiction., President Harry Truman vetoed the bill. A revised version of the bill, excluding the jurisdictional transfer, passed the following year.

On August 1, 1953, two weeks prior to the passage of P.L. 280, Congress passed House Concurrent Resolution 108 (HCR 108), which began the U.S. policy of termination that resulted in the federal government's ending its trust relationship with 109 tribes.[51] The removal of federal protection over land and natural resources left terminated tribes open for exploitation and loss of their land and resources. Further, members of terminated tribes were at the mercy of state governments. The Navajo were fortunate to escape termination through P.L. 81-474 because the federal government felt that they were unfit for the full "emancipation" that HCR 108 deceptively promised. Rather than being subjected to the horrific effects of termination, the Navajo Nation entered a time of relative prosperity in the 1950s.

COURT CASES

Once P.L. 280 was signed into law, its intent quickly came into conflict with its reality. As the federal government negotiated a withdrawal of responsibility, states negotiated for expansion of power over Native nations using P.L. 280 as a foothold, interpreting the law in ways Congress had not intended. It was

[48]Goldberg-Ambrose, *Planting Tail Feathers*, 70–71.

[49]James A. Bamberger, "Public Law 280: The Status of State Legal Jurisdiction over Indians after *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*," *Gonzaga Law Review* 15:1 (1979): 133–70, 147.

[50]"An Act to promote the rehabilitation of the Navajo and Hopi Tribes of Indians and a better utilization of the resources of the Navajo and Hopi Indian Reservations, and for other purposes" of April 19, 1950, 64 Stat. 46, 25 U.S.C. §635.

[51]House Concurrent Resolution 108, *United States Statutes at Large* 67:B132.

through state and federal court opinions that the current interpretation of P.L. 280 developed for disclaimer states—specifically through cases such as *Williams v. Lee, McClanahan v. Arizona Tax Commission,* and *Washington v. Yakima Indian Nation.*

Williams v. Lee

The U.S. Supreme Court's ruling in 1959 in *Williams v. Lee* had far-reaching consequences.[52] The ruling spoke directly to the issue of which court system would have jurisdiction over matters arising on Native land. With a license required by federal statute, Hugh Lee, a non-Indian, ran the Ganado Trading Post in Ganado, Arizona, in the Navajo Nation. Enrolled members of the Navajo Nation Paul and Lorena Williams bought goods on credit from Lee's store. When they failed to repay Lee, he brought a civil suit against them in the Arizona Superior Court. Although the Williamses countersued to dismiss the case, arguing that the Superior Court lacked jurisdiction over the case, both the Arizona Superior Court and Arizona Supreme Court ruled that the state courts did have jurisdiction. Both courts ruled in favor of Lee.[53] The courts based their decisions on the rationale that Arizona had jurisdiction over the case because it had never relinquished jurisdiction over the subject matter, and since the Tenth Amendment of the U.S. Constitution allots all powers not delegated to the federal government to state governments, Arizona still had jurisdictional control in this matter.[54] Furthermore, regulating trade does not constitute assumption of jurisdiction by the federal government to enforce contractual obligations.[55] In this sense, federal regulation only limited the extent of state law on Indian reservations. The Arizona courts ruled that the state's disclaimer referred only to land, not people. Therefore, the state could extend its laws over Native people on tribal land as long as state laws did not conflict with federal law.

The Williamses appealed their case to the U.S. Supreme Court which ruled that Arizona's extension of jurisdiction in this matter undermined the authority of tribal courts over reser-

[52]*Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

[53]*Lee,* 358 U.S., Petitioners Brief, 4 and Davis, 217.

[54]*Lee,* 358 U.S., Respondent's Brief, 7.

[55]Ibid., 5. The Commerce Clause, art. 1, sec. 8, clause 3 of the U.S. Constitution, reserves the right of the federal government to regulate commerce with Native nations; this is why Lee had to have a license in order to run a trading post in the Navajo Nation.

vation affairs.[56] By undermining the tribal courts, Arizona would therefore infringe on the tribe's right to self-government—its ability to make and enforce laws within its territory. The question the Court was answering is whether the absence of express congressional consent gave Arizona courts jurisdiction over suits between non-Indians and Indians.[57] In answering the question, the Court stated, "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. . . . Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."[58]

The Supreme Court's ruling in *Worcester v. Georgia* (1832) stood as precedent regarding states' lack of authority over tribes.[59] When Congress wishes states to exercise power over tribes, Congress expressly grants that power to states.[60] Through *Worcester*, the federal government appropriated plenary power over tribes, meaning it has absolute authority (legislative, judicial, and otherwise) over tribes. Thus, in the end, only the federal government and the tribal courts have jurisdiction over crimes committed in the Navajo Nation.

Further, negotiation of the Treaty of 1868 between Navajo leaders and the U.S. government occurred during the Navajo's exile at Bosque Redondo, placing the Navajo at a disadvantage in negotiating the terms of the treaty.[61] Implicit in the treaty was the fact that Indian affairs would remain exclusively under the jurisdiction of the Navajo government, and only the federal government would have greater authority over the tribe.[62] In the end, only Congress can take away tribes' authority and right to self-government. In its decision in Lee, the Court noted that had Arizona adopted P.L. 280, it would have had jurisdic-

[56]*Lee*, 358 U.S. at 217.

[57]Ibid.

[58]Ibid., 221.

[59]In *Worcester v. Georgia*, the state of Georgia attempted to extend its jurisdiction over the Cherokee Nation. Chief Justice John Marshall ruled that tribes are distinct communities with retained sovereignty and right of self-government. Only the federal government has the authority to interact with sovereign nations, and therefore, since the Cherokee Nation and other tribes retain their sovereignty, Georgia (and other states) have no power over tribes, unless otherwise granted by Congress. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[60]*Lee*, 358 U.S. at 222.

[61]Ibid., 222.

[62]Ibid., 221–22.

tion over this case.[63] Its ruling also further supported Congress' intent for Arizona and other disclaimer states to amend their constitutions before assuming and asserting jurisdiction over Native lands. Accordingly, the Court reversed the decision of the lower court.

McClanahan v. Arizona Tax Commission

In its ruling in *McClanahan v. Arizona Tax Commission,* the U.S. Supreme Court affirmed that P.L. 280 did not provide states with tax jurisdiction over income earned on reservations. Using precedent, the Court ruled that Arizona lacked tax jurisdiction because, unless power is given to states by Congress, states have no authority over tribes. Further, Arizona's Enabling Act disclaims tax authority over tribal land. Although the Treaty of 1868 does not explicitly assert the tribe's exemption from state taxation, the treaty must be interpreted within the context under which it was formed, including the federal government's assumption that states lack jurisdiction over tribes and tribal lands.[64] The Court's ruling in *McClanahan* also overturned earlier state supreme court decisions that ruled in favor of disclaimer states not amending their constitutions as stated in section 6 of P.L. 280. Using *McClanahan* as precedent, courts included personal property with personal income and limited states' civil jurisdiction to civil litigation.

Rosalind McClanahan was a Navajo who lived and worked on the Navajo Reservation in Apache County. In 1967, her employer withheld a total of $16.29 from her paycheck for Arizona income tax. In 1968, along with filing an Arizona tax return, McClanahan filed a written protest regarding the collection of state tax on her income, all of which was earned on the reservation, and filed for a complete refund of the withheld amount. After the Arizona Tax Commission's failure to resolve her complaint, in 1969 McClanahan instituted a class action suit in Apache County Superior Court for her refund. The Superior Court ruled in favor of the Arizona Tax Commission, stating that taxing an individual did not infringe on the Native nation's sovereignty, autonomy, or self-governance; nor was there anything in Arizona's Enabling Act "to prevent the State from taxing reservation Indians."[65] Upholding the lower court,

[63]Ibid.

[64]*McClanahan v. Arizona Tax Commission,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed. 2d 129 (1973), 175.

[65]Ibid., 166–67.

the Arizona Supreme Court denied the petition for review, allowing the case to be appealed to the U.S. Supreme Court.

In their brief to the U.S. Supreme Court, McClanahan's lawyers argued that Arizona has no tax jurisdiction over incomes earned on reservations because the imposition of state income tax conflicts with the federally protected rights of tribes and with retained tribal sovereignty. Further, Arizona has jurisdiction only where Congress expressly allows it.[66] (However, although the state lacks authority over Native people on reservations, Arizona does have power over the affairs of non-Indians on reservations insofar as this power does not infringe on Native nations' self-governance.[67]) Referring to legislative history, McClanahan's attorneys argued that the disclaimer clause prevented assumption of jurisdiction. McClanahan's lawyers reminded the Court that Arizona did have the opportunity to assume jurisdiction, "including the power to levy its income tax," through P.L. 280, but the state had failed to do so.[68] Because the federal government subsidizes state services to Native reservations, additional state revenue obtained through taxing individual Native income on reservations would only have been to Arizona's advantage.

In an opinion dated August 9, 1957, Arizona attorney general Robert Morrison supported the idea that Arizona disclaimed only proprietary interest in Native lands in its constitution, but not its jurisdiction over individuals.[69] Indeed, Morrison foreshadowed the events, as well as the conflicting legal interpretations, that led to the U.S. Supreme Court's decision in *McClanahan*:

> All Indians living on reservations are subject to Federal jurisdiction, but such Federal jurisdiction does not preclude concurrent state jurisdiction in matters not conflicting with Federal laws. The power to tax income of all residents of Arizona, including Federal employees living in Federal areas, is a concurrent state jurisdiction, which the United States Supreme Court has held not to conflict with Federal law, and by reasonable implication such jurisdiction must include imposition of State income taxes upon Indians on Federal reservations, providing the

[66]*McClanahan*, 411 U.S., Appellant Brief, 7.

[67]Ibid., 23.

[68]Ibid.

[69]In his opinion, Morrison referred to article 20, section 5 of the Arizona constitution, which "prohibits imposition of taxes on Indian lands and property," and the disclaimer in article 20, section 4. AGO op. no. 57-106, 2.

> income is not derived from the sale of Indian land itself or a use of the land that destroys its value.[70]

Morrison had reasoned earlier that "use of the land that destroys its value" includes activities such as the removal of natural resources from the land for sale but does not include agricultural activities and the income associated with the sale of agricultural products.[71] He also elaborated on concurrent jurisdiction, stating, "In the absence of congressional limitation, a state may exercise jurisdiction over the territory of an Indian reservation, at least so long as such authority does not interfere with the discharge of Federal functions."[72] He stated that "Indians have no tax immunity off the reservation, and there is no specific statute or constitutional personal exemption of Indians from taxation on the reservation."[73] In the Arizona courts' justification for their decision in *McClanahan*, they used Morrison's argument.

In *McClanahan* the U.S. Supreme Court reversed the lower court's ruling by holding that Arizona lacked tax jurisdiction over Native people, whether Navajo or otherwise, whose income was earned on a reservation.[74] In the opinion delivered by Justice Thurgood Marshall, the Court stated "that by imposing the tax in question on this appellant, the State has interfered with the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves. The tax is therefore unlawful as applied to reservation Indians with income derived wholly from reservation sources."[75] Although the Treaty of 1868 does not explicitly exempt the Navajo from state taxation, the historical context under which it was written indicates that the Navajo are under

[70]AGO op. no. 57-106., 2 and 16, emphasis added.

[71]Ibid., 5.

[72]Ibid., 10.

[73]Ibid., 13. Not stopping with Native individuals, Morrison cast a wider tax net, noting, "It being concluded that individual Indians are subject to taxation—income and excise—it follows that Indians collectively are subject to taxation. An Indian corporation or association engaged in business is similar to any other corporation or association in business for profit, the income of which is subject to tax. . . . Tribal councils may incorporate under Federal charter, with power to conduct corporate business. . . . To the extent, then, that the State income tax act is applicable to corporate income, the income of Indian tribal councils is subject to tax." Morrison claimed that not only was a Native individual on a reservation subject to state tax, but so were Native governments.

[74]*McClanahan*, 411 U.S. at 165.

[75]Ibid.

federal, not state, authority.[76] Since the signing of the treaty, Congress has not assumed otherwise. Article III of the treaty, which the Court cites, states that

> the United States agrees that no person except those herein so authorized to do, and except such officers, soldiers, agents, and [employees] of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.[77]

The Court interpreted the language of article III to refer to exclusive federal oversight of the Navajo reservation, which therefore precludes extension of state law.[78] The Court noted that Arizona admitted its lack of compliance with P.L. 280, and noted how Arizona failed to explain how its lack of jurisdiction still allowed it to impose or collect taxes on reservations.[79] Arizona lacked jurisdiction over both the land and the people it sought to tax: "In such a situation, the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself."[80]

Washington v. Yakima Indian Nation

In *Washington v. Yakima*, the U.S. Supreme Court was asked to consider whether Washington's adoption of P.L. 280 by legislative action without amending its constitution was valid, along with whether section 7 allowed for partial jurisdiction, and if Washington's adopted statute, Chapter 36, violated the Equal Protection Clause. In answering these questions, the majority and minority used similar methods to interpret P.L. 280, but they arrived at very different conclusions.[81]

[76]Ibid., 174.

[77]"Treaty with the Navahos."

[78]*McClanahan*, 411 U.S. at 175.

[79]Ibid., 178.

[80]Ibid., 181.

[81]U.S. Supreme Court justices Stewart, Burger, White, Blackmun, Powell, Rehnquist, and Stevens composed the majority in *Washington v. Yakima*, with Marshall and Brennan as the minority. Stewart wrote the opinion for the majority, and Marshall wrote the dissenting opinion.

The Washington Supreme Court's 1959 ruling in *State of Washington v. Janice Paul* set the legal precedent for option-disclaimer states not amending their constitutions.[82] In this case, the Washington Supreme Court ruled that the state's statutes were valid and a constitutional amendment was not necessary to assume jurisdiction through section 6 of P.L. 280.[83] As would later be the case in Yakima, the *Paul* ruling allowed the decision of elected officials to represent the "consent of the people of the State," making popular amendment to remove the constitutional disclaimer unnecessary. Although the U.S. Supreme Court can overturn state legislation, in matters of state constitutional analysis a state supreme court's interpretation lays the foundation, or precedent, in the upper court's ruling. In the U.S. Supreme Court's Yakima ruling, the justices used the *Paul* decision as precedent for option-disclaimer states regarding P.L. 280, along with the case law for current federal Indian policy and law.

