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Cover photo: Buildings were dynamited at Kearney and Market
Streets after the 1906 Earthquake (Courtesy of San Francisco
History Center, San Francisco Public Library)

SIX BITS OR BUST: INSURANCE LITIGATION OVER THE 1906 SAN FRANCISCO EARTHQUAKE AND FIRE

ROBERT A. JAMES

In 1906, California fire insurance policies excepted coverage of a variety of losses caused by earthquake. During and after their great tragedy of that year, San Francisco property owners wondered if their damages resulted from the uninsured quake or the insured fire. Citizens and leaders praised underwriters who paid claims in full, and condemned those who denied or compromised liability. Setting aside both the condemnation and the praise, one might reasonably ask what the policies legally covered. It was a vital question for policyholders and underwriters alike. While the sparks still flew and the firestorms still raged, British consul general Walter Courtney Bennett predicted, "If the insurance is not paid the city is ruined. If it is paid, many of the insurance companies will break."¹

A battle of words and images arose as soon as the battles against the flames died down. San Franciscans took elaborate care to refer to the "fire," not the "earthquake." Photographs were said to have been taken, destroyed, or doctored in ways that might support the contention that a building had been

¹Gordon Thomas and Max Morgan Witts, *The San Francisco Earthquake* (New York, 1971), 247.

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either severely toppled—or wholly unaffected—by the temblor.² Partly this was to convince the outside world that the losses were the result more of fire, a casualty to which many cities were subject and which is susceptible of prevention, than of an inscrutable act of God. But partly the words and photographs were intended as opening skirmishes in the coming fights with the insurance companies.

Many histories of the 1906 San Francisco earthquake and fire relate what might be called the physical, verbal, and economic aspects of the insurance issue. They state that some homeowners were said to have set their own quake-damaged structures on fire to perfect their insurance claims. They mention that some underwriters, notably Cuthbert Heath of Lloyd's, nobly offered to "pay all our policyholders in full irrespective of the terms of their policies," and paid "dollar for dollar" against adjusted losses. They record that other underwriters, particularly European firms, infamously offered 75-percent or "six-bit" compromises, denied coverage, or abandoned the California market altogether. Such narratives conclude triumphantly that after intense urgings from the press, the politicians, and policyholder organizations, San Franciscans wound up collecting some 90 percent of the face value of their fire insurance policies. These histories provide great detail and insight into what was done and what was said, but they fail to report who was proven right—who prevailed in court.³

One source that does address the subject states, boldly and incorrectly, "A number of disputed cases went to court, and in every case the insurer lost."⁴ Despite the hostile atmosphere, many of the insurance companies with the strongest

²Tom Graham, "Sunday Interview—Gladys Hansen," *San Francisco Chronicle*, April 14, 1996.

³The following histories discuss the insurance controversy without detailing the court decisions: Dennis Smith, *San Francisco Is Burning* (New York, 2005); Simon Winchester, *A Crack in the Edge of the World* (New York, 2005); Dan Kurtzman, *Disaster! The Great San Francisco Earthquake and Fire of 1906* (Waterville, ME, 2002); John C. Kennedy, *The Great Earthquake and Fire* (New York, 1963); Thomas and Morgan Witts, *The San Francisco Earthquake*; William Bronson, *The Earth Shook, The Sky Burned* (Garden City, NY, 1959). Gladys Hansen and Emmet Condon, *Denial of Disaster* (San Francisco, 1989), and Philip L. Fradkin, *The Great Earthquake and Firestorms of 1906* (Berkeley, CA, 2005), cite witness testimony from the state court *California Wine Association* case—but not the verdicts. An excellent summary of the San Francisco 1906 insurance issues and the modern cases on ensuing loss, though again not mentioning the litigation, is James S. Harrington, "Lessons of the San Francisco Earthquake of 1906: Understanding Ensnaring Loss in Property Insurance," *The Brief* (Summer 2008): 28.

⁴Risk Management Solutions, *The 1906 San Francisco Earthquake and Fire* (Newark, CA, 2006), 9.

defenses took their cases to the law, and the law heard them out. In the dusty law books and little-used sections of computer databases in law libraries, there are at least thirty reported federal, foreign, and California court decisions on this subject. (The known decisions are identified in the appendix.) While the insureds did win most of the judgments, the insurers won some cases—including jury verdicts in their favor in San Francisco courtrooms.

This article describes and analyzes the policyholder coverage court decisions and opinions arising from the 1906 San Francisco earthquake and fire, starting with a summary of the factual background and concluding with comments about their historic significance. By showing that policyholders could recover even under strict policy language, these cases helped to spur settlements by reluctant insurers and determined the pace at which the city's rebirth was completed in the years immediately following the disaster.

But these century-old cases are also important today. They are still relevant to the issue of "ensuing loss"—whether fires or other covered perils, stemming from earthquakes or other excluded perils, are nonetheless insured. This broader question is as current as Hurricanes Katrina and Sandy, and as imminent as the next calamity.

THE BACKGROUND

The Question at the Heart of the Bankroll

San Francisco lay in ruins on April 24, 1906. It was less than a week after the powerful April 18 earthquake, which had been followed by four days of devastating fire. The damage estimate approached \$500 million.⁵ Some 28,000 buildings had been destroyed, and 225,000 to 300,000 souls had been rendered homeless out of a population of about 410,000. Yet the city's Real Estate Board found time to convene a meeting on April 24 and to pass a resolution that "the

⁵This upper estimate of direct property damage was about the same as the entire United States federal budget or 1.8 percent of the gross domestic product in 1906. Munich Re, *The 1906 Earthquake and Hurricane Katrina* (Munich, 2006), 3; Kerry A. Odell and Marc D. Weidenmier, "Real Shock, Monetary Aftershock: The 1906 San Francisco Earthquake and the Panic of 1907," *Journal of Economic History* 64 (2004): 1002. It is equivalent to roughly \$10 billion in present dollars—once the country's greatest casualty loss in constant dollar terms but, depending on the inflation indices used, now approached or exceeded by those from 9/11, the *Deepwater Horizon*, and Hurricanes Katrina and Sandy.

calamity should be spoken of as 'the great fire' and not as 'the great earthquake.'"⁶

Mayor Eugene Schmitz similarly referred consistently to the "fire." A 1907 municipal report concluded, "The greatest destruction of wealth created by human hands was that which resulted from the fire which occurred in San Francisco on April 18, 1906, and the three days succeeding." The insurance industry journal *The Standard* noted with evident amusement that the insurance commissioner of California, E. Myron Wolf, after intense questioning, "admits that there was an earthquake."⁷

Why the fussiness over labels? Why the avoidance of the "E word"? Certainly one motive was to convince world opinion that the calamity was the kind of disaster that had from time to time beset other cities—like Baltimore in 1904 or Chicago in 1871—rather than a singular act of God visited upon a wild and degenerate town built along a major seismic fault. After all, San Francisco had weathered several severe fires in its infancy; the city seal with a phoenix rising from its ashes had been adopted in 1859, not 1906. Humans could cope with fires, through better building codes and water systems, more easily than they could combat forces of nature.⁸

There was, however, a more immediate and material reason for centering attention on the fire. For what was at stake was nothing less than "the heart of the bankroll that would rebuild the city."⁹ Even before that April, it was common knowledge that exculpatory language lurked in the fine print. Many policies of fire insurance procured by San Franciscans had exclusions for loss "caused directly or indirectly by earthquake" or "occasioned by or through earthquake," and for losses to "fallen buildings."¹⁰ Insurance for structural damage

⁶*San Francisco Chronicle*, April 25, 1906, <http://www.sfmuseum.org/1906.2/burnham.html>.

⁷Smith, *San Francisco Is Burning*, 234; Clifford W. Marsh, *Facts Concerning the Great Fire of San Francisco* (Bridgeport, CT, 1907); *The Standard*, July 7, 1906.

⁸Winchester, *A Crack in the Edge*, 319–24; Fradkin, *The Great Earthquake*, 231–34.

⁹Bronson, *The Earth Shook*, 110.