In the 1979 *Yakima* case, the U.S. Supreme Court overturned its previous interpretations of constitutional disclaimers and the meaning of section 6 of P.L. 280. The Yakama Nation is composed of fourteen Native nations that united into one when they entered a treaty with the U.S. in 1855 establishing a reservation in south-central Washington.[84] When Washington first accepted full jurisdiction under P.L. 280 in 1957, it chose not to amend its constitution due to its interpretation of the law. The 1957 and 1963 statutes allowed Native nations within the state to choose if they wanted to be under state jurisdiction. It was not until P.L. 280's 1968 amendment that the federal government required states to obtain tribal consent before extending state jurisdiction. Washington's 1957 statute authorized the governor to extend jurisdiction to consenting tribes; ten of Washington's twenty-two tribes consented.[85] The Yakama Nation was not among the ten consenting tribes. In 1963, Washington amended its 1957 statute and, while tribal consent was still required for full extension of jurisdiction, Washington mandatorily extended jurisdiction over eight categories of state law: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings,

[82]*State of Washington v. Janice Paul*, 53 Wash. 2d 789, 337 P.2d 33 (1959).

[83]Ibid., 791–92.

[84]*State of Washington v. Yakima Nation*, 439 U.S. 463, 99 S.Ct. 740. 58 L.Ed. 2d 740 (1979), 469.

[85]Bamberger, 153.

dependent children, and operation of motor vehicles.[86] Washington's assumption of jurisdiction over these eight areas undermined tribal sovereignty by circumventing Native nations' culturally sensitive and traditionally based process of law and order. In reaction, the Yakama Nation filed a suit against the state of Washington testing the validity of the state's 1963 assumption of jurisdiction. The Washington Supreme Court ruled in favor of the state of Washington, stating that the language of section 6 of P.L. 280 and Washington's state constitution did not require a statewide constitutional referendum to amend the state's constitution, since elected officials could act to represent the "consent of the people."

Picking apart the language of section 6, the U.S. Supreme Court ultimately upheld the Washington Supreme Court's decision. Further, the U.S. Supreme Court justices felt that "Congress clearly wanted all the option states to 'obligate and bind' themselves to assume the jurisdiction offered in Pub. L. 280," and while constitutional amendment was a process by which option-disclaimer states could do so, "this reference can hardly be construed to require that process."[87] In essence, constitutional amendment was a suggestion, not a requirement. Since the entire purpose behind P.L. 280 was to reduce federal spending and to enable the federal government to get out of the "Indian business," the U.S. Supreme Court concluded that the drafters of this act intended to make the transfer of jurisdiction as smooth as possible—removing barriers rather than creating them. Therefore, in the U.S. Supreme Court's view, "the circumstances surrounding the passage of Pub. L. 280 in themselves fully bear out the state's general thesis that Pub. L. 280 was intended to facilitate, not impede, the transfer of jurisdictional responsibilities to the states" and that the drafters showed no intention to require constitutional amendment in option-disclaimer states.[88] With Yakima, the U.S. Supreme Court changed its course concerning disclaimer states amending their constitutions. The Court's rulings also showed how the language of P.L. 280 could be viewed as vague and could be open to different interpretations that might ignore the original intent and interpretation of the 83d U.S. Congress.

[86]Wash. Rev. Code §37.12.010 (1976).

[87]*Yakima Nation*, 439 U.S. at 485.

[88]Ibid., 490.

TRIBAL-STATE COMPACTS

In 1987, in *California v. Cabazon Band of Mission Indians,* the U.S. Supreme Court held, with regard to state gambling laws, that civil jurisdiction is limited to litigation in state courts and not civil regulatory authority. Therefore, if a state law is criminal/prohibitive, then P.L. 280 applies, but if the law is civil/regulatory, then P.L. 280 does not apply.

The Cabazon and Morongo Bands of Mission Indians are federally recognized tribes whose reservations are located in Riverside County, California. The Cabazon reservation is located seven miles from Indio and eighteen miles from Palm Springs. The Morongo reservation is near Banning and twenty-two miles from Palm Springs. With the approval of the secretary of the interior, both tribes conducted bingo games on their reservations; Cabazon also had a card club offering draw poker and other card games.[89] Because the tribes have little or no natural resources to develop, they rely on casinos as major sources of income, employment, and economic development.[90] But California sought to apply its bingo statute to the tribal operations, which would have shut the operations down. As a result, the Cabazon and Morongo bands instituted an action for declaratory relief in federal district court.[91] The district court ruled in favor of the tribes, holding that California did not have authority to apply state or county civil regulatory laws. The Ninth Circuit affirmed, and California appealed to the U.S. Supreme Court.

The Supreme Court concluded that California regulates rather than prohibits gambling, that prevention of organized crime was not sufficient justification for state regulation of casinos, and that shutting down tribal gambling operations would violate Native nations' sovereignty. Therefore, since gaming was not a criminal offense, California—a P.L. 280 state—had no authority to prohibit Native gaming. Congress, of course, reacted to Cabazon by enacting the Indian Gaming Regulatory Act (IGRA) in 1988.[92] This law defined and codified gaming in Indian Country, setting the foundations of the state-tribe gaming relationship. One of IGRA's main features (other than creating the National Indian Gaming Commission) concerned the

[89]*State of California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), 205.

[90]Ibid.

[91]Ibid., 204.

[92]*Indian Gaming Regulatory Act,* Public Law 497, 100th Cong., 2d sess. (October 17, 1998), §2703.

classification of gaming. Congress established three classes of gaming: Class I—traditional games, Class II—bingo and other similar games, and Class III—Nevada-style gaming.[93] Both Class I and Class II gaming are under the jurisdiction of Native nations, meaning that if it is permitted in the state, then Native nations can conduct either class of gambling without a tribal-state compact.[94] Class III requires a tribal-state compact. Native nations seeking casino gaming must enter negotiations with their states. Since IGRA dealt in general with states, it allowed for the expansion of state power over tribes and circumvented P.L. 280.[95] Because many states demonstrate ill will toward Native peoples, IGRA required states to enter into good-faith negotiations with Native nations; moreover, IGRA allowed Native nations to take legal action against those states that refused to enter a compact or negotiate.

ARIZONA GAMING COMPACTS

Soon after the enactment of IGRA, the Yavapai-Prescott Indian Tribe of Arizona attempted to enter negotiations for a gaming contract with the Arizona state government but failed due to Governor Fife Symington's opposition to casinos.[96] Pursuant to IGRA, the tribe sued the state in 1992 in the U.S. District Court of Arizona. The court's decision in *Yavapai-Prescott Indian Tribe v. Arizona* held that Arizona must negotiate with Native nations seeking gaming compacts.[97] Soon after, the state passed Arizona House Bill 2352, which gave the governor the authority to negotiate compacts with Native nations.[98]

IGRA empowered tribal groups in this way, but by the mid-1990s, tribes lost the power to force states into compact negotiations. In 1991, the Seminole tribes of Florida, pursuant to IGRA regulations, had sued the state of Florida in order to force the state into negotiating a compact for Class III gaming. The U.S. District Court of Southern Florida decided in favor of

[93]Ibid.

[94]Ibid., §2710.

[95]Andrew Light and Kathryn Rand, *Indian Gaming and Tribal Sovereignty: The Casino Compromise* (Lawrence, KS, 2005), 44.

[96]*American Greyhound Racing v. Jane Dee Hull*, 305 F.3d 1015, 7.

[97]Arizona Department of Gaming, "History of Indian Gaming in Arizona," www.gm.state.az.us/history.htm. *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (1992).

[98]Codified in *Ariz. Rev. Stat.* §5-601.

the tribe, arguing that IGRA abrogated the state's own right of sovereign immunity.[99] On appeal, the Eleventh District Court of Appeals overturned the lower court's decision, arguing that IGRA did not remove states' sovereign immunity and that Florida had not waived its immunity. In 1996, in *Seminole Tribe of Florida v. Florida,* the U.S. Supreme Court upheld the court of appeals' decision, arguing that Congress did not have the right to abrogate states' sovereign immunity. Thus tribes were denied the ability to sue states in order to force them into gaming compact negotiations.[100]

The compact created during the negotiations with the Yavapai-Prescott Indian Tribe laid the foundation for Arizona's practice of having a standardized compact, meaning that all twenty-one Native nations within Arizona have basically the same compact.[101] The Arizona gaming compacts of 2003 follow the guidelines contained in IGRA; a compact may contain the following:

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
(v) remedies for breach of contract;
(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
(vii) any other subjects that are directly related to the operation of gaming activities.[102]

[99]C. Shannon Bacon, "The Indian Gaming Regulatory Act: What Congress Giveth, the Court Taketh Away—*Seminole Tribe of Florida v. Florida,*" *Creighton Law Review* 30 (1996–97), 569–604, 574.

[100]Ibid., 575.

[101]Arizona Department of Gaming, "History of Indian Gaming in Arizona," and "Tribal-State Compacts," http://www.gm.state.az.us/compacts.htm.

[102]Tribal Gaming Ordinances, 25 U.S.C. 2710 (d)(3)(C).

Compacts also allow for tribes and states to share law enforcement responsibilities requiring a negotiation of criminal and civil jurisdiction.[103] According to P.L. 280, a state's assumption of jurisdiction can occur only with a majority vote of the enrolled members of a Native nation and not merely by the actions of a tribal council. IGRA prohibits states from using gaming compacts to tax tribes.

To its credit, Arizona's tribal-state compacts fulfill all seven areas listed in IGRA. A common practice of Indian gaming, one that Arizona recognizes, is revenue sharing. Built into the Arizona gaming compacts is a four-tier contribution scheme that tribes must address, depending on the amount of revenue from their casinos, which means a tribe pays anywhere from 1 to 8 percent of its total gaming revenue to the state of Arizona.[104] In compliance with the IGRA, Native nations must also repay Arizona for regulatory costs incurred.[105] The main bulk of Arizona's compacts detail the regulatory aspects of casinos—clarifying the roles that the state, the Native nations, and the Arizona Indian Gaming Association play in Native Class III gaming. Everything is monitored and regulated, from licensing of employees to quarterly reporting to dispute resolution to internal control standards. Raymond Aspa, Sr., of the Colorado River Indian Tribes, asserts, "[O]ur tribal-state compact with the State of Arizona is probably the most rigorous in the country. The state shares broad authority with our tribal regulatory agency, with what we frankly sometimes view as intrusive rights to monitor, certify, and inspect."[106] Aspa's observation about the state regulatory function raises a question: at what point is Arizona infringing on Native nations' sovereignty?

The fact that Arizona did not accept full jurisdiction as outlined by P.L. 280, section 8, confounds the Native-state sovereignty matter even more:

[103]Arizona Department of Gaming, "Tribal-State Compacts."

[104]"(1) One percent (1%) of the first twenty-five million dollars ($25,000,000.00); (2) Three percent (3%) of the next fifty million dollars ($50,000,000.00); (3) Six percent (6%) of the next twenty-five million dollars ($25,000,000.00); and (4) Eight percent (8%) of Class III Net Win in excess of one hundred million dollars ($100,000,000.00)," Arizona Department of Gaming, "_____ Indian Tribe-State of Arizona Gaming Compact," section 12b, 39 of http://www.gm.state.az.us/pdf_compacts/compact.final.pdf.

[105]Ibid.

[106]U.S. House of Representatives, Committee on Resources. "Testimony of Raymond Aspa, Sr. Colorado River Indian Tribes Member, CRIT Tribal Council, The Committee on Resources, United States House of Representatives Oversight Hearing on Minimum Internal Control Standards (MICS) for Indian Gaming, Thursday, May 11, 2006," http://naturalresources.house.gov/uploadedfiles/aspatestimony05.11.06.pdf.

> Nothing in this Compact is intended to change, revise or modify the civil and criminal jurisdiction of the Tribe or of the State. Nothing contained herein shall be deemed to modify or limit existing federal jurisdiction over Indians and the Gaming Operations authorized under this Compact.[107]

Furthermore, section 16b upholds Native nations' tax-exempt status.[108]

Except where such powers are granted by the federal government, Arizona has no authority to be involved in law enforcement on reservations. Thus, by allowing Arizona limited authority, Native nations may have compromised themselves for economic security. Indeed, section 13d points out the extent to which Natives have compromised:

> The State Gaming Agency's intelligence unit will gather, coordinate, centralize, and disseminate accurate and current intelligence information pertaining to criminal and undesirable activity that may threaten patrons, employees, or assets of the gaming industry. The State and the Tribe will coordinate the use of resources, authority, and personnel of the State and the Tribe for the shared goal of preventing and prosecuting criminal or undesirable activity by players, employees, or businesses in connection with tribal Gaming Facilities.[109]

Although there are regulatory powers associated with IGRA, the exact details of how this act actually operates, in practice, depend heavily on the tribal-state compact. Moreover, given a jurisdictional foothold, Arizona may demand more from Native nations in future negotiations, such as authorization for the state to use tribal gaming revenue to close state budgetary gaps.

Overall, tribal-state gaming compacts provide highly fertile ground for states to preempt P.L. 280. Whereas P.L. 280 and IGRA require tribal consent through referendum, gaming compacts involve government-to-government negotiation and require only a tribal council/government's approval. Gaming may benefit tribes economically, but it also places Native

[107]Aspa, Sr., Raymond, Statement to the House Committee on Resources, *Minimum Internal Control Standards (MICS) for Indian Gaming*, 109th Cong., 2d sess., 2006. Available at www.gpo.gov/fdsys/pkg/CHRG-109hhrg27518/html/CHRG-109hhrg27518.htm.

[108]Ibid., sec. 16b.

[109]Ibid., sec. 13d.

nations at the mercy of the state, creating situations in which the state may infringe on tribal sovereignty by forcing Native nations to compromise on areas such as legal jurisdiction and tax immunity.

ARS 36-620

In Arizona, the twenty-one national parks, national monuments, and miscellaneous other reserves are maintained and regulated by the National Park Service, a subdivision of the Department of the Interior.[110] According to article 20, section 4 of Arizona's constitution, national parks are federal land over which Arizona has no jurisdiction unless there is an intergovernmental agreement or compact.