¹⁰The majority of fire insurance policies did not have express exclusions for fire caused by earthquake. Albert W. Whitney, *On Insurance Settlements Incident to the 1906 San Francisco Fire* [San Francisco, 1907], 40. A more common defense, potent for improvements evidencing structural damage from the quake prior to the presence of fire, was the "fallen building" clause: "If a building, or any part thereof, fall except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease." Most policies also had notification and proof of loss requirements, which could be difficult if not impossible to satisfy after the destruction of so many records.

from quake, unaccompanied by fire, was not marketed. Some owners were said to have deliberately set fire during the chaos to their own quake-damaged houses, in an effort to perfect insurance claims.¹¹ The question must have been hanging ominously in the smoky air: would the 137 insurance companies and seventeen reinsurers that had underwritten over \$250 million of San Francisco property risks escape liability on the ground that the city's devastation had been caused by an excluded peril?¹²

The Quake and the Plural "Fires"

The San Francisco Fire Department of 1906 boasted a hydrant system with a water supply theoretically of thirty-six million gallons per day, but the supply lines from the remote freshwater reservoirs miles away on the San Francisco Peninsula were fragile, and the cisterns and equipment were in poor repair. The National Board of Fire Underwriters had praised the department's personnel but harshly criticized the system.¹³ Fire chief Dennis Sullivan had long argued for improving the system by making greater use of the abundant seawater and distributing larger cisterns throughout the city. Sadly, Sullivan was mortally injured in the quake when the chimney from an adjacent hotel crashed into his firehouse. He was scheduled to testify in support of these improvements that very day.¹⁴

The temblor struck shortly after five o'clock in the morning of Wednesday, April 18, and, in two surges, lasted about a minute. The shaking caused lamps, stoves and chimneys to topple, gas lines to break, fuel and chemical tanks to rupture, and electric wires to fall. Some immediate combustion must

¹¹An unidentified fireman observed citizens "firing their houses, as they were told that they would not get their insurance on buildings damaged by the earthquake unless they were damaged by fire." Letter from Capt. Leonard Wildman to Military Secretary of California, April 27, 1906, <http://www.sfmuseum.org/1906.2/arson.html>. Arson was alleged to be the source of the fire in the state court *California Wine Association* case described below.

¹²Bronson, *The Earth Shook*, 110–12; Thomas and Morgan Witts, *The San Francisco Earthquake*, 247.

¹³The latest report was issued in September 1905, concluding, "San Francisco has violated all underwriting traditions and precedents by not burning up" (Smith, *San Francisco Is Burning*, 50).

¹⁴Swiss Re, *A Shake in Insurance History: The 1906 San Francisco Earthquake* (Zurich, 2005).

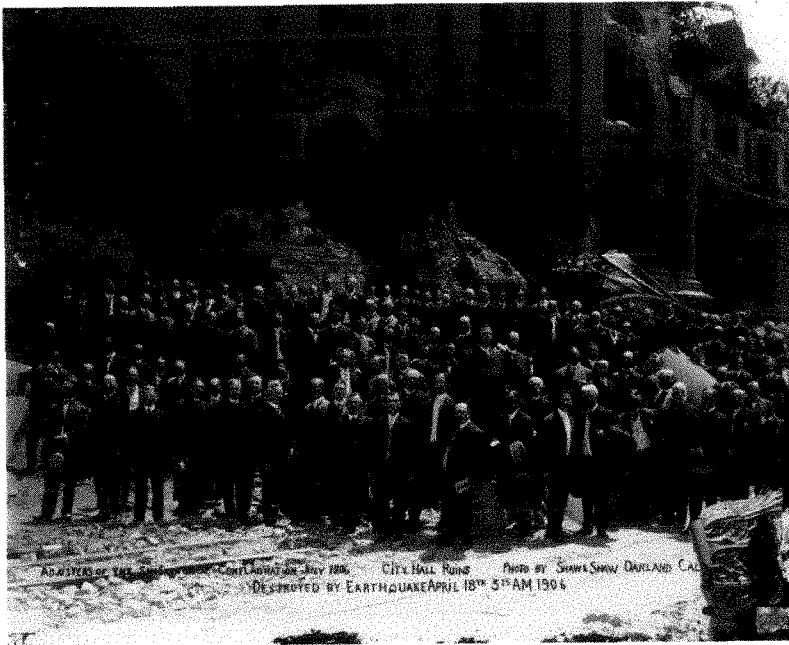
have been inevitable.¹⁵ Yet the initial fires so caused appear to have been isolated. Severe structural damage beyond the common occurrence of toppled chimneys was focused on vulnerable filled land along the waterfront and on shoddy building practices throughout town, such as at City Hall. Official reports somewhat arbitrarily concluded that no more than 10 percent of the damage was caused by the quake and the immediate fires.¹⁶

The reference to "fires" in the plural is an important point for the later litigation. That morning saw the birth across the city of thirty to fifty individual fires, some of which bore names—for example, the Alcazar Theater Fire, the Chinese Laundry Fire, the San Francisco Gas and Electric Fire, and the Girard House Fire. Several of the fires involved the intervention of some human agency—arson, dynamiting, back-firing, or plain inadvertence and negligence. Years later, a senior partner at the Pillsbury, Madison & Sutro law firm (now Pillsbury Winthrop Shaw Pittman LLP), John A. "Jack" Sutro, Sr., well described the fire with the most colorful nickname:

In those days most homes had wood and coal stoves and brick chimneys and shake roofs. There were no electric or gas stoves in those days. The earthquake, if you recall, was about 5:15 a.m. in the morning. People were shook up, and rather than go back to bed, they decided to get up and have some coffee or something. So they started fires in their stoves, and the result was—the chimneys had all been knocked down off those buildings—that all the coals and hot embers went on to the roofs and set fires all over the place south of Market Street. . . . One of the fires started on [Hayes] Street just west of Gough, and it was

¹⁵Winchester vividly relates a scene from the 1936 film *San Francisco*: "[T]he moment [Clark Gable] reaches the surface, another pipe breaks, this time gushing town gas—and, as it snaps, a pair of falling power lines cross, there is a cannonade of sparks, the gas ignites, and a huge fountain of orange flame hurtles up into the air" (*A Crack in the Edge*, 292). His description of the flame is perhaps too vivid, as this is a black-and-white movie.

¹⁶Whitney, *On Insurance Settlements*, 7–10.



The insurance adjusters of the San Francisco "conflagration" stand in front of the ruins of the City Hall "destroyed by earthquake." The battle over the "fire" and "quake" nomenclature is thus being waged even in the caption of this July 1906 photograph. (Courtesy of Bancroft Library, University of California, Berkeley, BANC PIC 1977.110:3-NEG)

memorialized as the "Ham and Eggs Fire." It eventually burned over a very large area of the city.¹⁷

Several of these fires joined in a great fire that presented a wall of flame over a mile-and-a-half wide, with smoke up to five miles high, visible across the entire San Francisco Bay. The water mains had broken in some three hundred places, leaving a city surrounded by shore without the resources to quench the

¹⁷John A. Sutro, Sr., "A Life in the Law," oral biography, University of California Regional Oral History Office (1986), 35 (in Bancroft Library, UC Berkeley). Jack Sutro was a San Franciscan infant at the time. The Ham and Eggs Fire was formally known as the Hayes Valley Fire.

Pillsbury's offices in the Nevada Bank Building, at Market and Montgomery Streets, were themselves destroyed in the tragedy. Two of the firm's partners relocated to 1155-½ Washington Street in Oakland, while the other three decamped to 1860 Webster Street in San Francisco, a residence housing so many displaced lawyers that it was nicknamed the "Little Mills Building" after the fashionable Financial District office address (materials in Pillsbury Winthrop Shaw Pittman LLP Library, San Francisco).

blazes.¹⁸ Firefighters and soldiers often could only combat real or perceived looters and arsonists, watch buildings collapse, and dynamite houses in fumbling attempts to construct fire-breaks (sometimes setting new fires when they did). The fire largely burned itself out on April 21, thanks in part to repaired hydrants, seawater pumped by tugboats, and sheer human effort. A welcome rain arrived too late.

The Concessions and the Denials

Amid the stories in the literature surrounding the 1906 tragedy, one often repeated is the waiver of defenses by certain insurance companies and syndicates. Cuthbert Heath, the senior name on fire insurance at Lloyd's, is legendary in insurance industry lore for cabling his agent to waive all defenses: "Pay all our policyholders in full irrespective of the terms of their policies."¹⁹ Other insurers followed with similar "dollar for dollar" payments on adjusted losses. Thirty-five of them deferred to a central group of adjusters called the "Committee of Five"—the California Insurance Company, Ætna and the Hartford among them, although the Hartford conditioned cash payment on a 2 percent discount.²⁰

Fireman's Fund, the main California-based insurer, lost its headquarters building along with many of its records and other assets. The fund paid all its reserves to claimants, then solicited new subscriptions from its shareholders, formed a new corporation, and caused the corporation to issue stock to claimants for their remaining losses.²¹ Observers hailed the company's reorganizing for the benefit of its policyholders, rather

¹⁸It has been estimated that the saloons and warehouses of the waterfront district, where many fires began, held over 45 million gallons of wine. This liquid might have been used to stop the fires early on, had the order not been given to close the bars [Smith, *San Francisco Is Burning*, 127].

¹⁹Archibald MacPhail, *Of Men and Fire* (San Francisco, 1948); Britton Wells, "Lloyd's Sees 1906 San Francisco Earthquake as a Turning Point," *Insurance Journal* (May 8, 2006): 50. In 2006, Lloyd's sponsored an event with the San Francisco Historical Society and a National Public Radio program, "The City Will Live," commemorating Heath's response.

²⁰Report of the Committee of Five to the "Thirty-Five Companies" on the San Francisco Conflagration (San Francisco, 1906).

²¹William Bronson, *Still Flying and Nailed to the Mast* (Garden City, NY, 1963); David W. Ryder, *They Wouldn't Take Ashes for an Answer* (San Francisco, 1948); Frank W. Todd, *A Romance of Insurance* (San Francisco, 1929). The company sponsored a centennial exhibition at the San Francisco Museum of Modern Art in 2006.

than "folding [its] tent for good."²² The fund's recapitalization, it must be noted, was also spurred by the unusual exposure faced by its owners. California law at the time did not limit liability of shareholders to their paid-in capital for debts of insurance companies.²³ The insurance commissioner had threatened a receivership proceeding against the company, and an assignee for benefit of insureds could have sued the wealthiest and easiest to reach shareholders.²⁴ The much-admired rebirth of the Fireman's Fund therefore sought to rope all shareholders into the recapitalization, as well as to do right by the policyholders.

It is noteworthy that none of these prominent companies appears to have used express earthquake exclusions for damages caused by fire.²⁵ Declaring that they would pay "irrespective of the terms of their policies" was widely lauded. But insurers facing claims involving buildings without known structural damage prior to any fire were in some cases waiving the sleeves off of their vests.

Unconditional vituperation and condemnation, on the other hand, were heaped by the press and politicians on some fifty-nine insurance companies that denied coverage in whole or in substantial part. Some of these firms were insolvent or withdrew from California or the United States altogether. Others cited their good faith uncertainty whether the exclusions applied and made offers to settle claims for a percentage, commonly 75 percent. Regardless of the facts or the contract language, the newspapers and civic leaders tended to believe that such "six-bit" proposals were "weaseling" or "welching" no less than would be an absolute denial.

Many of the vilified companies hailed from Europe. The Hamburg-Bremen Fire Insurance Company came in for special criticism based on its customer relations. It was reported that at the same time that the Hamburg-Bremen company was

²²Bronson, *The Earth Shook*, 113; John A. Bogardus, *Spreading the Risks: Insuring the American Experience* (Chevy Chase, MD, 2003) (thirty-seven insurers assessed their shareholders \$32 million to cover 1906 San Francisco liabilities).

²³Charles Eells, a partner in the law firm now known as Orrick, Herrington & Sutcliffe LLP, advised the Fireman's Fund. *The Standard*, Nov. 24, 1906 (reporting Eells's advice on California law); Whitney, *On Insurance Settlements*, 47 (describing "stockholders' unlimited liability" under California law).

²⁴*The Insurance Press* (Nov. 28, 1906); Todd, *A Romance of Insurance*, 172 (quoting July 27, 1906 S.F. newspaper article citing "personal liability" of stockholders who are still "rich men").

²⁵Compare George W. Brooks, *The Spirit of 1906* (San Francisco, 1921) (California Insurance offered to pay "dollar for dollar" and criticized "welcher and shaver" companies that offered six-bit compromises) with Whitney, *On Insurance Settlements*, 40 (California Insurance, along with Aetna, Hartford, and Fireman's Fund, had no express earthquake exclusion clauses to waive).

denying claims in California on a wholesale basis, it was assuring prospective customers and investors in New York that funds were being sent to pay off the San Francisco holders. The principal study of the San Francisco insurance settlements states flatly, "Hamburg-Bremen . . . settled its claims at 75 per cent." The legal opinions involving the company described in this article show that these sentiments and statements are overbroad. In fact, the company paid 98 or 100 percent of some of the claims reported in the cases.²⁶

The National Association of Credit Men and a specially formed Policy Holders' League investigated and publicized which companies had paid, compromised, and denied liability. "Rolls of honor" and "box scores" were published.²⁷ Newspapers and magazines scolded the deniers,²⁸ Mayor Schmitz and a policyholder committee made separate trips to Europe in the fall of 1906 to urge payments,²⁹ lawsuits were filed in the courts of Germany and Austria,³⁰ and Congressman Julius Kahn delivered a rousing speech on the floor of the U.S. House of Representatives about "honest and dishonest insurance."³¹

²⁶Whitney, *On Insurance Settlements*, 32, 40; National Association of Credit Men, *Report of Special Committee on Settlements Made by Fire Insurance Companies in Connection with the San Francisco Disaster* (San Francisco, 1907), 10 (acknowledging that Hamburg-Bremen did pay more than 75 percent on some later claims).

²⁷National Association of Credit Men, *Report* [placing thirty-nine companies on a "Roll of Honor" and the other companies in successively lower tiers]; Bronson, *The Earth Shook*, 112 (illustrating "box score" of companies).

²⁸In a backhanded compliment to corrupt union bosses, one commentator acknowledged, "[B]etween welching insurance companies and extortionate demands of the lumber men and purveyors of other materials necessary for the City's rehabilitation, there is not always very much for the smaller robbers to take." E.P. Erwin, "The Matter with San Francisco," *Overland Monthly* (Sept. 1906).

William Randolph Hearst's newspaper declaimed, "To say that [insurers] will not recognize as an obligation the destruction of a building by fire, which fire was the result of an earthquake, is to take a position hardly more reputable than that of an ordinary pickpocket." *San Francisco Examiner*, May 7, 1906.

An underwriter complained, "The San Francisco press, without exception, has abused and maligned the insurance companies from the start, without a single friendly or encouraging word." *The Standard* (July 7, 1906).

²⁹The trips were ineffectual. On his return, Mayor Schmitz was indicted for extorting bribes from restaurants and brothels. Smith, *San Francisco Is Burning*, 245.

³⁰James D. Phelan, "The Situation in San Francisco," *New York Evening Post*, June 1, 1907. One determined claimant pursued the Rhine & Moselle Fire Insurance Company and a succession of German governments through the 1950s and perhaps into the 1960s. Bronson, *The Earth Shook*, 187-88.

³¹Speech in U.S. House of Representatives (June 28, 1906).

Although historians duly record that the press and politicians loudly claimed that the "six-bit" companies were dishonest, there is evidence that sophisticated insurance customers had a far more measured reaction. The president of the Bohemian Club men's organization explained matter-of-factly to his members that the club received 100 percent payment from solvent insurers that had no earthquake exclusions, and 75 percent payment from insurers that enjoyed such clauses. He did not express special gratitude to the 100 percent companies, because he acknowledged that they had no exclusions to waive, and he did not express special condemnation of those that limited their payouts. He concluded that "the insurance companies, as a rule, were exceedingly fair in their treatment of the Club, several making an exception in its favor in their settlements."³²

The concessions were gallant indeed, particularly since many policies and other records of insureds and insurers alike had been destroyed.³³ For those companies remaining in business, these waivers also made good business sense, since litigation costs would be saved, and renewing policyholders attracted by the companies' actions would replenish the underwriters' capital.³⁴ Further, due to aggressive adjustment practices, "some of the 'six-bit' companies settled their claims quite as favorably as the 'dollar-for-dollar' companies."³⁵

Credit and blame should not be based solely on concession and denial. With utmost respect for the claimants, many of whom had suffered grievous personal injury and loss of loved ones, the property insurers also had some minimum duties to

³²Frederick W. Hall, *Bohemian Club 1906-07 Annual Report* (San Francisco, 1907). One eccentric writer even exclaimed, "In spite of the carpings of the press and the mouthings of the blatherskites, the insurance companies furnished the money which has made the San Francisco workman more independent than any bloated bondholder in the country." John Ball, *Spirits and the Destruction of San Francisco* (San Francisco, 1906), 16.

³³Winchester states that the contents of safes "often" spontaneously combusted when they were opened before being cooled down (*Crack in the Edge*, 286 n.*). Bronson states that this happened after the Chicago and Baltimore fires, but not in any great respect in San Francisco. *The Earth Shook*, 160.

³⁴Risk Management Solutions, *The 1906 San Francisco Earthquake*, 9. ["Some insurers, including Fireman's Fund and Lloyd's of London, saw [the political and newspaper denunciations] as an opportunity to market their generosity in settling claims."] A London insurer reported with pride that the thirty-nine companies placed on the "Roll of Honor" received San Francisco premiums in 1907 that were 86 percent higher than the premiums those same companies had received in 1905, as rates were increased and owners abandoned the underwriters that had denied liability or withdrawn from the state. G.H. Marks, *The San Francisco Story* (London, 1909).

³⁵Whitney, *On Insurance Settlements*, 2.

their investors and other insureds, since the companies in many cases could be and, as it turned out, were bankrupted by payout.

Parties to commercial disputes "bargain in the shadow of the law."³⁶ Lost amid tales about the underwriters' responses and the public's reactions is the legal question for any claim: was this loss covered by this policy? If losses were covered, then Cuthbert Heath's waiver was not purely an act of altruism. If losses were excluded, then the Hamburg-Bremen company's denial was not purely an act of infamy.

THE OPINIONS

Despite the hounding of the press, politicians, and policyholder organizations, the determined insurance companies that employed earthquake exclusion clauses and that possessed the will to seek to enforce them allowed their denials of claims to be taken into court. The preceding background helps to explain the reported opinions in the policyholder lawsuits. The majority of the decisions were issued by federal courts, chiefly those then named the United States Circuit Court for the Northern District of California and the Circuit Court of Appeals for the Ninth Circuit. Many of these holdings squarely address the insurer's argument that the earthquake caused the loss. A handful of cases were reported from courts of sister states and foreign countries, and from California's new intermediate court of appeal.³⁷

Three, and only three, reported cases ultimately were heard by the California Supreme Court. The last and greatest of these decisions involved the California Wine Association. By the time that dispute reached the state's highest tribunal, the outcome would turn not on abstract notions of causation or close reading of policy language, but instead on the litigation tactics of the parties and their lawyers.