In 1976, the Arizona legislature passed *Arizona Revised Statute (ARS)* 37-620 to allow for concurrent jurisdiction by Arizona and the federal government over national parks and dams.[111] Subsection B of this statute states, "Concurrent Criminal jurisdiction shall vest as to the lands in each area identified in subsection D when the United States submits to the governor of the state a formal written request for concurrent criminal jurisdiction. . . . The state may withdraw jurisdiction over any land or area three years after written notification by the governor to the secretary of the interior."[112]

This sharing of criminal jurisdiction can benefit both Arizona and the federal government, but the list provided in subsection D is a cause for concern. Among the national parks and monuments listed are Canyon de Chelly National Monument, Navajo National Monument, and the Hubbell Trading Post National Historic Site—all three located within the Navajo Nation. Navajo National Monument and Hubbell Trading Post are islands of federal land, but Canyon de Chelly is Navajo trust land and not public (i.e., federal) land.

> Canyon de Chelly National Monument has a unique position among areas controlled by the National Park Service. It is the only monument that the Park Service does not own, jurisdiction being based solely on Section 3 of the Congressional act that charges the Service with

[110]If the historical trails are included, there are twenty-five. Rose Houk, *The Guide to National Parks of the Southwest* (Tucson, AZ, 2005), 2–3. The Bureau of Indian Affairs is also a part of the Department of the Interior.

[111]*Ariz. Rev. Stat.* §37-620.

[112]Ibid.

> administration of the ruins and other features of scientific and historical interest. The Service also has rights to construct roads and trails and provide visitation facilities. The Navajos, on the other hand, were promised that they would lose no rights whatever.[113]

Canyon de Chelly's uniqueness comes from section 2 of 46 Stat. 1161 (the act that created Canyon de Chelly as a national monument in 1931). The statute states, "[N]othing herein shall be construed as in any way impairing the right, title, and interest of the Navajo Tribe of Indians which they now have and hold to all lands."[114]

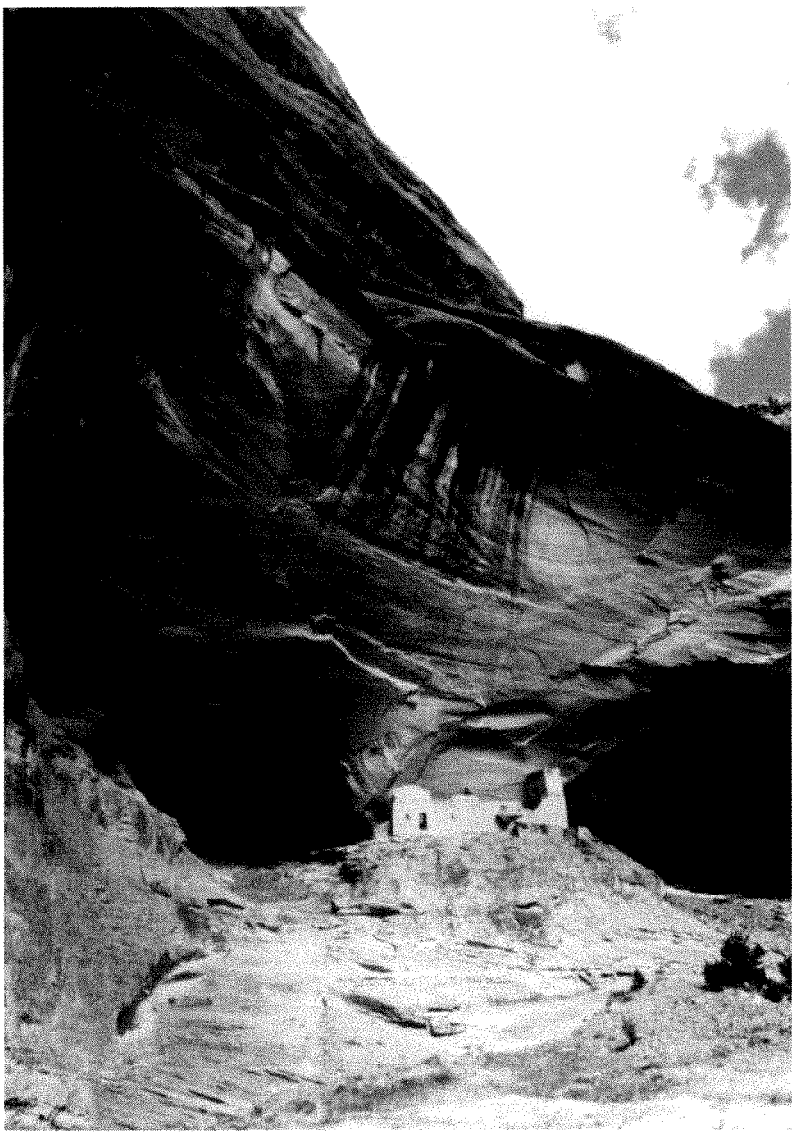
Although Canyon de Chelly is a part of the NPS system, it is not under the same regulations as other national parks. Special considerations regarding administrative, legal, and other issues arise because both the federal government—through the NPS—and the Navajo Nation are involved. For Arizona to share concurrent jurisdiction over Canyon de Chelly, the state had to gain permission from the Navajo Nation through P.L. 280. Interestingly, subsection C of *ARS* 37-620 states that, "in the case of any lands included within the boundaries of the areas set forth in subsection D which are not owned or controlled by the United States, the jurisdiction shall not change."[115] On the one hand, Canyon de Chelly would be excluded through subsection C because it is trust land, controlled by both the Navajo Nation and the federal government.

Although state legislators may never invoke this statute for Canyon de Chelly, its inclusion in the list and the statute's vague language are sufficient cause for concern. Canyon de Chelly's presence in subsection D suggests that the drafters of this statute did not consider the unique history of the monument before including it. Arizona's history of attempting to gain jurisdiction over Native lands illegally could make this "oversight" dangerous and could haunt future legislation. The vague language in Subsection C could enable Arizona to enter into an agreement with the federal government for concurrent criminal jurisdiction over Canyon de Chelly. Removing Canyon de Chelly from the list would be the best method to

[113]David M. Brugge and Raymond Wilson, *Administrative History: Canyon De Chelly National Monument, Arizona*, United States Department of the Interior, National Park Service, January 1976, www.nps.gov/cach/historyculture/upload/CACH_adhi.pdf, 9.

[114]Canyon de Chelly Act of 1931, Public Law 71-667, *U.S. Statutes at Large* 46 (1930–31), 1161.

[115]*Ariz. Rev. Stat.* §37-620.



Although Canyon de Chelly is not owned by the National Park Service, the NPS administers the ruins, such as White House Ruin, above, and other features of scientific and historical interest. (Collection of the Ninth Judicial Circuit Historical Society)

prevent future court or political battles. Revising ARS 37-620 would close a potential loophole in P.L. 280.

CONCLUSION

The last two hundred years of federal-state-tribal interaction have involved negotiation, compromise, betrayal, and broken promises. The jurisdiction shared by courts and law enforcement is a complex web, formed from contradictory and faulty doctrines. Ideally, most, if not all, of Indian law and federal Indian policy should simply be rewritten. Unfortunately, such a re-crafting of Indian law is largely impossible.

Clearly P.L. 83-280 is a poorly crafted piece of legislation, as is any piece of legislation that treats tribes as a uniform group, ignoring the diversity that exists between and within Native nations. For smaller tribes that are close to large cities but cannot afford tribal police forces, state jurisdiction has the potential for good. Depending on the circumstances, shared jurisdiction need not be a threat to Native sovereignty. Some scholars suggest that P.L. 280 be amended to allow tribes to make jurisdictional compacts with states in the same manner as the gaming compacts. But, in amending P.L. 280, Congress would have to clarify the meaning of disclaimers and "the consent of the people." Any assumption of jurisdiction by disclaimer states without constitutional amendment should be invalidated.

P.L. 280 is an example of the federal government's attempt to terminate tribes' status as quasi-sovereign nations. The law, in some cases, offers tribes protection against state intrusion, but it also provides a means for states to undermine tribal sovereign, notably by taking power away from tribal courts, which are a powerful means of maintaining traditional practices, asserting identity, and preserving language. Although Arizona and other disclaimer states intentionally interpreted P.L. 280 to their own advantage and not for the benefit of Native nations, it is still possible to change and improve the law to address the needs and sovereignty of Native nations.

The Color and Gender of Citizenship: Immigration Restriction in the Development of Oregon

Jacki Hedlund Tyler

The Oregon constitution, approved by white male voters in 1858, excluded black Americans from settling there when the territory became a state. The constitutional provision further required that current black residents of Oregon move out of the territory and denied this group of Americans the right to file suit. The Oregon immigration restriction debates that played out in the *Oregonian*, *Oregon Statesman*, and *Oregon Argus* newspapers from 1854 to 1858 demonstrate how politicians used gender and racial discourses to legitimize their own claims to American citizenship as white males while discrediting their political opponents. These debates echoed national arguments about citizenship and manhood in the antebellum United States. Although the use of such rhetoric changes over time, the Oregon immigration debates reflect the continuous practice

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of emasculation, racialization, and sexualization to define exclusions in American citizenship.[1]

Months prior to Oregon's constitutional convention, Linn County representative Delazon Smith stated that discussions of the immigration restriction bill reminded him of an "anecdote of the Prince, who complained on his entrance into the city, that his arrival had not been suitably celebrated. They replied that they had a hundred reasons for not firing a salute, but they would name but one, and that was, that they had no gunpowder."[2] Addressing the restriction provision, Smith explained that there were "a hundred reasons why this bill should not pass. They have neither gun nor powder. . . . But there is something concealed in this matter, and these sentiments pent up in the breast of people which must come out and be met."[3]

Histories addressing American politics in the 1850s, including those focused on debates of sectionalism and the free soil movements, generally present the issues from a supposed national perspective, drawing their examples from the eastern states. It also is possible to achieve a national perspective from events in the American West during the 1850s, however, because the West became a representative stage on which political issues presented themselves and required resolution, evidenced by political reaction to "Bleeding Kansas." Although politicians made national decisions in Washington, D.C., western events and the actions of western politicians reflected the national narrative as well as influential sectional perspectives leading into the Civil War. Moreover, editorials from the *Oregonian*, the *Oregon Statesman*, and the *Oregon Argus*

[1]The term *race* refers to the socially created perception of a person's skin color. The debates about what constitutes whiteness during Oregon's constitutional convention demonstrated that people's race could depend on their skin color, their contribution to their neighborhood, their birthplace, and, in some cases, their religion. The term *gender* refers to social roles defined by sexual differences, such as masculinity, manhood, and femininity. Reflecting Joan Scott's discussion of gender as a category of analysis, this essay evaluates the use of gender as a discourse in political debates and perspectives. The work of historians such as Kathleen Brown, Gail Bederman, and Glenda Gilmore informs my analysis of race and gender as interconnected categories. These historians have demonstrated that the analysis of gender cannot be separated from an analysis of race, and that the issues of race and gender influence one another and the ways in which groups use ideas of race and gender against each other. Peggy Pascoe's examination of legislation to understand the social implications of gender and race also influences this evaluation of political debates and perspectives, as those political ideas used and influenced the institutionalization of race and gender.

[2]"Legislative," *Oregon Statesman*, January 20, 1857.

[3]Ibid.

presented a range of these political perspectives in the Oregon Territory and demonstrated how immigration restriction in Oregon reflected national trends.

The revisionist school of historians has claimed that histories of the 1850s have exaggerated the political tensions that arose over the expansion of slavery. Western historians have challenged these claims by demonstrating the political and economic impact of the slavery debates in the development of the West. Arguing that midwestern migrants brought with them to the West Coast ideas of racial segregation and the desire to secure lands for white settlers, western historians have demonstrated how the development of the westerner's political ideology entwined with national politics.[4] The excellent research on politics and race in the West, however, falls short of making a comprehensive connection between pre-Civil War "anti-negro" prejudices and issues of citizenship both nationally and in the West.[5] Linking slavery, immigration restriction, naturalization, and gender, this article contributes to the history of western politics and reveals how the discourse of gender and race influenced political debates and perspectives.

Histories of American politics in the 1850s have focused on a variety of subjects, from the sectional divide over slavery to arguments that economic and class motivations ruled the day. Regardless of what ultimately caused the Civil War, historians of nineteenth-century politics agree that multiple changes embodied the 1850s, including the influence of Whig ideology in the American perspective of land and economic expansion, the sectional fractioning of the Democratic party, and the

[4]For political histories of the West with discussions of Oregon, see Eugene H. Berwagner, *The Frontier Against Slavery: Western Anti-Negro Prejudice and the Slavery Extension Controversy* (Chicago, 1967); Robert W. Johannsen, *Frontier Politics and the Sectional Conflict: The Pacific Norwest on the Eve of the Civil War* (Seattle, 1955); David Alan Johnson, *Founding the Far West: California, Oregon, and Nevada, 1840–1890* (Berkeley, CA, 1992); Patricia Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1987); Henry H. Simms, "The Controversy Over the Admission of the State of Oregon," *Mississippi Valley Historical Review* 32:3 (December 1945); Quintard Taylor, "Slaves and Free Men: Blacks in the Oregon Country, 1840–1860," *Oregon Historical Quarterly* 83:2 (1982); and Taylor, *In Search of the Racial Frontier: African Americans in the American West, 1528–1990* (New York, 1998); Henry Wilson, *History of the Rise and Fall of the Slave Power in America*, vol. 2 (Cambridge, MA, 1874); Walter Carleton Woodward, *The Rise and Early History of Political Parties in Oregon, 1843–1868* (Portland, OR, 1913).

[5]Peggy Pascoe's *What Comes Naturally* does exactly this for miscegenation laws; although it touches on naturalization, it does not address slavery in relation to immigration restriction and gender during the Civil War era. Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York, 2009).

emergence of the Republican Party.[6] Historians of nineteenth-century politics have provided a critical foundation for understanding party politics and national ideologies that continue to shape political thought today. Although economic motivations and issues of class played a large role in the politics of the 1850s, this article primarily addresses the influence of race and gender in the formation and implementation of political ideologies in order to provide a more complete understanding of party platforms and the political discourse of citizenship.

Over the last thirty years, gender and race histories have become entwined, and each is indispensible to the understanding of the other. Historians of gender and women's history have persuasively argued that a manmade legal system, rather than divine right or natural law, denied white women access to citizenship, and that this exclusion of citizenship could extend to other groups including black Americans. By establishing citizenship as male in order to exclude white women, white men could also use the gender of citizenship against other white men by questioning their manhood. Similarly, the fear of losing their own masculinity if free labor turned to slave labor, white working-class men viewed race as a signifier of manhood. Moreover, gender historians have explained how white men used gender discourse to institutionalize race, and demonstrated how racial discourse could legitimize gender structures and patriarchy.[7]

[6]For a discussion about American politics leading up to and during the 1850s, see Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (New York, 1970); Daniel Walker Howe, *The Political Culture of the American Whigs* (Chicago, 1979); Howe, *What Hath God Wrought: The Transformation of America, 1815–1848* (New York, 2007); and Ronald G. Walters, *The Antislavery Appeal: American Abolitionism after 1830* (Baltimore, MD, 1976). For a greater focus on slavery in the 1850s, see Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery*, ed. Ward M. McAfee (New York, 2001).

[7]For a discussion of how race and gender intersected before and during the nineteenth century, see Gail Bederman, *Manliness & Civilization: A Cultural History of Gender and Race in the United States, 1880–1917* (Chicago, 1995); Sharon Block, *Rape and Sexual Power in Early America* (Chapel Hill, NC, 2006); Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (Chapel Hill, NC, 1996); Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ, 2009); Glenda Gilmore, *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896–1920* (Chapel Hill, NC, 1996); Nancy Isenberg, *Sex and Citizenship in Antebellum America* (Chapel Hill, NC, 1998); Susan Lee Johnson, *Roaring Camp: The Social World of the California Gold Rush* (New York, 2000); Eric Lott, *Love and Theft: Blackface Minstrelsy and the American Working Class* (New York, 1993); Pascoe, *What Comes Naturally*; Ann Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley, CA, 2010).

Gender and race historians have prompted the reexamination of social, cultural, and political events in order to incorporate interconnected ideas of race, gender, and citizenship. Through an analysis of Oregon's immigration restriction, this article contributes to the understanding of how racial and gender discourses played a role in the political development of the West.

The definitions of citizenship in the nineteenth century—and today—reflected societal perceptions of race and gender in both legal parameters and in less formal discussions about what constitutes a citizen. Political debates played out in the *Oregonian*, *Oregon Statesman*, and *Oregon Argus* newspapers during Oregon's statehood process reveal gender and racial discourses used to discredit political opponents and define qualifications for citizenship. Although requirements for citizenship varied from state to state, Oregon's debates over a constitutional provision to prohibit the immigration and settlement of black Americans reflected not only local politics but also political parties' positions on issues of citizenship, slavery, and naturalization. The newspaper and legislative debates over Oregon's immigration restrictions demonstrate that politicians and political parties used gender and racial discourses to meet political objectives and to legitimize the politicians' claims to citizenship.

WESTERN EXPANSION AND OREGON POLITICS

In the 1850s, the development of the West was both an object of intense national focus and a subject that politicians preferred to ignore in order to avoid conflict. The establishment of the territory and eventual state of Oregon occurred in the context of national debates over slavery, western settlement, immigration, and gender. With a majority of Oregon's early white settlers hailing from Missouri and Kentucky, Oregonians' perceptions of slavery and the citizenship of free blacks stemmed from much earlier cultural and political constructions, including the recent Missouri Compromise, the Compromise of 1850, the *Scott v. Sandford* decision, and the Kansas Nebraska Act. The California gold rush aided in the settlement of white agrarians but also spurred immigration of free black Americans and newly arrived Chinese.[8]

[8]According to K. Keith Richard's article "Unwelcome Settlers: Black and Mulatto Oregon Settlers," by 1850 a majority of the "blacks and mulattoes" in Oregon were born in Virginia and Missouri, and the population of black Americans was approximately 112 people. See *Oregon Historical Quarterly* 84:2 (1983): 193–95.

Despite Oregon's generous Land Law Act, the territory struggled to build its population to an acceptable statehood size.[9] Nevertheless, in 1847 this issue did not stop Oregon politicians from pushing forward with writing a state constitution. The Democratic Party had the strongest showing in Oregon politics by the mid-1850s. Like the members of the national party, however, Oregon Democrats had difficulty bridging their differences, especially their opinions about slavery, and relied on the *Oregon Statesman* and its editor Asahel Bush to convey unity even when none existed.[10] Opposition to the Democrats included politicians with alliances that ranged from Whigs to Republicans to temperance advocates to the Know-Nothings. Classifying these activists as anti-Democrats might at times oversimplify their identities, but they often acted in unison, especially with regard to issues of slavery.[11] The *Oregonian*, edited by Thomas Dryer, and the *Oregon Argus*, edited by William Lysander Adams, were the predominant voices of the anti-Democrats.[12]

Debates over restricting the settlement of black Americans had occurred in Oregon since Oregon's provisional government established the first immigration act in 1844, which Oregonians reinstated under the territorial government of 1849. Although rarely enforced, the restriction consistently appeared in newspaper editorials and legislative minutes from 1855 until the adoption of an immigration restriction provision in the Oregon

[9]Annals of Congress, 33d Cong., 1st sess., part 2, 1092–1102; Congress essentially voted down the Oregon bill because of the small population of the territory, which was less than some Midwestern territories during their application for statehood. Johnson, *Founding the Far West*, 44–48; the immigration restriction was not original to Oregon, as Kansas and Missouri had similar laws.

[10]An editorial on August 25, 1857 demonstrates Bush's importance to the party: "The Democratic Territorial Convention declared that voting for or against slavery in Oregon should not be the test of a man's democracy, or affect his standing in the democratic party. And he who declares that the man who votes for a free State cannot be just as good a democrat as the man who votes for a slave State, or that he who votes for a slave State cannot be just as good a democrat as the one who votes for a free State, has not at heart the good of the democratic party—has at heart its destruction." Also see Barbara Mahoney, "Oregon Democracy: Asahel Bush, Slavery, and the Statehood Debate," *Oregon Historical Quarterly* 101:2 (2009): 202–27.

[11]The description of the political opposition to Democrats as anti-Democrats comes from chapter 2 of Johnson's *Founding the Far West*.

[12]Johnson, *Founding the Far West*, 50–66. Advocates of the Free Soil movement supported the anti-Democrats, particularly during debates over the application of the Kansas-Nebraska Act, which allowed individual territories—future states—to determine their slave status. Free Soil advocates believed that the Northwest Ordinance of 1787—prohibiting slavery west of the Mississippi River—trumped the Kansas-Nebraska Act and thus made Oregon a free state.

constitution in 1858. During that era, Oregon politicians used gendered discourses of race and racial discourses of gender to discuss the immigration restriction of black Americans in order to address underlying issues of labor, miscegenation, abolition, citizenship, and naturalization.

LABOR: A NEED FOR LABOR, OR LABOR COMPETITION

From the 1855 legislative session to the beginning of the 1857 session, Oregon politicians framed part of their arguments about immigration restriction around ideas of labor and class. In these particular debates, race played a significant role in defining both what a laborer was and what a person's possession of laborers said about his or her class. Oregon politicians also used perceptions of gender to imply the inferiority of a race and to define class structures that legitimized the social authority of one class over another.[13] Anti-Democrat politicians—namely the Republicans—insinuated conditions of white slavery by arguing that, without the immigration restriction, the degradation of free laborers remained feasible. Moreover, anti-Democrats speculated that those in favor of slavery were testing the acceptability of black laborers before they addressed the actual question of slavery in Oregon. Simultaneously, some Democrats attempted to equate black laborers with white laborers, arguing that Oregon had a need for workers, regardless of their race. This particular group, however, did not explicitly distinguish between free black Americans and slaves and sometimes made the argument on behalf of slave labor. Some pro-slavery politicians argued openly for the restriction of black Americans if Oregon voted down the option for slavery. Ultimately, the anti-Democrats used a discourse of race and class to link Democrats with slavery and to suggest that the Democrats were attempting to emasculate white laborers.

On the first day of the Oregon Territory's legislative session in January 1855, politicians initiated a discussion about including a restriction on black American settlement in a future state constitution. During the debate, a member of the

[13]For a discussion on a discourse of gender to suggest inferiority of race and class, see Sarah Deutsch, *No Separate Refuge: Culture, Class, and Gender on an Anglo-Hispanic Frontier, 1880–1940* (New York, 1987); Linda Gordon, *The Great Arizona Orphan Abduction* (Cambridge, MA, 1999); Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New York, 1995); and Peggy Pascoe, *Relations of Rescue: The Search for Female Authority in the American West* (New York, 1990).

House moved to amend the immigration provision to include Chinese immigrants in this restriction. Delazon Smith, Democratic representative from Linn County, spoke in opposition to the amendment and the provision in general, stating "that he was not opposed to negroes coming into this country: they made better servants than white people, and their labor was needful."[14] Smith proceeded to argue that the remoteness of Oregon from other states with large black American populations would limit the chances of their presence exceeding the amount of labor needed to settle Oregon. Anti-Democrat politicians attributed Smith's position to his pro-slavery views and his concern that the restriction might jeopardize his ability to bring slaves to Oregon. Although this particular discussion of the immigration restriction continued at some length, the Democrats soon abandoned their argument in favor of black American labor until later legislative debates, since their opponents increasingly were using the opportunity to speak out against slave labor.[15]

By the beginning of Oregon's constitutional convention in January 1857, debates about labor in connection with immigration restrictions reemerged in legislative sessions and editorials, especially in the *Oregon Argus*. Clearly favoring Oregon admission to the Union as a free state, the *Argus* served as a platform for emerging Oregon Republicans to voice their opinions against slavery and to question the Democrats' perspectives on labor and race—with the immigration restriction serving as a means of establishing such positions. Addressing the proposal that the settlement of black Americans could resolve the area's labor needs, an *Oregon Argus* editorial by J.D.L. argued, "Oregon rests under a disadvantage from not having laborers enough . . . , but he who imagines that the passage of a law declaring this to be a slave State would remedy the evil, deceives himself."[16] The author went on to suggest that permitting black Americans to settle in Oregon would enable "him who owns the colored stock to live at his ease, and perhaps to look down with scorn upon those who chance to be in poorer circumstances than himself."[17] Insinuating that slavery would create a class division among white Americans in the region, the writer questions the Democrats' loyalty to white laborers, whose social position would be challenged by the existence of slavery. If slavery were permitted in Oregon, white laborers

[14]"What the Present Legislature Finds to Do," *Oregonian*, January 6, 1855.

[15]Ibid.

[16]J.D.L., "Slavery and Freedom," *Oregon Argus*, January 3, 1857.

[17]Ibid.

would run the risk of losing control of their labor. Masculinity, as perceived in the West and elsewhere during the nineteenth century, relied on the ability of an independent man to settle the land and provide for his family. As exemplified in cultural practices such as minstrel shows, white male laborers in the nineteenth century feared losing their masculinity if free labor turned to slave labor, because they regarded race as a signifier of manhood.[18] Through this understanding, a white laborer who did not control his labor potentially lost his livelihood as well as his position as a provider and a man in society. Thus J.D.L. used discourse of race and class to claim that the Democrats impugned the masculinity of white laborers.[19]

Shortly after the *Oregon Argus* editorial appeared, the *Oregon Statesman* published a lengthy speech by Democrat Delazon Smith who, once again, spoke against the immigration restriction and on behalf of the need for black American laborers. Smith prefaced his argument with the suggestion that "the bill might pass without any reference to the question of slavery," and insisted that he did not "look upon it as a criterion on this subject."[20] Smith continued, "We want laborers here. Oregon wants working men. We want negroes in every town. They do not come in competition with any class of white laborers. We want barbers, waiters and boot-blacks everywhere."[21] The *Oregon Argus'* coverage of the same debate included the proposed but failed amendment from Representative Allen to insert "free" before the word "negroes" in the immigration restriction bill in order to clarify the difference between slave labor and free labor.[22] In order to make the Democrats acknowledge the distinction, Allen further stated that he "was in favor of a free State, and wanted no negroes to black his boots."[23]

[18]Lott, *Love and Theft*, 122–99.

[19]Eric Foner notes in *Free Soil, Free Labor, Free Men* that "the phrase most often repeated in debates—the 'right to fruits of his labor'—was thought to embody the distinction between slavery and freedom. . . . Republicans still clung to the sentiments that the female laborer was an anomaly, not really a free laborer at all." See also Limerick, *The Legacy of Conquest*, 180–200; Susan Lee Johnson, *Roaring Camp*, 32–54, 99–139; and Bederman, *Manliness & Civilization*, 5–44.

[20]"House," *Oregon Statesman*, January 20, 1857.

[21]Ibid.

[22]"Oregon Legislature," *Oregon Argus*, January 31, 1857. Although published at a later date, both this article and the "House" article from the *Oregon Statesman* on January 20, 1857, address the same session and discussion; no first name is give for Mr. Allen in this article, nor does he appear in Carey's list of representatives.

[23]"Oregon Legislature," *Oregon Argus*, January 31, 1857.

Despite *Oregonian* editor Thomas Dryer's claim that his paper was neutral, Dryer became one of the strongest advocates for the anti-Democrats in the 1857 convention and used his paper to produce arguments similar to those made by the anti-Democrats during the legislative sessions. One March editorial posed the question of whether the Democrats, specifically Asahel Bush, would succeed in their plot to deceive the Oregon public about the Democrats' position on immigration restriction. The article asked its readers, "Are the free white laborers of Oregon ready and willing to sell themselves into a bondage worse than that of a Russian serfdom? Can they be deluded by the cry of *democracy* when it is used for so base a purpose as the degradation of free labor?"[24] Similar to the case made in the *Oregon Argus* only months before, the *Oregonian* editorial argued that slavery threatened white American men's control of their labor. Moreover, the author suggested that the men who promoted slavery in Oregon supported this "bondage" of white laborers, which would deprive white men of their independence and their manhood.[25]

Editorials from the *Oregon Statesman* retaliated for this quite personal attack. Because the *Oregonian* had attributed the argument for slavery to Asahel Bush, the *Oregon Statesman*'s editor, Bush changed his approach to avoid an association with slavery. Demonstrating a national attempt by some members of the Democratic Party to deflect their primary political focus away from slavery, an editorial called "Slavery in Territories," published in late March, made the argument that certain Oregon politicians were intentionally and unnecessarily creating agitation about slavery.[26] The editorial further suggested that the Oregon Organic Act prohibited slavery, and therefore the argument that Democrats wanted slavery was preposterous.[27]

Not easily dissuaded, the *Oregon Argus* increased its discussion of slavery's possible assault on Oregon labor as the constitutional convention's debates moved into fall 1857. Although discussions about immigration restriction and slavery took place throughout the legislative session of 1857, Oregon's Democratic politicians attempted to curb discussion of these topics by passing a bill that put both issues to a public vote.[28] This vote was separate from the public's vote on the constitu-

[24]"Bush and Slavery," *Oregonian*, March 7, 1857.