THE FEDERAL AND FOREIGN CASES

A Hospitable Federal Forum for Insurers

After submitting claims and having insurers deny them or make "six-bit" compromise offers, many policyholders brought

³⁶Robert H. Mnookin, "Bargaining in the Shadow of the Law," *Yale Law Journal* 88 (1979): 950.

³⁷This intermediate appellate court was approved by voters in November 1904, and justices had only been appointed to its bench in 1905 and 1906.

suit in state court, usually the Superior Court of California for the City and County of San Francisco. Insurers that were not California corporations regularly sought to remove these cases to federal court, usually the Northern District of California, on grounds of diversity jurisdiction (that is, because the plaintiff and the defendant were citizens of different states).

In *Baumgarten v. Alliance Assurance Company*, a Northern District court held that insurers from foreign countries were citizens of their home jurisdiction, not of California, where they conducted some or all of their American business. Judge John J. De Haven cited in passing decisions where foreign parties were said to have felt that federal courts would be "more impartial."³⁸

Was the insurers' preference for the federal courts justified? One piece of evidence is the Northern District's reaction to a statute enacted by the state legislature, requiring a defendant insurance company to spell out in its initial court filings the details of any exclusionary clause in its policy on which it intended to rely. In *Board of Education of the City and County of San Francisco v. Alliance Assurance Company*, Judge William Cary Van Fleet held that, because the law imposed this requirement on insurers but not on insureds, and not on parties to other kinds of contracts, it violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. Such instances of invalidation by federal courts of state economic regulation were common in the era of the Supreme Court's *Lochner* decision.³⁹

In any event, the policyholders won every reported decision at every level of California state courts, while the results in federal court were mixed. The insurance companies' preference for federal court appears to have been prudent.

The Earliest Reported Coverage Decisions

An important early federal case described in the press was *Levi Strauss Realty v. Transatlantic Fire Insurance Company of Hamburg*, heard by a jury in the district court in Oakland on September 14, 1906, only a few months after the quake and fire. To avoid the appearance of bias, the judge, Edward Whitson, had been imported from the Eastern District of Washington, and jurors had been sought from throughout northern California.

The policy at issue, like most that had been issued for 1906, had no express earthquake exclusion whatever. Undaunted, the intrepid but unnamed defense counsel cited section 1511 of

³⁸153 Fed. 301 [N.D. Cal. 1907].

³⁹159 Fed. 994 [N.D. Cal. 1908]; *Lochner v. New York*, 198 U.S. 45 [1905].

the *Civil Code*, which excuses non-performance of obligations due to an "irresistible, superhuman cause." Judge Whitson ruled that this statute furnished no excuse to performance of an obligation to pay money, and directed the jury to return a verdict for the policyholder in the sum of \$10,000 plus \$58.33 in interest.

The local press praised the decision as "admirable" and "clear-cut," and a warning to the "cold-feet," the "crooked," and the "welching." The San Francisco coverage omitted to mention that the victory was hollow, since the defendant had no assets in California. The insurance industry and the East Coast press noted that the plaintiff would need to file suit all over again in Germany.⁴⁰

The Williamsburgh City Loophole

A large number of federal and state decisions construed the awkwardly drafted clause used by the Williamsburgh City Fire Insurance Company of Brooklyn, New York ("Williamsburgh City") and its affiliates. Their policy stated,

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority; or for loss or damage occasioned by or through any volcano, earthquake, or hurricane . . . or when the property is endangered by fire in neighboring premises, or (unless fire ensues and in that event for the damage by fire only) by explosion of any kind. . . .

At first reading, the clause appears to provide a strong defense. Were not all the fires and ensuing damage caused "directly or indirectly" by the quake, or at least "occasioned" by the temblor? These companies "were advised by counsel that they were not liable to their [San Francisco] policy holders and that their stockholders could hold them legally responsible for any payments."⁴¹ This overconfident view was not borne out in the courts.

⁴⁰*San Francisco Argonaut*, Sept. 22, 1906; *The Standard*, Sept. 22, 1906; *New York Times*, Sept. 15, 1906. Another early trial was held in federal court in *Whitter-Coburn v. Alliance Assurance Co.*, <http://www.archives.gov/exhibits/sf-earthquake-and-fire/earthquake-fire.html>.

⁴¹Whitney, *On Insurance Settlements*, 40–41. Michael Cardozo, a prominent New York attorney and cousin of the famed jurist Benjamin N. Cardozo, issued such an opinion. *San Francisco Chronicle*, July 21, 1906. Some policyholders also complained that an earthquake clause was inserted without notice into policies only two years earlier. *San Francisco Chronicle*, July 8, 1906.

The official report in *Henry Hilp Tailoring Co. v. Williamsburgh City* consisted exclusively of a transcript of an oral jury instruction. Judge Van Fleet told jurors that if the quake caused a fire that spread from other property to the claimant's property, this policy exclusion applied and judgment should be entered for the insurer. Ominously for policyholders, he also cited section 2628 of the *Civil Code*, a maxim of jurisprudence that could be read to exclude all losses that would not have occurred but for the earthquake, even if not "immediate[ly]" caused thereby: "When a peril is specially excepted in a contract of insurance, a loss, which would not have occurred but for such peril is thereby excepted; although the immediate cause of the loss was a peril which was not excepted."⁴² Had this maxim been construed liberally, a "but for" causation test could have applied to all of the damage, wiped out most insurance coverage, and forestalled the rebirth of the city.⁴³

One week later in the same court, Judge Whitson interpreted the same policy more favorably to the policyholder. In *Baker & Hamilton v. Williamsburgh City*, he acknowledged that a quake might "indirectly" cause the inception of a fire. But he seized on the distinction in the policy drafting between the phrase "caused directly or indirectly by" for the civil unrest exclusions and the phrase "occasioned by or through" for the natural calamities. There must be a reason for the different phrases, he reasoned, and he proceeded to declare to exist what many contemporary readers would call a loophole: "[I]t was the intention of the defendant to exempt itself from liability [only] if an earthquake should be the immediate, proximate, and direct cause of a fire which destroyed the property."

Thus, without the company's saying it, it was as if the policy had read that only fires "immediately, proximately and directly" caused by the quake were excluded. If the fire that destroyed the insured's property did not start inside that building due to the quake, or was a fire involving human agency such as arson or dynamiting, a policyholder like Baker & Hamilton would likely recover. Judge Whitson rejected the defendant's objection to the complaint, which was a victory of sorts for the insured. No report was found of further proceedings or settlement.⁴⁴

After these district court opinions, the Ninth Circuit decisively entered the picture. In *Williamsburgh City v. Willard*, the policyholder received a directed verdict in the Northern District, and Judge William Ball Gilbert affirmed the judgment

⁴²Now codified, with revisions, at *California Insurance Code* §532.

⁴³157 Fed. 285 [N.D. Cal. 1907]. The jury's verdict in this case is not reported.

⁴⁴157 Fed. 280 [N.D. Cal. 1908] (overruling defendant's demurrer).

on appeal. He cited Judge Whitson's *Baker v. Hamilton* opinion and agreed that, since the insurer used the phrase "caused directly or indirectly by" for one set of perils, the phrase "occasioned by or through" for quakes must mean something different—and here should be confined in its effect to fires caused "directly" by a quake. Since in Willard's case the quake "did not produce a fire on the insured premises," it was at most an indirect cause, and coverage was not excluded.

What of section 2628, the ominous maxim of jurisprudence? According to Judge Gilbert's reading, "[T]he 'peril specially excepted' here is fire directly caused by earthquake. . . . To [hold] that the insurance company, although it has specially provided for exemption of liability for loss by fire directly caused by earthquake, is entitled to an exemption wider than that which it stipulated for, is to hold that the intention of the statute is to deny to the contracting parties the power to make the contract which they made. . . ."⁴⁵

He also noted that section 3268 of the *Civil Code* subordinated section 2628 and similar rules to the intention of the parties, who may waive them unless such a waiver would contravene public policy. So construed, section 2628 ceased to be relevant to the remaining *Williamsburgh City* decisions or the other 1906 policyholder cases. The U.S. Supreme Court declined to hear an appeal from the Ninth Circuit's decision.⁴⁶

Victories in San Francisco for the Insurance Companies

There are several reported decisions where the unpopular insurance companies enjoyed favorable trial court results in

⁴⁵164 Fed. 404, 408–09 (9th Cir. 1908). *San Francisco Chronicle*, Nov. 8, 1908 (after the Ninth Circuit's decision, "about five hundred thousand dollars in claims against the Williamsburgh City Insurance Company, the Norwich Union and the Insurance of New York remain unsettled").