[25]Ibid.

[26]Fehrenbacher, *The Slaveholding Republic*, 277–94.

[27]"Slavery in Territories," *Oregon Statesman*, March 31, 1857.

[28]For an example, see "The Nigger Question," *Oregonian*, August 29, 1857.

Oregon Democrats relied on the *Oregon Statesman* and its editor, Asahel Bush, above, to convey unity within the party, even when none existed. (Courtesy of Oregon Historical Society, #ba017992)

tion but was taken at the same time.[29] On November 7, 1857, Oregon voters answered the following questions: "Do you vote for Slavery in Oregon? Yes, or No" and "Do you vote for free

[29]The representatives to the constitutional convention passed the Oregon constitution on September 18, 1857, but the public vote for the constitution was necessary before they could present their application for statehood to Congress.

Negroes in Oregon? Yes, or No."[30] Between September and November, the *Oregon Argus* filled its columns with information pertaining to these questions.

On October 17, 1857 politician Leander Holmes, a self-identified Republican from Linn County, published his opinions about the proposed Oregon constitution and voiced his concerns that the immigration restriction and slavery provisions would appear on the ballot alongside the constitution. Holmes remarked that answering yes to these questions "might curse our soil with its enervating and blasting effects, that the poor, honest white man's labor should be made disreputable, that this occupation should be disgraced, that all who by the sweat of their brow eat the fruit of their tool, should be placed side by side and equally yoked with the black serfs of Africa?"[31] Preoccupied with the possibility of slavery, Holmes included the two questions in the introduction to his lengthy article, but his concern about the degradation of white men's labor was clear. Holmes argued that the presence of black American laborers or slaves not only lowered the economic value of white men's labor, but also made the two races of laborers seem equal. By emphasizing the difference between white American laborers and slave owners or employers of black American laborers, Holmes invoked the discourse of class and race to imply that those in favor of black labor in any form regarded themselves as social superiors.

In his argument that Democrats "equally yoked" both races of laborers, Holmes suggested that voters should "teach the framers of the [state] Constitution that we [white laborers] are neither nigger nor slaves, as they'd have us to be; but free and independent white men who know our rights and how to secure them."[32] In linking the word *white* with independence, Holmes implied that the Democrats used a discourse of class and race to question white American laborers' claims to independence, and thus their manhood and right to citizenship.[33]

Newspapers from across the country published editorials and proceedings from the United States Congress and Senate debates on Oregon's constitution, beginning in 1857 and continuing until the acceptance of Oregon's statehood in 1859. In some ways, these echoed Oregon's political discussions. Commenting on congressional coverage by the *Boston Post*, an edi-

[30]Charles Henry Carey, ed., *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857* (Salem, OR, 1926), 429.

[31]"Constitution," *Oregon Argus*, October 17, 1857.

[32]Ibid.

[33]Ibid.

torial in William Lloyd Garrison's abolitionist paper *Liberator* in May 1858 noted opposition to the Oregon constitution by senators in Massachusetts, New Hampshire, and Maine. The editorial suggests that these senators opposed the "admission of Oregon with a clause in her Constitution excluding negroes from residence there."[34] Referring to these anti-slavery Republican senators' discontent with Oregon's Republican Party, the editorial notes, "A large proportion of the Republican settlers in those Northwestern Territories seem to oppose slavery only because it would cause turmoil and disquiet to themselves, not because of its meanness and wickedness; and if the same selfish end can thereby be promoted, they do not shrink from the equal meanness of disfranchising and banishing men who have committed no crime, but who, as the subjects of an unjust prejudice, are especially entitled to sympathy and help."[35] Similar to the concern of anti-Democrats that black labor would threaten the value of white labor, the editorial accuses the Oregon Republicans of being more concerned about labor and class than they are about the "wickedness" of slavery and the "disfranchising" of black American men. The editorial also addresses an issue that appeared in later Oregon debates about the immigration restriction: in many instances, the anti-Democrats had to make a choice between supporting the provision and opposing slavery.

MISCEGENATION: MIXED RELATIONS

The "Cockstock incident," as politicians referred to it, was an event associated with Oregonians' initial attempt to restrict the settlement of black Americans. Taking place at Willamette Falls in 1844, the Cockstock incident began as a dispute between James Saules, a black settler, and Cockstock, an American Indian man from Wasco, over the ownership of a horse. The confrontation resulted in an exchange of fire and the death of four men, including Cockstock. As the first major confrontation between local American Indians and Oregon settlers, the event became a trope for politicians to invoke when they argued that the presence of black Americans endangered the settlement of Oregon.[36] Moreover, politicians discussed whether relations between black Americans and American Indians created tensions between Indi-

[34]"Wilson's Vote on Oregon," *Liberator*, May 21, 1858.

[35]Ibid.

[36]Taylor, "Slaves and Free Men," 156.

ans and settlers, or resulted in miscegenation. Eventually, these discussions expanded to address possible associations between black and white Americans.[37] Democrats used racial discourse to insinuate that relations between free black Americans and American Indians could risk Oregon's successful settlement. Anti-Democrats drew arguments that connected miscegenation to slavery. Thus politicians from both sides who wished to exclude black Americans from Oregon used arguments about the dangers of miscegenation.

When discussion of an immigration restriction on black Americans first appeared in Oregon's 1855 legislative session, anti-Democrats quickly connected the debate to the issue of slavery. Some of the Democrats, who perhaps anticipated Oregon's admission as a free state, argued that the presence of free black Americans might jeopardize relations between Oregon settlers and American Indians. In one of the first legislative sessions in January 1855, the *Oregonian* highlighted a speech by pro-slavery Democratic representative H.N.V. Holmes: "Mr. H knew from his *experience* in niggers, that they should never be allowed to mingle with whites. They would amalgamate and raise a most miserable race of human beings. . . . If niggers are allowed to come among us and mingle with the whites, it will cause a perfect state of pollution."[38] Further into his speech, Holmes suggested, "If niggers *is* not *prevented* from coming here, they'll come and mix up with the aboriginees [sic] and create the most vilest race on earth."[39] Although Holmes did not explain what this "state of pollution" would include, he clearly regarded the presence of black American settlers as dangerous.[40] Holmes implied that the "mixing" of a white or Native population with people classified as black would demean the former two groups, which he evidently viewed as more racially pure. The editor did not explain exactly what Holmes' "experience in niggers" was, but in questioning how pro-slavery men "experienced" their slaves, the editor suggested a sexual connotation and brought the anti-Democrats squarely into the discussion about racial "mixing."[41]

Responding to a speech made by Democrat Delazon Smith about how he would have brought slaves with him to Oregon had the action been profitable, Republican Leander Holmes suggested, "The gentle*men* from Linn [Smith], says he would

[37]"House," *Oregon Statesman*, January 13, 1857.

[38]"What the Present Legislature Finds to Do," *Oregonian*, January 6, 1855.

[39]Ibid. Italics in original.

[40]Ibid.

[41]Ibid.

have brought one with him; I have no doubt he would, if he could have got a negress to come."[42] Allegations of sexual relations between slave owners and their slaves was an avenue of protest used not only by abolitionists against the institution of slavery in the 1850s, but also by some Republicans to oppose the Democrats' support of slavery.[43] Holmes' sexualization of a pro-slavery politician therefore reflected a national approach to combating both slavery and the Democratic Party. Because Smith and his colleagues had discussed the inherent dangers of sexual relations between black Americans and whites or American Indians, the desire to bring slaves to Oregon presented an interesting contradiction in their stance on miscegenation and an opportunity to inject the issue of slavery into the discourse. Despite the Democrats' marginal success at keeping the issue of slavery out of this particular argument until the constitutional convention in 1857, this first phase of racial discourse reflected the use of miscegenation and slave owners' relations with slaves to justify the exclusion of black Americans from Oregon.

Reporting on the initial arguments in favor of the restriction on black American immigration, the *Oregon Statesman* recorded Democrat La Fayette Grover as supporting the provision at Oregon's constitutional convention. Grover stated, "Those who framed our earlier laws, found that negroes were coming into the Territory and affiliating with the Indians and both became enemies of the whites. The cross between the Indian and the negro produced bad blood—a clan liable to become hostile to the white settlers."[44] After sexualizing black Americans by insinuating that relations between them and American Indians would create antagonistic offspring, Grover described the history of immigration restrictions in Oregon legislation and declared his belief that the people would easily accept this new provision.[45] A week later another *Oregon Statesman* article about the convention noted Delazon Smith's response that "the mixture of a half negro and half Indian is dangerous," but stated that Smith believed the immigration restriction was unnecessary because only perhaps fifty black

[42]Ibid. Italics in original.

[43]Aileen S. Kraditor, *Means and Ends in American Abolitionism: Garrison and His Critics on Strategy and Tactics, 1834–1850* (Chicago, 1989); 178–270. Also see Eric Foner's *Free Soil, Free Labor, Free Men* for a discussion of the influence of radical antislavery on the Republican Party, 103–48; and Sidney Kaplan, "The Miscegenation Issue in the Election of 1864," *The Journal of Negro History* 34:3 (July 1949): 274–343.

[44]"House," *Oregon Statesman*, January 13, 1857.

[45]Ibid.

Americans resided in Oregon.[46] Nevertheless, both Democrats used racial discourse to sexualize black Americans and suggest that they posed more danger to the settlement of Oregon than did white Americans. Thus Democrats used the potential sexual relations of black Americans to justify excluding them from Oregon.

Although the anti-Democrats' response in the constitutional convention and in newspaper editorials did not reflect the Democrats' stance on sexual miscegenation, the anti-Democrats maintained that their opponents wanted a personal relationship with black Americans. Referring to the immigration restriction, Republican politician Leander Holmes argued in an *Oregon Argus* editorial that the Democrats presented the public with two negative options. Holmes suggested that the provision "requires us to make it unconstitutional for them [black Americans] to live, breathe or have any kind of rights even the rights of a grizzly bear—or vote for free negroes coming here."[47] Holmes insisted that anti-Democrats "prefer the society of white people, whatever may be the preference of pro-slavery men. There's no accounting for *tastes*."[48] Implying that the Democrats, unlike the anti-Democrats, desired a mixed society, Holmes continued, "Now because we do not want their friends the negroes as our bosom companions, they require us to violate every principle of justice, religion and civilization by voting that their friends shall not *live* at all."[49] Holmes implied that black Americans, whom the Democrats wanted in Oregon, were the Democrats' "bosom companions," hinting at sexual relations between the Democrats and black Americans. Holmes used the expression *bosom companions* to suggest that the Democrats were trying to force the anti-Democrats to either vote for personal relations with black Americans or deprive them of the rights that the anti-Democrats believed black Americans possessed—outside of Oregon.[50] Thus the anti-Democrats used the discourse of race to imply that the desire to avoid sexual relations between black and white Americans could justify the exclusion of black Americans and the denial of their basic rights, especially claims to citizenship.

Reflecting Oregon's discussion about potential sexual relations of black Americans with American Indians and white Americans, an article from the *New York Tribune* questioned

[46]Untitled, *Oregon Statesman*, January 20, 1857.

[47]Leander Holmes, "Constitution," *Oregon Argus*, October 17, 1857.

[48]Ibid. Italics in original.

[49]Ibid. Italics in original.

[50]Ibid.

the relations of Oregon congressional representative Joseph Lane and other leading Oregon Democrats with the Native inhabitants of the territory. The editorial suggested, "Quite a number of the leading Lane politicians, lead as they brawl against 'Black Republicanism' and miscegenation, which they represent as pretty much the same thing, have already, according to some of our Oregon letters, provided themselves with Indian wives. Very likely they may find satisfaction in completing patriarchal establishments by the addition of Indian slaves."[51] The editorial claimed to have received this information from Oregon correspondents; nevertheless, Republican arguments about miscegenation and slavery were not unique to Oregon. Published on June 9, 1857, this article appeared several months before Oregonians voted on their proposed constitution and, therefore, before the constitution reached the federal government for discussion. This Republican argument not only reflected the Oregon debates but also used racial discourse to sexualize the relationship between Republicans' opponents and American Indians.

ABOLITION: "GRANNY ABOLITIONISTS"

The act of calling Thomas Dryer of the *Oregonian* and other anti-Democrats "abolitionists," regardless of their actual position on slavery, was a popular tool that Oregon Democrats used to radicalize their opponents and unify their party. Editorials in the *Oregon Statesman* used this strategy to such an extent that the word *abolitionists* became a common description for anti-Democrat politicians. Between 1855 and 1858, the Democrats' radicalization of their opponents also embodied gendered connotations in an attempt to feminize their opponents. Democrats referred to anti-Democrats as "grannies," "old ladies," and "dames" alongside references to abolition, thus questioning the anti-Democrats' manhood while, at the same time, associating them with a radical and racialized organization.

Prior to the immigration restriction becoming a provision in Oregon's proposed constitution, newspapers included discussions of the restriction together with debates about slavery. Some of the newspaper articles from the *Oregon Statesman* did not clarify which issue pertaining to black Americans the author was addressing. In July 1855, an *Oregon Statesman* editorial reported that a group it identified as a "collection of old

[51]"Slavery in Oregon," reprinted from the *New York Tribune*, in the *Oregon Statesman*, June 9, 1857.

grannies" had asked to publish the minutes of their meeting, which the paper referred to as an "abolition meeting."[52] The paper did not publish the minutes. Instead, it published an article that feminized, radicalized, and racialized a group of white American men—not recognized members of the Democratic Party—who had discussed something that pertained to black Americans. The author wrote, "It is decidedly *icy* of these nigger-struck *dames* to ask the Oregon Statesman to publish their stale fanaticism."[53] This passage insinuates that these men not only were "dames" but also were infatuated with black Americans.[54] By feminizing an opponent, a politician could weaken his adversary's claims to the rights of white manhood. During the 1850s, even a white woman's claims to citizenship rights were dependent upon her connection to a male citizen and his access to the state.[55] The *Oregon Statesman* article therefore connected white, anti-Democrat men to the racialized group of abolitionists and questioned their masculinity and right to citizenship.

In the same month that the *Oregon Statesman* reported on the "abolition meeting," a letter to the editor appeared in the newspaper claiming to have the true interpretation of the proceedings of the "Liberty Convention," which catered to anti-Democrats and predominantly Free Soil supporters.[56] In this lengthy letter, a Mr. Smith depicted the convention as a small gathering of confused individuals who believed the Democrats were attempting to bring slavery to Oregon through multiple guises. In addition to accusing the convention's participants of denouncing "the administration, the Union, the Constitution and the democratic party" in order to "go over soul, body, breeches, newspaper, types in all, to the one idea, abolition fusionites," Smith suggested the group had perhaps "thirty-two

[52]"Cool!" *Oregon Statesman*, July 11, 1855.

[53]Ibid. Italics in original.

[54]Ibid. As discussed in the last section about implied sexual relations, the anti-Democrats who opposed the immigration restriction on grounds of it being in violation of human rights risked the Democrats insinuating that those men in opposition had relations with Black Americans.

[55]Pascoe, *What Comes Naturally*, 2–3, 13–46; Linda Kerber, *No Constitutional Rights to Be Ladies: Women and the Obligation of Citizenship* (New York, 1998), xx–xxiv, 19–29, 81–92; in "The Paradox of Women's Citizenship in the Early Republic: The Case of *Martin vs. Massachusetts*, 1805," Kerber also argues that "the construction of the autonomous, patriotic, male citizen required that the traditional identification of women with unreliability, unpredictability, and lust be emphasized. Women's weakness became a rhetorical foil for republican manliness." See *The American Historical Review* 97:2 (April 1992): 349–78.

[56]Mr. Smith, "Abolitionism," *Oregon Statesman*, July 21, 1855.

other old ladies of *both* sexes" to support their effort.[57] The early American press challenged the connection between the Republican identity and maleness by creating an avenue for the public to judge men's manliness, thus necessitating a performance that exemplified masculinity.[58] By associating the convention with abolition and denunciation of the government, the letter radicalized the "Liberty Convention." But Smith also insinuated that the convention's anti-Democrat members were both women and men characterized as "old ladies." Smith's letter, therefore, not only feminized the anti-Democrats, but also associated them politically with women.

White women's participation in politics, especially in connection with slavery—whether supporting abolition or attacking it—generally consisted of providing a group with a political message that the leaders could project to the public as non-political. This was because society perceived women as non-political and gendered their political voices as domestic or motherly, thus depriving them of claims to complete citizenship.[59] For example, many of the temperance meetings in Oregon during the 1850s included women, but to admit that women participated at a political convention where members elected officers would feminize the political group and reduce the credibility of the convention.[60] Mr. Smith's letter used a gendered discourse that racialized the "Liberty Convention" and questioned the anti-Democrats' claims to male political authority and citizenship.

Before the Democrats could attempt to silence discussion of slavery in Oregon's constitutional convention, they had to deal with the debates surrounding the 1856 presidential election among Democrat James Buchanan, Republican John C. Frémont, and Know-Nothing Millard Fillmore. As with the rest of the nation, Oregon politics took to the printers with discussions of the election from all sides of the political spectrum. The 1856 election, like the 1860 election, was an opportunity for the federal government to establish a definite position on the constitutionality of slavery.[61] Debates over the constitu-

[57]Ibid. Italics in original.

[58]Carroll Smith-Rosenberg, *This Violent Empire: The Birth of an American National Identity* (Chapel Hill, NC, 2010), 110.

[59]Elizabeth R. Varon, *We Mean to Be Counted: White Women and Politics in Antebellum Virginia* (Chapel Hill, NC, 1998), 1–9, 41–136.

[60]For examples of discussions on temperance meetings in Oregon in the 1850s and women's involvement, see articles in the *Oregon Argus* from January 1855 to December 1859.

[61]Foner, *Free Soil, Free Labor, Free Men*," 73–148.

tionality of slavery became unavoidable during the lead-up to Oregon's constitutional convention. Editorials in the *Oregon Statesman* continued to radicalize their opponents' positions in an attempt to both feminize and racialize their public image.

Discussing coverage of the presidential election by the *Oregonian*, an *Oregon Statesman* editorial on November 11, 1856, suggested, "[T]he anticipation of Freemont's [sic] election filled their last issues with as black dye as Fred Douglas could have squirted forth. The *Oregonian* goes in boots and breeches, and suffers itself to become terribly alarmed for fear that Mr. Buchanan, if elected, will force slavery into Oregon. The old lady is so much exercised on that account that we suspect she lays awake nights."[62] By associating the color of the printer's ink with Frederick Douglass' skin color, the editorial attempted to racialize the *Oregonian*'s coverage of the presidential election. In referring to the *Oregonian*, specifically its editor Thomas Dryer, as an "old lady," the *Oregon Statesman* feminized the man as well as the paper's political authority.[63] In order to downplay the anti-Democrats' position on issues of slavery, including the immigration restriction, the *Oregon Statesman* used a gendered discourse of politics to portray its political opponents with both a racialized and feminized identity.

Anti-Democrats responded to statements made by Democrats in the newspaper articles and during the Oregon constitutional convention, particularly those regarding anti-Democrats' association with abolition. Debates increased as the public vote on the constitution approached. An editorial in the *Oregon Argus* on January 10, 1857, confronted allegations made by Delazon Smith that anti-Democrats were "fanatics" trying to make an issue of slavery where no issue existed, by insinuating that Smith lived in a "delusion" of the Democrats' proslavery stance.[64] The editorial also questioned why the Democrats were reluctant to word the separate constitutional issues differently regarding black Americans' settlement and slavery. Both of the ballots implied that the vote would prohibit slavery and settlement but would not really remove slavery, only displace free black Americans. Suggesting that the Democrats' sensitivity to slavery lay at the root of their accusations of abolition, the author implied that "Mr. Smith can see no motive in 'these fanatics' but the sole desire of dividing and distracting the democratic party. . . . The division of Smith's party is the one,

[62]"The Old and the New," *Oregon Statesman*, November 11, 1856.

[63]Ibid.

[64]"Slavery and Freedom," *Oregon Argus*, January 10, 1857.

and the only one object they have in view."[65] The editorial, therefore, combated the Democrats' racialized association of anti-Democrats with abolition by emphasizing the Democrats' preoccupation with mending the division the very subject of slavery caused their party.

The Oregon Democrats' accusation that anti-Democrats were abolitionists was a common occurrence throughout the immigration restriction debates. In fact, this type of radicalization by the Democrats received enough attention that the *Oregonian* published articles that included an array of derogatory terms that the *Oregon Statesman* had used to describe abolitionists and anti-Democrats. An *Oregonian* editorial in July 1857 provided a list of various unfavorable names the Republican Party and its associates had been called, and also suggested that the Democrats "HOWL it, until the whole party are convinced, that all who opposed slavery in Oregon, are ergo, opposed to democracy, and therefore, enemies to the country, and rebels against God and man."[66] Avoiding the associations of femininity and emphasizing the extreme nature of the labels, the *Oregonian* article attempted to convince the public of the absurdity of connecting these terms with the abolitionist movement.[67] Ultimately, as Oregon approached the public vote on its proposed constitution, the anti-Democrats more actively contested the Democrats' use of gendered discourse to racialize and feminize the anti-Democrats' positions on the immigration restriction and slavery, as well as their public identity.

An editorial from the *New York Herald* in January 1859 provided an alternative perspective regarding Oregon's debate about the association between abolition and the immigration restriction of black Americans. The editorial connected the probable rejection of Oregon's statehood with the assumption that southern politicians believed Oregon's representative to be "a mere gassy, reckless, unprincipled place-hunter, who is no better than a rotten abolitionist, *black*-washed merely to secure a seat in the Senate in order to sell himself to whatever

[65]Ibid.

[66]"New Names, New Doctrines, New Devices," *Oregonian*, July 25, 1857. The list included "old stereotyped slang of 'black republican,' 'nigger worshipping,' 'colored brethren,' & e., together with a few newly coined *slang phrases*, such as 'freedom shriekers,' 'northern disunionists,' 'liberty fanatics.'"

[67]Ibid. The article concluded with the request that the Democrats save their "*buncomb* and *dap-trap slang* for other purposes. Don't prostitute the Bible, and slander St. Paul, by making them favor slavery in Oregon, but give us something tangible, plain, and straight forward." Italics in original.

'section' will 'pay' the most for him."[68] Questioning Democrat Joseph Lane's acceptance by staunch sectionalists within the Senate, the author insinuated that the southern politicians suspected Lane of being something of an abolitionist. Thus, according to the paper, some of the Democrats in the Senate fixed a racial identity to their actual or suspected political opponents, to legitimize their own authority and claims to citizenship.

This strategy was also evident in southern newspapers such as the *Mississippian and State Gazette*, which addressed partisan divisions within the Senate over Oregon's statehood application. Accusing senators who were against the admission of Oregon of being abolitionists, a *Mississippian and State Gazette* editorial argued that "Oregon has applied for admission as a free State, but, the Negrophilists in Congress, headed by Senators Wilson, Trumbull, Hale, Fessenden and others, are making opposition to her because her constitution excludes negroes from the State. To this extent do the Abolition Senators and Representatives carry their infamous doctrine of the equality of the races."[69] Although the editorial did not address the fact that Oregon would be a free state, the author suggested that the northeastern senators opposed the immigration restriction because they were abolitionists. Regardless of whether any of the senators identified as abolitionists, this Democratic newspaper racialized and radicalized the senators who opposed Oregon's constitutional provision in order to discredit their positions and their claims to citizenship.

IMMIGRATION: CONTROL OF CITIZENSHIP AND NATURALIZATION

Matters of citizenship during the immigration restriction debates brought the Democrats and anti-Democrats into discussion of black citizenship and naturalization. Although there was little argument about the Oregon constitution's definition of suffrage as applicable to white men only, the question of whether the state could legally restrict the settlement of black Americans who were citizens in other states lacked such agreement. The anti-Democrats' editorials and legislative discussions doubted the ability of foreigners to become citizens. Although the anti-Democrats were not in complete agreement

[68]"Arrival of Cortez," a reprint of an article from the *New York Herald* in the *Oregon Argus*, January 22, 1859. Italics in original.

[69]"Oregon," *Mississippian and State Gazette*, May 26, 1858.

on the matter (some were anti-immigrant, while others supported a quick naturalization process), some wondered how Oregon could deny black men who were born on American soil the citizenship rights that other states recognized, but allow foreigners easy access to those rights. Democrats connected manhood with access to citizenship; by questioning the manhood of black men, these Democrats were using racial discourse to restrict citizenship to a particular race and legitimize their own claims to citizenship as white men.

One of the political groups among the anti-Democrats was the Know-Nothings. Although this group possessed strong opinions against foreign immigrants, Oregon's Republican Party eventually absorbed the Know-Nothings and some aspects of their political ideology. In 1855, the *Oregon Argus* served as a platform for anti-Democrats with Know-Nothing leanings to express their fears of foreign immigration and the power that foreign-born white men could gain in local politics. An editorial in May 1855 asserted that as "true patriots, and lovers of our own country," this particular group of the anti-Democrats wanted "to do something to avert the danger which hangs over us, from the rapid influx of foreign paupers and monarchical emissaries, who are altogether too hastily admitted to the rights of suffrage and the privilege of holding offices under our government."[70] The editor insisted that his political associates did not dislike foreigners but feared that "their ignorance of our political policy" led them to support Democrats, creating "a very dangerous balance of political power."[71] Regardless of these stated fears, Democrats questioned the anti-Democrats' priorities, insinuating that anti-Democrats preferred black Americans to white, foreign-born immigrants.

By spring 1856, discussions about citizenship that were included in immigration debates began to command an audience in the anti-Democrat papers, and also provoked rebuttals from opponents. An *Oregonian* editorial from April of that year offered a political platform representing the views of the anti-Democrats, including the desire for a "free *Constitution* for Oregon. The exclusion of all the African race, whether bond or free, except those who by education, habits and qualifications, have become voters in other States."[72] As with the controversy surrounding the Missouri constitution's restriction of free black Americans in 1821, the states of New York, Vermont, New Hampshire, and Massachusetts acknowledged free black

[70]"To the 'Foreigners' in Oregon," *Oregon Argus*, May 26, 1855.

[71]Ibid.

[72]"Reader! Let Us Stop and Think," *Oregonian*, April 26, 1857.

men as partial citizens at the time of Oregon's constitutional convention. How Oregon would recognize other states' citizens, however, became less of a question for many Democrats in March 1857, after the Dred Scott decision, which determined that black people, although they enjoyed the rights of citizens in free states, were not American citizens and were not protected by the Constitution.[73]

Shortly after the *Oregonian* article's publication, a writer for the *Oregon Statesman* responded to the exception that the anti-Democrats granted to black Americans. In addition to taking issue with the *Oregonian*'s entire political platform, the editorial on May 6, 1857, suggested that the exception for black Americans' exclusion "is the choicest plank in the whole 'platform.' The exception is amusing, and doubly so, when the reason is known. One of Dryer's regular advertisers is 'of the African race'—he keeps a store and advertises; he thinks he ought to be invested with the rights of citizenship, in addition to being able to come and remain here."[74] Possibly referring to Abner Hunt Francis, a black American man who owned a store in Portland, the editorial dismissed this Oregon resident's claim for citizenship based on his race.[75]

The article then addressed Massachusetts' naturalization law that required a foreign-born white immigrant to reside in the state for twenty-one years before attaining full citizenship. In contrast, free black American males could enjoy certain citizenship rights from birth in the New England state. The growth in the numbers of Know-Nothing politicians in Massachusetts during the 1850s contributed to the establishment of this extensive period required for naturalization, and Democrats began to use Massachusetts as a symbol of anti-foreign sentiment in their political arguments about citizenship throughout the nation, including in Oregon.[76] Questioning the anti-Democrats' perceived preference for black Americans over foreign-born white men, the *Oregon Statesman* editorial inquired how the Whig ideology, which they equated with the Know-Nothings, could "accord with their sword [sic] endeavors to deprive the adopted citizen, as much a citizen 'by the

[73]Leon Litwack, *North of Slavery: The Negro in the Free States, 1790–1860* (Chicago, 1961), 30–63.