⁴⁶The U.S. Supreme Court decision regarding *Willard* was reported in the *San Francisco Chronicle* on January 19, 1909. This insurer group featured in many other 1906 cases. *Pacific Heating & Ventilating Co. v. Williamsburgh City*, 158 Cal. 368, 111 Pac. 4 (1910), is described below with the other California Supreme Court opinions. A \$2,500 federal judgment for Frank and Minerva Marston against the Williamsburgh City was reported in the *San Francisco Chronicle* on August 28, 1909. In the final reported coverage judgment dealing with this clause, *Norwich Union Fire Ins. Soc'y v. Stanton*, 101 Fed. 813 (2^d Cir. 1911), the Second Circuit deferred out of comity to the Ninth Circuit's decision in Willard and affirmed a judgment in the Southern District of New York in favor of the policyholder. *Rosenthal Shoe Co. v. Williamsburgh City* was described in the press as "the first of the insurance cases involving the earthquake clause," but there is no reported decision. *New York Times*, Aug. 15, 1906. Nine lawsuits against the Williamsburgh City were earlier reported to be pending in state court. *San Francisco Chronicle*, July 21, 1906.

the California federal courts. The first victory raised an issue not of causation but of prompt notice. In *San Francisco Savings Union v. Western Assurance Company of Toronto*, the policy required proof of loss to be submitted within sixty days after the fire, but the plaintiff inexplicably delayed making the submission for 180 days. The policyholder made no argument for waiver, consent, estoppel, prevention, impracticability or other potential excuse. The plea must have been that the notice clause was only a covenant and that the defendant had not been prejudiced by the delay. Judge Van Fleet construed the sixty-day requirement as an absolute condition, not a covenant, and had no difficulty finding for the insurance company.⁴⁷

A San Francisco jury verdict was obtained by an insurance company in *Richmond Coal Company v. Commercial Union Assurance Company*. The policy in question excluded "loss caused directly or indirectly by . . . earthquake, . . . or (unless fire ensues, and, in that event, for the damages by fire only) by explosion of any kind." The Northern District judge instructed the jury that, if the earthquake caused a fire and that fire eventually reached and destroyed the plaintiff's property, then the entire loss was excluded.⁴⁸ The insurer recorded a clear victory at trial.

Unfortunately for the insurer, this victory was reversed on appeal. Judge Erskine M. Ross for the Ninth Circuit rejected the verdict, saying that the instruction had forced the jury not to "give any consideration" whether "new or intervening causes" had interrupted the chain of causation from the earthquake-caused fires. These intervening causes might have included "explosion, back-firing, dynamiting, the course or force of the winds" or other "attending circumstances." Thus, the insurer's victory was short-lived because the case was remanded for retrial.

This opinion drew a lengthy and heated dissent from Judge Gilbert. He stressed that any concern over omitting these causes from the jury instruction was purely hypothetical in the case at bar: "We have no evidence that any such causes intervened to disturb the causal relation between the fires which were started and the destruction of the [Richmond Coal] insured property. . . . There is no suggestion anywhere in the record in this case that there was back-firing or dynamiting or

⁴⁷57 Fed. 695 [N.D. Cal. 1907] (sustaining defendant's demurrer).

⁴⁸*Richmond Coal Co. v. Commercial Union Assurance Co.*, 159 Fed. 985 [N.D. Cal. 1909] (report of jury instruction), rev'd, 169 Fed. 746 [9th Cir. 1909]. These decisions helpfully pinpoint the origin of eight fires in the waterfront district that were apparently agreed among counsel and judges as having been "earthquake-caused fires."

that there was a wind. There was no request for an instruction on those subjects, nor was any specific exception taken to the charge for want of such instruction."

It is difficult to reconcile the *Richmond Coal* majority appellate opinion with the other 1906 coverage decisions. In particular, the fact that an earthquake-caused fire spread to the insured property by "the course or force of the winds" would not be relevant to the other analyses.⁴⁹

In the third reported insurer trial victory, *German Savings & Loan Society v. Commercial Union Assurance Company*, the policy language was the same as that considered in *Richmond Coal*. At trial in the Northern District, the defendant introduced evidence that a fire "caused by said earthquake shock" reached and destroyed the insured property. The plaintiff introduced evidence that an explosion occurred nearby, at a time when the earthquake-caused fire was not close at hand, and that an independent fire caused by that explosion caused the plaintiff's damage. In rebuttal, the defendant introduced evidence that the explosion came after, or was itself the result of, the earthquake-caused fire.

After this exchange of testimony, the unidentified trial judge instructed jurors that an explosion could interrupt the chain of causation from the earthquake-caused fire only if a separate fire was "originated by and ensuing upon explosion." If the earthquake-caused fire triggered the explosion, he explained, the exclusion would still apply. The jury then returned a verdict for the insurance company.

Judge Charles E. Wolverton for the Ninth Circuit saw no error in this instruction. He distinguished in passing *Richmond Coal* and affirmed the jury verdict:

[T]he court did leave the question to the jury as to whether an explosion was an independent cause of the fire which destroyed plaintiff's property, or whether it was the result of an earthquake-caused fire. The distinction, we think, was clearly made between the explosion as a controlling and predominating cause of the fire which destroyed plaintiff's property, and the explosion as merely an incident to the fire which produced the loss, and the jury, we must assume, fully understood it.

⁴⁹Alfred Sutro personally—not on behalf of either party, any other client, or even his law firm—was listed as the sole "amicus curiae" (friend of the court) before the Ninth Circuit in *Richmond Coal* (169 Fed. at 746). It is possible that Sutro made the argument on appeal attacking the omissions from the jury instruction, which had not been objected to by the plaintiff's own counsel at trial.

Judge Ross, possibly stung by criticism of his decision in *Richmond Coal*, wrote a short concurrence emphasizing that "the instructions of the court below were in strict accord" with that august prior ruling.

Finally, there is a mysterious comment in a state court appellate opinion, the *Pacific Union Club* case described in detail below. In that case, the court's decision favored the policyholder. Somewhat defensively, Court of Appeal justice Norton Parker Chipman noted that there were "numerous" other federal and state cases upholding a similar construction of the policy language. More intriguingly, he stated, "A number of cases have quite recently been tried in the United States Circuit Court for the United States—Judge Deitrich [sic] presiding—in which the insurance companies made successful defense where they were able to show that the fire was directly traceable to the earthquake."

Perhaps the fires in these cases were caused by fallen electric wires coming in contact with broken gas lines, inside or adjacent to the structure in question. Perhaps even the Hamburg-Bremen company's position was further vindicated in one of these unreported and uncitable actions. But no reference has been found to 1906 policyholder decisions of Judge Frank S. Dietrich, who was appointed to the federal bench in 1907.⁵⁰

Victory in Germany for an Insured

While the suits proceeded in California, a judgment was entered in Germany by the General Court of Hamburg against a German insurance company. This judgment is known because a translation of the decision was filed with a brief in another case heard by the Maryland Court of Appeals. The Maryland tribunal cited the German opinion with approval in upholding a lower court's ruling on payouts by Security Fire Insurance Company of Baltimore, a company that became insolvent after the 1906 San Francisco claims.⁵¹

In *Borgfeldt v. North German Fire Insurance Company*, the policy excluded "loss caused directly or indirectly" by various types of civil unrest, "or [unless fire ensues, and, in that event, for the damage by fire only] by explosion of any kinds or from any cause or the bursting of a boiler, or earthquake, or hurricane. . . ." The Hamburg court found, "[T]he defendant has,

⁵⁰12 Cal. App. at 514; David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891–1941* (Berkeley, CA, 1994).

⁵¹*McEvoy v. Security Fire Ins. Co. of Baltimore*, 110 Md. 275, 73 Atl. 157 (1909).

without perhaps sufficiently considering the without [sic] consequences, introduced into the clause taken from the standard policy the words, 'bursting of a boiler, earthquake, hurricane.' By so doing it has effected the result that the contents of the parenthesis apply also to these causes."

Thus, destruction of Borgfeldt's San Francisco property by a fire, even one directly caused by the quake, was held to be covered by the policy.⁵² In this particular case, the claimant had a Germanic surname.⁵³ But the Hamburg tribunal, said by the Maryland court to consist of a law judge and two lay or business judges, must have known that their decision would favor policyholders of all nationalities against the insurance companies of their countrymen.

The Vilified Hamburg-Bremen Company

With all the opprobrium that San Franciscans directed towards the Hamburg-Bremen Fire Insurance Company, it is interesting to see evidence in the cases of that firm fully honoring its obligations. In *Haas Bros. v. Hamburg-Bremen Fire Insurance Company*, the insurer paid the plaintiff 75 percent of the adjusted claim in return for a receipt marked "in full." The plaintiff alleged the existence of an oral promise by the insurer to pay 98 percent if it paid other claimants at that rate, then alleged, "Since the settlement and payment [Hamburg-Bremen] has paid to other San Francisco creditors 98 percent of the face value of their claims as adjusted." The Northern District judge refused to admit evidence of this oral promise. Judge William Morrow for the Ninth Circuit

⁵²Similarly, the Maryland court found that the Baltimore insurer appropriately paid its San Francisco policyholders even if their fires were caused directly or indirectly by the quake. The parties cited a number of San Francisco coverage cases, including *Baker v. Hamilton*, *Henry Hilp*, *Richmond Coal*, *Board of Education of S.F.*, and *Willard*, but the court distinguished the language in the policies from that at bar. 73 Atl. at 161.