[74]"Another Platform—The Oregonian in Favor of Nigger Suffrage," *Oregon Statesman*, May 6, 1857.

[75]Taylor, *In Search of the Racial Frontier*, 82.

[76]Dale Baum, "Know-Nothing and the Republican Majority in Massachusetts: The Political Realignment of the 1850s," *The Journal of American History* 64:4 (March 1978): 959–86.

constitution and laws' as any born upon our soil, of his rights, his independence, his manhood?"[77] By implying that independence, and thus citizenship, was a requisite for manhood, the author insinuated that the anti-Democrats—who provided an exclusion for free black Americans, but not foreign-born white men—challenged white men's masculinity and claims to citizenship.[78] Furthermore, the editorial's dismissal of the black American storeowner's claims to citizenship fixed citizenship with a race. The Democratic paper used a gendered discourse to emphasize the connection between citizenship and white manhood, thus securing access to citizenship rights for white American men while denying black American men their citizenship and their manhood.

Oregon Argus and *Oregonian* editorials attempted to refute accusations that these publications were supporters of the Know-Nothings, or argued that the Know-Nothings of Oregon were not anti-foreigner. One *Oregon Argus* article suggested to the foreign-born population that the Know-Nothings had no plan "to deprive you of any of your rights, or your property."[79] Nevertheless, the anti-Democrats' position against an accelerated naturalization process—a national issue that the East Coast states did not agree upon—but sympathetic to exclusion of black Americans provided Democrats an avenue to question anti-Democrats' perception of citizenship and masculinity.

Some Democrats, like Marion County representative La Fayette Grover, bluntly stated their ideas about race and citizenship and ignored arguments in favor of black Americans' rights to citizenship. During the opening month of Oregon's constitutional convention in 1857, Grover informed his colleagues that the "declaration of Independence was a declaration of the equality and natural free citizenship of white men."[80] Grover continued with a reference to "the first act of Congress regulating the naturalization for foreigners wherein the qualification of citizenship under our government, . . . [was] declared 'Any alien, being a *free white person*, may be admitted to become a citizen of the United States."[81] It was Grover's belief, then, that "[n]o race of color—no negro, no mulatto, no kanaka [Hawaiian],

[77]"Another Platform—The Oregonian in Favor of Nigger Suffrage," *Oregon Statesman*, May 6, 1857.

[78]The question of what gender qualified for citizenship became clear during the constitutional convention, since women's suffrage did not even appear in the discussion of citizenship. See Carey, ed., *The Oregon Constitution*, 404–406, 443–61.

[79]"To the 'Foreigners' in Oregon," *Oregon Argus*, May 26, 1855.

[80]"House," *Oregon Statesman*, January 13, 1857.

[81]Ibid.

no Chinaman, can become a citizen of the free republic of the United States."[82] This argument used the naturalization law as justification for exclusively white citizenship, regardless of the fact that the black Americans referred to in the Oregon immigration restriction were born in the United States and therefore did not have to go through the naturalization process. Implying that black American men were somehow more foreign to the United States than were foreign-born white men, the Democrats' argument ignored any claims to citizenship black American men had. The Democrats used a gendered discourse to associate citizenship with white men and deprive black American men of their claims to citizenship and thus their manhood.

By summer 1857, the Democrats and anti-Democrats were actively engaged in debating the nuances of Oregon's proposed constitution, including those regarding the immigration restriction. An *Oregon Statesman* editorial of July 1, 1857, supported the restriction on immigration of free black Americans. The editorial suggested, "One good German is worth more than fifty free negroes, to a neighborhood. Amongst free darkies, there is, perhaps, not more than one of a thousand, that has any other idea of freedom, than freedom from work; and that, they are very much inclined to enjoy to the fullest extent."[83]

Claiming that foreign-born white immigrants were more economically beneficial to Oregon than were free black Americans, the *Oregon Statesman* editorial implied that black Americans would be less productive. This racially based perception of laziness challenged black men's claims to citizenship, because an inherent obligation of citizenship is to contribute to the community and country.[84] These ideas about black American labor and laziness were derived from racialized justifications for the enslavement of black Americans. Thus the editorial writer was presenting ideas that appeared in the national debates about slavery, specifically from the Democratic Party. Although the editorial did not actually deny black Americans' claims to citizenship in Oregon, the writer used a racial discourse of productivity in order to emphasize the difference between German immigrants' right to citizenship and the claims of free black Americans.

Debates about naturalization provided yet another avenue for Democrats and anti-Democrats to discuss the immigration restriction provision. Ultimately, the Democrats accused the anti-Democrats of being Know-Nothings or anti-foreigners,

[82]Ibid.

[83]"Slavery," *Oregon Statesman*, July 1, 1857.

[84]Ibid.; Kerber, *No Constitutional Rights to Be Ladies*, 81–92, 112–23, 221–28.

since the anti-Democrats questioned the constitutionality of denying rights to black Americans that other states acknowledged, while extending citizenship to foreign-born immigrants. Through a racial discourse of citizenship, the Democrats argued for the naturalization of foreign-born white men based on their race and gender. In denying black American men access to citizenship, the Democrats also denied their claims to masculinity.

Reflecting the Oregon anti-Democrats' association of naturalization with the immigration restriction, an 1859 editorial in the *Boston Daily Advertiser* suggested,

> That the new State should by its fundamental law admit foreigners to exercise the elective franchise, after a year's residency only, and the declaration of intention to become a citizen;—while free negroes, however, long residents, are not only debarred the right of voting, but deprived of almost all civil rights;—is a political inconsistency which none but democrats of the modern school would regard as falling within the definition of 'a republican government.' The possession of which is prescribed as the condition of admission for a new State by the federal constitution.[85]

The *Daily Cleveland Herald* also echoed the Republican opposition to the immigration restriction, noting, "Mr. Bingham, of Ohio, opposed the bill on the account of the alien clause in the Constitution, and that with reference to free negroes and mulattos. . . . Mr. Clark B. Cochrane, of New York, opposed it because . . . of exclusion of free colored persons . . . [and] Mr. Gilman, of Maine, would be compelled to vote against it, principally on the ground of the free negro clause in the Constitution."[86] Both of these editorials reflected Oregon's debate on the immigration restriction and its connection to issues of naturalization. Moreover, the editorials demonstrated a national acknowledgement of the provision's challenge to black Americans' rights in comparison to the rights of foreign-born white men.

[85]"The Constitution of Oregon," *Boston Daily Advertiser*," January 24, 1859. For another example, see "The Opposition of the Oregon Bill," *Bangor Daily Whig & Courier*, May 27, 1858, which states, "If one class of the citizens of Maine may be excluded from Oregon, any other class may be excluded from that or any other State. If one class may be excluded on account of their color, another class may be on account of their politics."

[86]"Why the Oregon Bill Is Opposed by Republican Members of Congress," *Milwaukee Daily Sentinel*, January 15, 1859.

MORAL JUSTICE: UNDEMOCRATIC AND IMMORAL TREATMENT

Both the Democrats and anti-Democrats claimed some form of moral guidance or moral authority as Christians in their opinions about the immigration restriction; some of the anti-Democrat politicians argued that the restriction on immigration of black Americans in Oregon was undemocratic and immoral. Suggesting that the Democrats' support of the immigration restriction reflected their undemocratic principles, some anti-Democrat politicians used a racial discourse of civility to criticize the provision and its supporters. Additionally, other anti-Democrats applied a gendered discourse of citizenship to question the Democrats' apparent racism and support for slavery.

During many of the debates, Oregon politicians did not separate the moral and democratic implications of the immigration restrictions from their discussion of slavery. Risking being called abolitionists by the Democrats, Republican politicians confronted the connection between the immigration provision and slavery by scrutinizing the Democrats' desire to bar free black Americans from Oregon. Addressing the Democrats' interpretation of "black democracy," an *Oregon Argus* editorial in October 1865 argued that the Democrats wanted to prove that "'nigger ain't a white man'" to ensure that black Americans could not qualify for citizenship.[87] The Democrats, the author suggests, could then argue that slavery was moral and a natural condition for black Americans. Acknowledging the Democrats' argument against classifying black Americans in the same manner as white Americans, the editorial further stated that "the Southern democrats have something more on hand than merely proving that a 'nigger aint a white man.' They have to show that *'African slavery is a moral, religious, natural, and probably in general a necessary institution!'*"[88]

Throughout the immigration restriction debates, Anti-Democrats continued to address the Democrats' attempts to prove that black Americans were not the equals of white Americans. In January 1857, in recording the constitutional convention's legislative minutes, the *Oregon Argus* summarized, "Dryer made a lengthy speech against the bill, declaring it useless, unwise, and unphilanthropic. He was supported by Muffitt; and opposed by Grover who fully endorsed it as

[87]"What Black Democracy Is," *Oregon Argus*, October 11, 1856.

[88]Ibid. Italics in original.

democratic, and planted his fact upon the rock of democracy as laid down in the N.Y. Day Book, viz, that a 'nigger aint a white man."[89] In order to exclude black Americans from citizenship, the Democrats tried to prove that black men lacked the two qualifications for citizenship in Oregon: whiteness and maleness. The editorial suggested that the Democrats used both gendered and racial discourse to argue that black American males' race excluded them from citizenship.

At the beginning of the 1857 constitutional constitution, the *Oregon Statesman*'s recorded minutes included a speech by anti-Democrat Thomas Dryer that addressed the Democrats' racial argument for restricting black Americans from Oregon. Dryer suggested that "the fact that the Supreme being has fixed a certain color on these people distinct from ours, to be made a reason why they should be driven from among us, is not republican."[90] After questioning the civility of the provision, Dryer continued, "According to this act, a black man—a freeman, cannot remain in the Territory forty days without being liable to arrest and imprisonment as a criminal. Have they committed any crime? Is it a sin to be black?"[91] To declare that the color of a person's skin was qualification for restriction and imprisonment made the racialized immigration provision morally questionable.

By October 1857, the Oregon newspapers began publishing politicians' reasons for voting for or against the Oregon constitution. One example was the *Oregonian*'s report of Josephine County representative William Watkins' lengthy opposition to the immigration restriction and his indecision about accepting the constitution.[92] A Republican, Watkins stated that he was not an abolitionist and that he did not believe black Americans were equal to white Americans, but he also argued, "The black man in my estimation, has as much right to live, eat, drink, read, think, and in the various avenues of life, to seek a livelihood and means of enjoyment and happiness as has the proudest Caucasian."[93] Watkins continued, "Under the barbarous provision (for I can use no milder term), the negro is cast upon the world with no defense; his life, liberty, his property, his all, are dependent on the caprice, the passion, and the inveterate prejudices of not only the community at large, but of every

[89]"January 8. Council," *Oregon Argus*, January 17, 1857.

[90]"House," *Oregon Statesman*, January 13, 1857.

[91]Ibid.

[92]William Watkins ultimately voted against the Oregon constitution and did not sign the final document. See Carey, ed., *The Oregon Constitution*, 397, 432–33.

[93]"State Legislature," *Oregonian*, October 10, 1857.

Anti-Democrat Thomas Dryer, editor of the *Oregonian*, spoke out against the Democrats' racial argument in favor of restricting black Americans from Oregon. (Courtesy of Oregon Historical Society, #ba021621)

felon who may happen to cover an inhuman heart by a white face."[94] He not only challenged the civility of the provision by calling it "barbarous," but also questioned Democrats' racialized justification for the immigration restriction. Suggesting that white men were capable of possessing an "inhuman heart" and taking advantage of black Americans through this provision, Watkins questioned the Democrats' racialized discourse of citizenship in the immigration restriction and challenged the morality and civility of the Democrats for supporting the provision.

Issues of morality and the undemocratic nature of Oregon's immigration restriction were addressed in many newspapers outside of Oregon, especially in the northeastern states. Within a couple of days in January 1859, newspaper articles in the *Boston Daily Advertiser* and the *Milwaukee Daily Sentinel* examined the reasons why Oregon's statehood bill lacked Republican support. According to these newspapers, the immoral and unconstitutional nature of the immigration provision prevented Republican representatives from accepting Oregon, even as a free state. The *Boston Daily Advertiser* stated, "Even if negroes could be justly excluded from the new State, this clause carries their disability to a needless length of oppression."[95] The *Milwaukee Daily Sentinel* added that black Americans' "exclusion from the inchoate State of Oregon is more than violation of the Federal Constitution. It is hostile to the genius of free institutions, the liberal spirit of the age, and the golden precepts of the Christian faith."[96] These newspapers argued that Oregon's immigration restriction not only lacked civility, since it did not reflect their interpretations of democracy, but it also was an immoral provision that violated Christian principles. Writers in these publications expressed the opinion that race did not justify the exclusion of black Americans from Oregon and questioned the civility of those who supported the immigration restriction.

On February 14, 1859, Oregon became the thirty-third state in the Union. The *New Hampshire Statesman* concluded that, although several Republicans felt that some aspects of Oregon's constitution did not correspond to the U.S. Constitution, Oregon's position as a free state helped it to gain admission to

[94]Ibid.

[95]"Oregon Bill," *Boston Daily Advertiser*, January 14, 1859. For a similar argument that includes a discussion of Oregon's naturalization process, see "The Constitution of Oregon," *Boston Daily Advertiser*, January 24, 1859.