⁵³He was likely Christoph J. Borgfeldt, whose later litigation was most unseemly. This Borgfeldt made promissory notes to the Swiss-American Bank of Locarno, then transferred his quake-damaged properties to his wife, Anna, "in consideration of love and affection" the day after the 1906 fire destroyed his grocery and liquor business. The California Court of Appeal found that the transfers were made in contemplation of insolvency, and voided them as fraudulent against a purchaser of the notes. Borgfeldt confessed that he was only trying to make a fresh start in a mining venture. *Borgfeldt v. Curry*, 25 Cal. App. 624, 144 Pac. 976 (1914).

reversed, holding that the "in full" receipt was not a fully integrated contract.⁵⁴

Evidence of the Hamburg-Bremen company's 100 percent payment of a small claim appears in a criminal case. In *People v. Di Ryana*, the defendants were alleged to have forged a proof and an assignment of a 1906 fire policy claim. On presentation of these documents, Hamburg-Bremen "paid the defendants the insurance money," the full \$1,000 against the \$1,000 that had been claimed.⁵⁵

The Federal Court California Wine Association Case

The largest individual verdicts in all of the reported 1906 policyholder cases were won by the California Wine Association, in a series of federal decisions that unfortunately were not published in the official reports. The California Wine Association itself is described in detail with respect to the published California Supreme Court decision discussed below. The federal cases involved the strict exclusion, in the policies of the Commercial Union Assurance Company of London and its affiliates, of "losses caused directly or indirectly by . . . earthquake . . . or (unless fire ensues, and in that event, for the damage by fire only) by explosion of any kind."

The California Wine Association filed thirty separate complaints for thirty policies issued by Commercial Union companies in San Francisco Superior Court in March 1907, and they were promptly removed to the Northern District in May. There the cases languished for three years before going to trial before Judge Van Fleet; the trial began in May 1910, and the verdicts were issued June 12, 1910. Otto Irving Wise and H.B.M. Miller represented the insurer, and the California Wine Association was

⁵⁴181 Fed. 916 (9th Cir. 1910). Judge Morrow was the president of the San Francisco chapter of the American Red Cross in 1906 and a prominent community leader during the relief efforts. The infamous Hamburg-Bremen company was represented by Page, McCutchen & Knight, the predecessor to today's Bingham McCutchen LLP.

⁵⁵8 Cal. App. 533, 96 Pac. 919 (1908).

represented by Alfred Sutro of the Pillsbury, Madison & Sutro law firm.⁵⁶ The insurance press reported, with evident perplexity,

A jury of the United States Circuit Court has returned a verdict against contesting insurance companies, the policies with interest aggregating \$268,446. Seven of the policies were in favor of the California Wine Association against the Commercial Union amounting to \$55,758. Eighteen, in favor of the same company against the Palatine for \$151,939; and five, same company against the Alliance for \$34,767. Smaller policies with different parties made up the balance. *The insurance companies were of the opinion that they had a very strong case.*⁵⁷

The Federal Court Pacific Union Club Case

There was a trio of reported verdicts in favor of the Pacific Union Club, a men's organization formed in 1889 by the merger of two older clubs; after its 1906 loss, it moved to the repaired Flood mansion atop Nob Hill.⁵⁸ When the Pacific Union Club submitted its claims under multiple policies, several insurers denied coverage, citing exclusions "for loss caused directly or indirectly by earthquake." The reason given was that the quake broke the city's water mains, making it impossible to stop the fire before it reached and damaged the club's premises.

⁵⁶E.S. Pillsbury, a Civil War veteran, began practice in California in 1866 and moved to San Francisco in 1874. He later took into partnership his son Horace D. Pillsbury, Frank D. Madison, and the brothers Oscar and Alfred Sutro. (These brothers were sons and nephews of the founders of the Sutro & Co. banking house, and remote cousins of Mayor Adolph Sutro of Mt. Sutro and Sutro Baths fame.) The name of Pillsbury, Madison & Sutro had just become fixed in 1905. Alfred "had broad and successful experience both in business fields and [in] litigation" and was "a man of great culture"; the Sutro Reading Room at Hastings College of the Law is named after him and contains his collection of books about the law (materials in Pillsbury Winthrop Shaw Pittman LLP Library, San Francisco).

⁵⁷*The Advertiser*, June 1910, 197–98 (emphasis added); *San Francisco Chronicle*, June 13, 1910 (the "smaller policies" were in favor of M.T. MacDonald, Mt. Shasta Mineral Spring Co. and Baker & Hamilton against Palatine Ins. Co., and in favor of Baker & Hamilton against Commercial Union Assurance Co. and Commercial Union Fire Ins. Co. of N.Y.).

⁵⁸The Flood residence [National Historical Landmark 66000230] is the only grand mansion left on Nob Hill from before the quake and fire.

One of the club's suits against Commercial Union Assurance Company landed in federal court.⁵⁹ The club's counsel was Alfred Sutro of Pillsbury. The defense counsel was Thomas C. Van Ness, litigating against the very club of which he was a member and had served as president.⁶⁰

An unnamed Northern District judge ruled for the club, and the Ninth Circuit affirmed in an opinion by Judge Ross. The judge rejected the water main argument, on the ground that the policy did not make the existence of such a water supply an express condition.⁶¹

THE CALIFORNIA LOWER COURT CASES

The Pacific Union Club saga continued with two additional cases brought in San Francisco Superior Court and, for some reason, not removed to federal court. In one case, in the courtroom of James M. Seawell against Commercial Union again, the club won a trial verdict in the princely sum of \$1,765. The parallel trial verdict was a victory against the Palatine Insurance Company, an affiliate of Commercial Union.⁶² The decisions were affirmed in two opinions by Norton Parker Chipman, the presiding justice of the Third Appellate District in Sacramento.⁶³

Sutro argued that an insurer cannot make the absence of an "extrinsic saving power," like an intact water main, the cause

⁵⁹Removal from San Francisco Superior Court occurred June 12, 1910. It is unclear why the litigants were in federal rather than state court for one and only one of the three cases.

⁶⁰T.C. Van Ness was insurance company counsel in most of the 1906 coverage cases discussed in this article. He was the son of a mayor of San Francisco, James Van Ness, after whom was named the city thoroughfare that later became the crucial firebreak in 1906. *The Bay of San Francisco* (San Francisco, 1892), 1:585–86. T.C. and his own son, T.C. Van Ness, Jr., later became affiliated with the Chickering & Gregory law firm.

⁶¹*Commercial Union Assurance Co. v. Pacific Union Club*, 169 Fed. 776 (9th Cir. 1909). Shortly after the Ninth Circuit's decision in *Pacific Union Club*, Judge Van Fleet of the Northern District entered judgment for the policyholders in twenty-four additional cases, aggregating over \$277,000. *San Francisco Chronicle*, May 28, 1909.

⁶²*Pacific Union Club v. Commercial Union Assurance Co.*, 12 Cal. App. 507, 107 Pac. 728 (1910); *Pacific Union Club v. Palatine Ins. Co.*, 12 Cal. App. 515, 107 Pac. 733 (1910).

⁶³There was a First Appellate District in San Francisco, but the appeals from the *Pacific Union Club* verdicts in San Francisco Superior Court were heard by the Third Appellate District in Sacramento. By contrast, the appeal of the San Francisco Superior Court verdict in *Pacific Heating*, discussed below, was heard by the First Appellate District.



Alfred Sutro (1869–1945) was a founding partner in the law firm of Pillsbury, Madison & Sutro, and the lawyer for the California Wine Association and other clients in the 1906 insurance cases. (Courtesy of Pillsbury Winthrop Shaw Pittman LLP)

of an otherwise insured loss. Van Ness, now joined as counsel by Wise, cited what the court politely called “quite a number” of cases in response. Typical of these citations was *McAfee v. Crofford*, where the defendant had “carried off and frightened away” the plaintiff’s slaves from a plantation shortly before a flood; without his slaves, the plaintiff could not rescue his cordwood and crops. This strange case went all the way to the U.S. Supreme Court, which held the thief (or abolitionist?)

liable for the flood damage. Justice Chipman found the “tor-tious acts” in this non-insurance ruling to be irrelevant to the succession of events in the 1906 insurance cases.⁶⁴

The court tested Van Ness with hypothetical questions based on a parade of other possible extrinsic causes. What if the quake had simply made the streets impassable for the firefighters? What if, instead of a quake, a riot had impeded them in their duties? What if a foreign enemy had invaded the city and kept the firefighters from reaching the blaze? Justice Chipman held that the lack of an “extrinsic saving power” not expressly mentioned in the insurance policy, namely a functioning water main, was too remote a cause to invalidate a covered cause of loss. The only exclusion he recognized is an earthquake “when operating as a direct or indirect force in causing or starting the fire.” In a flourish, he cited the venerable canon that ambiguities in policy language are to be construed in favor of the insured.⁶⁵

The other known court of appeal decision is the intermediate victory of the Pacific Heating & Ventilating Company in the Supreme Court case described below. A handful of other case filings and decisions in San Francisco Superior Court have also been identified. They include an \$850 “test case” against the judgment-proof Transatlantic Fire Insurance Company of Hamburg in favor of an assistant city attorney, A.S. Newburgh,⁶⁶ and each of the trial decisions for policyholders affirmed by the California Supreme Court as described below.