[96]"Why the Oregon Bill Is Opposed by Republican Members of Congress," *Milwaukee Daily Sentinel*, January 15, 1859. For another example of these sentiments, see "Speech of Ho. Eli Thayer," *Liberator*, February 25, 1859.

the Union.[97] The northern Democrats, and those in the party who attempted to dissociate their politics from slavery, aided in Oregon's acceptance, voting with the late Polk administration's desire to admit Oregon against the wishes of some of their constituents.[98] The *Milwaukee Daily Sentinel* reported, however, that a group of senators had voted against Oregon's acceptance, basing "their negative votes upon the provision of the Oregon constitution, which excluded free negroes from the Territory."[99] Ultimately, the timing was right for passage: Kansas was admitted first as a slave state, so Oregon's acceptance as a free state did not disrupt the precarious balance of power in the federal government.[100] Nevertheless, the nation took notice of Oregon's immigration restriction provision and questioned the necessity for it within the context of multiple issues, including morality and civility, labor and class, sexual relations, abolition, and naturalization.

Despite the passage of Oregon's constitution with the immigration provision, the state did not enforce the restriction. In fact, in the few known cases in which Oregon courts attempted to implement the provision after 1859, community members came out in support of their black neighbors, and the court dropped the charges.[101] Why, then, did the Oregon politicians want this provision? The connection between the restriction and slavery played a large role in the provision's supposed necessity. But unlike the debates over slavery, the immigration restriction did not die with the Civil War. Oregon retained the provision until 1926, a reflection of ongoing national arguments about citizenship, manhood, and racism that materialized on Oregon soil.[102] Ultimately, the political debates about immigration restriction that played out in the *Oregonian*, *Oregon Statesman*, and *Oregon Argus* newspapers from 1854 to 1858 reveal the use of gender and racial discourses by politicians to legitimize their own citizenship claims as white males

[97]"Proceedings of Congress," *New Hampshire Statesman*, February 19, 1859.

[98]Simms, "The Controversy Over the Admission of the State of Oregon," 355–74; Woodward, *The Rise and Early History of Political Parties in Oregon*, 128–43, 147–50.

[99]"The Admission of Oregon," *Milwaukee Daily Sentinel*, May 21, 1858.

[100]Woodward, *The Rise and Early History of Political Parties in Oregon*, 128–43, 147–50.

[101]Jacob Vanderpool was the only Black American expelled from Oregon in 1851. Taylor, "Slaves and Free Men," 160–64, 169–70; K. Keith Richard, "Unwelcome Settlers: Black and Mulatto Oregon Settlers," *Oregon Historical Quarterly* 84:2 (1983): 173–92.

[102]Carey, ed., *The Oregon Constitution*, 434.

and to discredit political opponents. Thus an understanding of Oregon's immigration debates can explain how politicians' practice of emasculation, racialization, and sexualization define exclusions in American citizenship.

Book Reviews

Woman Lawyer: The Trials of Clara Foltz, by Barbara Babcock. Stanford: Stanford University Press, 2011; 371 pp.; notes; $45.00 cloth.

After decades of pioneering research and writing about Clara Foltz, including a "women's legal history" website (http://womenslegalhistory.stanford.edu), Stanford law professor Barbara Babcock enriches our knowledge of women and the law in California history with this single volume, *Woman Lawyer: The Trials of Clara Foltz.*

Foltz was the first woman admitted to the State Bar of California, the creator of the public defender, an accomplished trial lawyer, and a public intellectual, yet she was also a person who struggled economically, constructed a public image without nasty personal details, and advocated for pay for politicians. She was a complex person caught up in turbulent times.

Foltz lived a consistently hectic life. She farmed in the Midwest, operated a boarding house in Oregon, read law while struggling to pay her husband's debts, and raised five children alone after her husband abandoned her in 1878. She participated in the anti-Chinese movement in California in the 1870s, fought for woman suffrage, and served as a lobbyist for the Woman Lawyer's Bill. After becoming the first woman to pass the California bar examination, she opened a law practice limited to handling minor property cases, but she played a public role in the 1878–79 California Constitutional Convention. The result of her efforts included a constitutional provision for equality of employment rights for women.

Foltz eschewed law partnership for fifty years as a sole practitioner, but without economic success. For additional income she took up concurrent employment in politics, platform lecturing, lobbying, and even a newspaper business for a short time. Foltz was a paid political orator for James A. Garfield and in 1884 spoke for James G. Blaine, a racist advocate of Chinese exclusion. Two years later, she stumped for the Democratic Party. In 1887, she opened a law practice in San Diego and published the *San Diego Bee*, engaging in a newspaper war with another lawyer and newspaper editor, Tom Fitch, but quitting the business after six months. She sold the newspaper at a profit.

Foltz's frenetic career fractured further in the 1890s. Her law practice declined with the California economy, and Bellamy Nationalism—the vision of a socialist state that benefited women—captured her attention. She was elected president of the Bellamy Club of San Diego in 1890, but returned to San Francisco and lobbying in the legislature. The 1891 session, known as "the legislature of a thousand scandals," provided the backdrop for her work to establish a parole system, ultimately achieved in 1893. She also successfully championed a bill to allow women to become executors of their husbands' estates and gain access to notary public positions.

In 1892, Foltz unsuccessfully ran for San Francisco city attorney on the Populist Party ticket. Undaunted, she attended the Chicago World's Fair in 1893 and there proposed the office of public defender. Foltz returned to San Francisco, took up residence on Van Ness Avenue amid the socially elite, and founded the Portia Law Club to bring women and the law together. She was soon off to Colorado to earn a fee in the Julia Bolles divorce case and then on to New York to reinvent herself. In New York she found law practice dominated by law firms that shut women out of lucrative practice and a legal system given to shysterism. Foltz returned west to Denver and California, the Republican Party, and the oil business. After the San Francisco earthquake of 1906, Foltz moved to Los Angeles.

By the end of the nineteenth century, Foltz had established herself as a public thinker and advocate for women's rights. In 1910 she was named to the State Board of Charities and Corrections. She was now a force in Progressive Era politics. Her life's work found fruition when, in 1911, the Los Angeles City Charter finally included a public defender's office.

Babcock's book also places Foltz in the context of the Women's National Liberal Union, the Women's Christian Temperance Union, and the Republican National Convention of 1896. Chapters devoted to her writings in law reviews and model statutes investigate and reveal Foltz's thinking and her impact on public life. Although these latter chapters are topical and do not follow the first four chapters chronologically, readers will find in them extensive detail and compelling analysis.

Brenda Farrington
Chapman University

Flamboyant Lawyer in a Maverick Western Town: Las Vegas Through the Eyes of Harry Claiborne, by J. Bruce Alverson. Foreword by Senator Harry Reid. Las Vegas: privately printed, 2011; 264 pp.; illustrations, bibliography, index; cloth.

It's not easy to stand out in Las Vegas. It's a city full of colorful characters in many fields of endeavor. But over seven decades as a lawyer and federal judge, Harry Claiborne managed to emerge from the crowd—in a positive way as one of the most highly regarded defense attorneys of his time and in a negative way as the target of a federal investigation of political corruption in Las Vegas.

J. Bruce Alverson, a veteran Las Vegas attorney, recorded more than forty hours of interviews with Claiborne before the lawyer's death in 2004 at age eighty-six. Those interviews form the foundation and much of the substance of Alverson's highly readable book, *Flamboyant Lawyer in a Maverick Western Town.*

The heavy reliance on interviews with Claiborne is both a strength and a weakness of Alverson's book. Because Claiborne was such a spellbinding storyteller, the book is loaded with humorous and intriguing stories, many of them reflecting the "frontier justice" practiced in Las Vegas in the 1940s, '50s and '60s. This must stack up as one of the funniest works of legal history that has been produced, as Alverson relates Claiborne's experiences inside and outside the courtroom.

But taking Claiborne's word on exactly what happened, which Alverson clearly does in many instances, is risky from the standpoint of historical scholarship. There's little question that Claiborne would refine the facts of a favorite memory in order to make it a better story. This doesn't hurt much when it's a humorous war story of little consequence to the historical record. But it's unfortunate when it casts Claiborne in a more positive light than he deserves or skirts a controversial subject. This is most evident in Alverson's cursory examination of Claiborne's representation of notorious clients, including some connected to organized crime. Although everyone is constitutionally entitled to a competent and vigorous defense, which Claiborne skillfully provided, Claiborne's relationships with questionable characters often extended beyond the courtroom. For example, he not only represented legendary casino operator Benny Binion; the two became close friends. Binion's gambling exploits started with elaborate illegal betting operations in Dallas, then shifted to Las Vegas, where his Binion's Horseshoe casino was a source of drama—cultural, legal and otherwise—for decades. How much did Claiborne know about Binion's criminal and other suspicious dealings

that he kept to himself? Even considering the boundaries of attorney-client privilege, Claiborne's long-running relationship with Binion should have prompted Alverson to ask some probing questions about his propriety.

Two years after Claiborne became a federal judge in 1978, he was targeted by FBI special-agent-in-charge Joseph Yablonsky, who believed Claiborne to be corrupt. Yablonsky had been sent to Las Vegas on a mission to clean up the city's organized crime and political corruption. The self-described "King of Sting" cast a wide net, ensnaring politicians and mobsters in the process. In some cases, Yablonsky's efforts were righteous, catching bad characters in the act of violating the public trust. In Claiborne's case, Yablonsky was blatantly overzealous in his pursuit of a high-profile head to mount on his wall.

Claiborne's cavalier approach often made him his own worst enemy and ultimately led to his fall from grace. Although bribery claims didn't stick, Claiborne was convicted on two counts of failing to report his income accurately to the Internal Revenue Service, and he was removed from the federal bench in 1986. This chapter of Claiborne's life is more thoroughly detailed in another book, *Lies Within Lies: The Betrayal of Nevada Judge Harry Claiborne* (Stephens Press, 2011), by Michael Vernetti.

Alverson is most valuable in documenting Claiborne's brilliance in the courtroom, where he often employed an "aw-shucks" Arkansas preacher persona to captivate juries. Claiborne was indeed born and raised in rural Arkansas, but he could turn that aspect of his heritage on and off as needed. It's important to emphasize, too, that Claiborne's talents weren't limited to his ability to play-act during a trial. He studied hard for each case, and he was a keen listener and observer, capitalizing on details not picked up by others and conducting effective cross-examinations.

"Claiborne was without a doubt the greatest criminal defense lawyer in the southwest United States," said fellow Las Vegas attorney George Dickerson. Even if this is a case of friendly hyperbole, it reflects Claiborne's reputation accurately in Las Vegas in the decades before he became a judge.

Geoff Schumacher
Ames, Iowa

Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices, by Noah Feldman. New York: Hachette Book Group, 2010; 513 pp.; illustrations, notes, bibliography, index; $30.00 cloth.

Today, the justices on the U.S. Supreme Court are rather uniform in their educational backgrounds and professional experience. All of the current justices graduated from either Yale or Harvard Law School, with the exception of Justice Ruth Bader Ginsburg, who graduated from Columbia but had attended Harvard. Further, most of the current justices have either prior judicial experience or hail from academia but have little to no political experience.

The contrast is significant between the modern Supreme Court and the four prominent justices appointed by Franklin Roosevelt to guide his New Deal legislation through judicial and constitutional review. In Scorpions, author Noah Feldman does a masterful job of describing the personal histories of Justices Felix Frankfurter, Robert Jackson, Hugo Black, and William O. Douglas. The diversity of these justices, in terms of their personal and legal experience, is remarkable.

As Feldman entertainingly points out, Frankfurter was an Austrian immigrant, a graduate of and a professor at Harvard Law School, and a friend of Franklin Roosevelt. Frankfurter was also a champion of numerous progressive causes during the 1920s. While he was a professor at Harvard, he became a close advisor to Roosevelt during the New Deal years.

In contrast, Jackson attended only a single year of Albany Law School and began his career litigating cases over disputed ownership of farm animals. He went on to become U.S. solicitor general and attorney general during the Roosevelt administration, before his appointment to the Court. While serving on the Supreme Court, he was also appointed U.S. prosecutor of Nazi war criminals at the Nuremburg Trials.

Hugo Black attended the University of Alabama Law School and was a sitting U.S. senator when he was appointed to the Supreme Court. Black was also a strong advocate of New Deal legislation during his years in the Senate. In order to foster his political ambitions in his native Alabama, early in his career Black had joined the Klu Klux Klan; this became a source of controversy when he was nominated to the bench.

William O. Douglas was also a well-known political figure who was twice considered for nomination as vice president. Douglas began his legal career in academia at Columbia and Yale Law Schools and then was appointed to the Securities and Exchange Commission by Roosevelt in 1934.

Feldman does an excellent job describing, in a highly readable and entertaining fashion, these justices' colorful careers and their rise to the Supreme Court, as well as their relationships with Roosevelt. The author also provides remarkable accounts of the development of their respective constitutional philosophies: Frankfurter's advocacy of the courts deferring to the legislature, Black's original analyses of the Constitution, Douglas' role as an activist libertarian, and Jackson's mostly pragmatic approach to constitutional interpretation. Feldman traces the evolution of these philosophies through some of the seminal cases of the era involving free speech, internment of Japanese Americans during the Second World War, the prosecution of communists during the Red Scare, the steel plant seizures during the Korean War, and, lastly, the elimination of racial segregation in the 1950s.

Although all of these justices were appointed by Roosevelt as judicial proponents of the New Deal, their differing philosophies, personalities, and egos, as the book's title suggests, soon placed these men at odds with one another. For example, Feldman relates the feud, both personal and professional, between Black and Jackson at some length and includes a complete description of Jackson's criticisms of Black regarding potential conflicts of interest and how this dispute spilled over into significant public controversy during Truman's nomination of Fred. M. Vinson as chief justice.

Feldman does a very creditable job in describing the interactions among four highly opinionated justices. He also explores the evolution of the justices' philosophies and illustrates in great detail how each justice arrived at his decisions. Perhaps the most striking is Black's development from Klan member to supporter of desegregation in *Brown v. Board of Education.*

Overall this book is a highly readable account of four Supreme Court justices who had a significant role in shaping modern constitutional interpretation. Feldman explores the personalities and philosophies of these justices in a clear and entertaining way. I highly recommend his book to anyone who is a student of the Court.

Michael Trenholm
Riverside

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.

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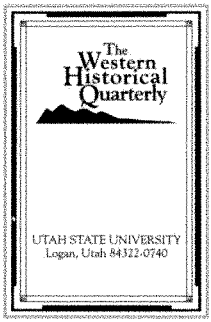

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