THE CALIFORNIA SUPREME COURT CASES

It is remarkable that in the aftermath of the greatest disaster in California history, only three reported cases made their way to the state’s own highest tribunal. As noted above, the insurers’ clamor for removal of cases to federal court appears to have been very strong.

The Early Cases

The earliest supreme court case, *Clayburgh v. Agricultural Insurance Company of Watertown, N.Y.*, construed a “fallen

⁶⁴54 U.S. (13 How.) 447 (1851); 12 Cal. App. at 507.

⁶⁵This canon was often cited in the 1906 policyholder cases, usually after the statement of the decision. See, e.g., *Pacific Heating & Ventilating Co. v. Williamsburgh City*, 158 Cal. 367, 111 Pac. 4 (1910).

⁶⁶Described as “the first [earthquake coverage] decision to be rendered in the Superior Court.” *New York Times*, Oct. 9, 1906.

building" clause: "If a building, or any part thereof, fall except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease." Justice Marcus C. Sloss for the court confirmed that this clause applies to partial damage only if that damage substantially impaired the structural integrity of the building.⁶⁷

Pacific Heating & Ventilating Company v. Williamsburgh City was the single *Williamsburgh City* case reported from the state court system. The San Francisco Superior Court, the court of appeal and the supreme court all construed the peculiarly drafted clause consistently with the Ninth Circuit's decision in *Willard*. They held that the fire that destroyed the plaintiff's property had not been "directly" caused by the quake. In a per curiam or unsigned opinion, the supreme court further endorsed the Ninth Circuit's reading of *Civil Code* section 2628 as not modifying the express policy language.⁶⁸

*The Supreme Court California Wine Association Case:
The 1908 Trial*

The California Wine Association state court lawsuit is the most colorful of the 1906 policyholder coverage decisions. The well-preserved trial transcript consists of more than three thousand pages in six buckram-bound volumes. The wine association lawsuits are of interest partly because their large size justified the production of more than two hundred witnesses, whose testimony on the origins and progress of individual fires has long been consulted as a historical reference. But the well-preserved documents also provide insights into both the legal argumentation and the courtroom tactics that were critical to victory.

In its heyday before Prohibition, the California Wine Association was the great accumulator and distributor of California wine. It controlled large quantities produced in the Napa, Sonoma, and San Joaquin valleys. At the time of the earthquake, it held twelve million gallons stored in very large warehouses across San Francisco. Almost all was lost, with the notable exception of two million gallons kept in barrels at Third and Bryant Streets. When these barrels burst, they filled a concrete cellar that was so solidly constructed that it became a veritable swimming pool. The enterprising wine association somehow obtained equipment and hoses and pumped the wine through a pipe along Third Street to

⁶⁷155 Cal. 708, 102 Pac. 812 (1909).

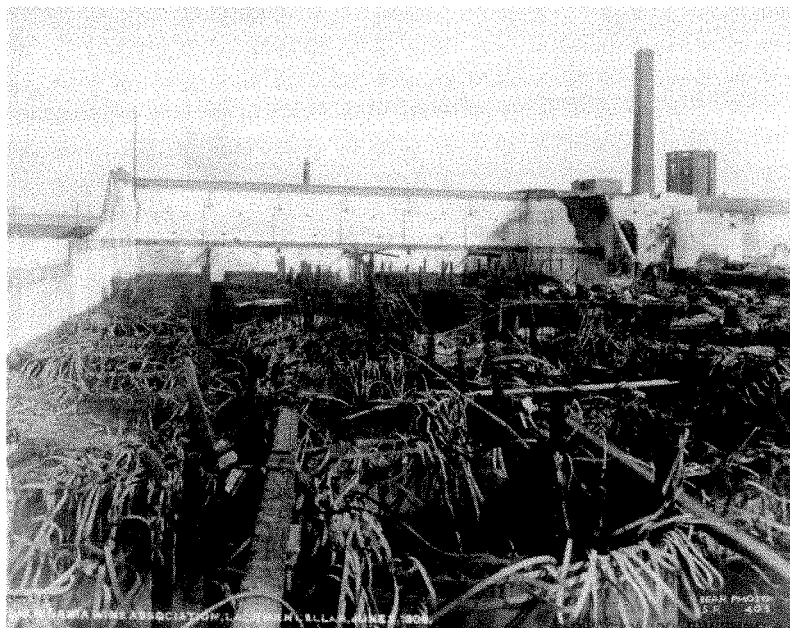
⁶⁸158 Cal. 367, 111 Pac. 4 (1910) [per curiam]; *San Francisco Chronicle*, July 27, 1909 (reporting court of appeal affirmance by Justice J.A. Cooper).

the waterfront and waiting barges, which sped off to the city of Stockton, where the wine was distilled. On its inevitable return, this brandy must have helped to steady the nerves of an unsettled city.⁶⁹

The wine association carried approximately \$5 million in insurance coverage for its San Francisco property.⁷⁰ It tendered claims in the millions of dollars for building damage and loss

⁶⁹Ernest P. Peninou and Gail G. Unzelman, *The California Wine Association and Its Member Wineries, 1894–1920* (Santa Rosa, CA, 2000) (hereinafter *CWA & Member Wineries*), 98. See, generally, Robert A. James, "The California Wine Association Lawsuits: Was San Francisco's 1906 Damage from the Insured Fire or the Uninsured Earthquake?" *San Francisco Argonaut* (Winter 2010), 74 [portions of present article published by San Francisco Museum & Historical Society].

⁷⁰*California Wine Association v. Commercial Union Fire Ins. Co. of N.Y.* (S.F. Superior Court) trial transcript (hereinafter *CWA trial transcript*), vol. 4, 2421 (Bancroft Library, UC Berkeley). The single San Francisco building with the largest insured loss was the Palace Hotel, at \$1.5 million, but this loss apparently was covered by numerous policies with dollar-for-dollar companies and does not appear to have been embroiled in litigation.



In the Lachman cellar, a California Wine Association property in San Francisco, only the metal hoops of the wine barrels remain in June 1906, two months after the fire. (Courtesy of the California History Room, California State Library, Sacramento, California)

of inventory, and eventually some of the insurers paid up. Its charismatic chairman, Percy Morgan, hung photographs of their checks on his wall, like the stuffed-head trophies of a big-game hunter. But several insurers denied coverage or offered "six-bit" compromises based on a percentage of the claimed loss. Morgan issued a classic rejection of a settlement offer: "Either you owe us money, or you don't. If you do, we want it all, with interest."⁷¹

Sutro filed a large number of separate suits on behalf of the wine association, one on each policy and totaling about \$300,000, against Commercial Union Fire Insurance Company of New York in San Francisco Superior Court. One case involving one of these policies was tried to a jury for three months, from January 27 to April 16, 1908, before Judge Frank J. Murasky. Justice in his courtroom was a little rough and ragged.

The insurer, represented by Van Ness and Wise, again had used the strong version of the exclusionary clause: "loss caused directly or indirectly by . . . earthquake . . . ; or (unless fire ensues, and in that event, for the damage by fire only) by explosion of any kind." The lawyers did not rely solely on the argument based on the broken water mains, as they seem to have done in the *Pacific Union Club* cases.⁷² Perhaps they felt that the fires that destroyed the wine warehouses were, in the words of Justice Chipman in the *Pacific Union Club* state court opinion, "directly traceable" to the quake. For whatever reason, in the *California Wine Association* cases, these lawyers argued that each of the fires in question was started by the quake and "continuously and uninterruptedly" reached and destroyed the plaintiff's property.⁷³

Sutro argued that the damage to the wine association's property had been caused by one or more "incendiary fires" (in other words, fires deliberately set, by arson, a firebreak, or gunpowder) or by an explosion. He also alleged fraud or estoppel, in that this insurer was a New York corporation and New York insurance law required a policy labeled as "Standard Fire

⁷¹Peninou and Unzelman, *CWA & Member Wineries*, 101; Christopher Carlsmith, "Percy Tredegar Morgan (1862–1920): Portrait of a Stanford Trustee," *Sandstone & Tile* 28:3 (Fall 2004): 5.

⁷²The *Insurance Law Journal* editor, and perhaps other members of the defense bar, suggested with some delicacy that this theory was likely doomed to fail. See *Insurance Law Journal* 39 (1910): 729 ("in most of the so-called earthquake cases [the 'peculiar feature' of an argument based on loss of water supply] was at most, a subordinate point").

⁷³*California Wine Ass'n v. Commercial Union Fire Ins. Co. of N.Y.*, 159 Cal. 49, 51, 112 Pac. 858 (1910).

Insurance" to use standard language that did not include an earthquake exclusion.⁷⁴

At the end of the trial, Sutro convinced Judge Murasky to require the jury to answer twenty-seven "special issues, as the law terms them, or special questions of fact," in the form of special verdicts. While the general verdict form asked simply whether the plaintiff should recover, the special verdicts specifically addressed separate aspects of the insurer's legal argument. One asked whether of all the fires begun on April 18, there were some fires that were "not caused directly or indirectly by the earthquake." Two others collectively asked whether it was only one of these latter fires that reached and destroyed the wine association's warehouses.

The insurer apparently did not object to the form or content of these special verdicts. The legal issues associated with causation, even "indirect" causation, were thus encapsulated in the specific questions, factual in form, that were put to the jury. The jury returned all of these general and special verdicts in favor of the California Wine Association.

The trial verdict was received with great glee in the local press. The *Chronicle* proclaimed, "DECISION HITS WELCHERS HARD. Vast Sum Involved in Judgment Against an Insurance Company. TWO MILLIONS AT STAKE. Many Policy Holders Interested in Result of the Legal Battle." The paper stated that the "victory . . . is regarded by attorneys who represent persons holding claims against the so-called 'earthquake' companies as of far-reaching importance to the city," and that "the result of this case practically disposes of claims that may reach a million or two and means so much more money for property owners who carried insurance in the welch-ing British companies."⁷⁵

*The Supreme Court California Wine Association Case:
The 1910 Affirmance*

The appeal to the California Supreme Court did not produce an opinion for two-and-a-half years. Van Ness and Wise sought to contest the special verdicts, by which the jury found that the fires that damaged the wine association's property were not "directly or indirectly" caused by the quake. When Sutro origi-

⁷⁴See c. 488, N.Y. Stats. of 1886; c. 690, N.Y. Stats. of 1892. Sutro proposed to introduce into evidence a telegram from the secretary of state of New York in Albany to prove the content of these laws. CWA trial transcript, vol. 3, 1087 (March 2, 1908).

⁷⁵*San Francisco Chronicle*, April 17, 1908.

nally had moved to include the special verdicts in the judgment roll, the trial judge had ruled they were not necessary, given the general verdict. Sutro moved again in the supreme court to add them to the transcript on appeal, and Van Ness and Wise now strenuously objected. Justice Henshaw held that the jury was required to answer the special verdicts, that section 670 of the *Code of Civil Procedure* declares that "the verdict" is automatically part of the roll, and that these special verdicts were "verdicts" for purposes of the statute.⁷⁶

This procedural nuance all but dictated the outcome of the appeal. The jury verdicts contained all of the legal findings for the insurers to be liable—the fires causing the damage were not "directly or indirectly" caused by the quake. After deeming the special verdicts to be part of the record, Justice Frederick W. Henshaw for the supreme court saw no issue of law remaining in the judgment. All Van Ness and Wise could do was complain about Pillsbury's conduct at trial, particularly Alfred Sutro's remarks in front of the jury.

Immediately before his closing argument, Sutro infuriated the defendants by telling the jurors that the insurance company had not deposited its half of the juror pay. Wise objected vociferously, noting that the share was established retroactively and that the defendant was not in default, and moved then and there for a mistrial. A presumably weary Judge Murasky, three months into the case, instructed the jurors to ignore the discussion altogether.⁷⁷

Sutro had reminded a witness of his prior testimony ("Did I ask you if you saw anything there?" "Did you tell me what you saw?"), something not usually done unless the witness first denies or contradicts his or her earlier statement. The trial judge overruled objections to these reminders because "the witness is a man who does not comprehend readily," and the supreme court saw no abuse of the judge's discretion. "Undoubtedly the questions were leading," Justice Henshaw said, "but they were in their nature harmless."

More entertainingly, Sutro crossed a rhetorical line in the midst of a factual question. The trial transcript on this point

⁷⁶159 Cal. at 52–54. It is unclear why the *California Wine Association* appeal went directly from superior court to the supreme court, now that there was an intermediate appellate court. *Pacific Heating*, at about the same time, progressed to the court of appeal before being heard by the supreme court. The larger amount in controversy in the *California Wine Association* cases may have been the reason.

⁷⁷CWA trial transcript, vol. 5, 3078 (April 13, 1908). Wise also objected to Sutro's comments to a reporter that appeared in the *San Francisco Examiner* of April 13, 1908, but no juror admitted to reading the story. This does not speak well for the *Examiner's* circulation.

has not been found but, with some literary license, might have read along the following lines:

Mr. Sutro. "When [did] the subject of the welching insurance companies that refused to pay the California Wine Association first [come] up?"

Mr. Van Ness. Objection as prejudicial and inflammatory, as mere conjecture and as opinion.

Mr. Sutro. Very well, I will withdraw the adjective "welching."

The supreme court held that the question was inappropriate, but that "the use of this epithet" did not call for reversal.

Tantalizingly, Justice Henshaw turned, at the end of the opinion, to the underlying question. Was the jury verdict—that the loss in question was insured—supported by evidence as required by law? "The more interesting consideration, to which no small part of the briefs of both parties is directed—namely, what in law constitutes a fire directly or indirectly caused by an earthquake—is, for the reasons already given, eliminated from this case. Whatever might be said about it would be purely dicta [language in an opinion not necessary for the holding], and the question may well be left for future consideration."⁷⁸

The insurer's strongest legal argument had apparently been subsumed in the special verdicts, leaving it without recourse on appeal. Had Sutro outfoxed his opponents by securing the special verdicts without objection? The last word in California on the critical issue in the 1906 policyholder cases was thus uttered by a jury, not a judge.

In any event, the last known reported California decision on a policyholder coverage claim based on the great earthquake and fire was entered on December 28, 1910. Soon the California Wine Association had its recovery, without compromise—in Percy Morgan's words, "all, with interest" (minus Pillsbury's fees, of course).⁷⁹

⁷⁸159 Cal. at 54, 55, 57.

⁷⁹Contribution and reinsurance disputes between insurers continued to wend their way through the courts. The decision in *Royal Ins. Co. v. Caledonian Ins. Co.*, 182 Cal. 219, 187 Pac. 748 (1920), for example, was issued fourteen years after the quake and fire. In another category altogether is *American Can Co. v. Agricultural Ins. Co. of Watertown, N.Y.*, 27 Cal. App. 647, 150 Pac. 996 (1915), where a policy expired on April 18, 1906—the very date of the earthquake and the fire in question—and the issue was whether the failure to pay the premium then due invalidated the coverage.

THE SIGNIFICANCE

Jack Sutro's explanation of the importance of his father's work for the California Wine Association has been passed down in the lore of their law firm to the present day: "That decision of the California Supreme Court enabled literally hundreds and even, perhaps, thousands of San Francisco property owners whose property was destroyed on that fateful day of 1906 to recover. Which I think is a pretty important case."⁸⁰ An earlier interview with Sutro refers in similar terms to the federal court *California Wine Association* case. He may have had the April 1908 state trial victory, the June 1910 federal trial victory, and the December 1910 state supreme court affirmance all in mind when he made these statements. Throughout this time period, the *California Wine Association* rulings are likely to have induced stubborn insurers to concede or settle with large numbers of remaining policyholders.⁸¹

Some \$235 million was eventually paid to San Franciscans by the insurers. "The property insurers saved San Francisco by covering more than 90 percent of the damage as fire damage at a time when earthquake damage was not insured."⁸² Since their investors were chiefly from the East Coast and Europe, a form of geographic wealth transfer contributed to the renaissance of the city.

Unfortunately, San Francisco missed a chance to rebuild along the natural contours of its hills using the grand designs long proposed by architect Daniel Burnham; the reconstruction took place using the checkerboard layout of streets heedless of topography. The state failed to upgrade its building code for many years. The city's coming-out party was the 1915 Panama

⁸⁰Sutro, "A Life in the Law," 35.

⁸¹The federal trial transcript (CWA trial transcript, vol. 6) refers to some seven other cases pending in the Northern District as of May 1910, which appear to have been disposed of immediately after the *California Wine Association* victory. They may have included *Whittier-Coburn Co. v. Alliance Co. Ltd. of London* (N.D. Cal. 1908), case 14193, a pending case evidenced by testimony in the National Archives and excerpted at <http://www.archives.gov/exhibits/sf-earthquake-and-fire/earthquake-fire.html>. The San Francisco Historical Society website features a photograph of a section of Clay Street still in ruins some time after the quake and fire. An online caption notes that the owners were waiting for insurance adjustments before rebuilding (<http://www.sfmuseum.org/eqphotos/sfweb/big/19060318.jpg>).

⁸²Harrington, "Lessons of the 1906 San Francisco Earthquake," 28. The 90-percent figure must refer to the total fire insurance policy face value, not the estimated \$500 million of total property damage.

Pacific International Exposition, subdued by the outbreak of World War I.

San Francisco continued to lose ground to Los Angeles for West Coast leadership, despite the reconstruction. As Simon Winchester notes, the city was rebuilt, but no one ever forgot that San Francisco had been leveled, while Los Angeles had not.⁸³ One wonders if New Orleans will reclaim its commercial prominence on the Gulf of Mexico after Hurricane Katrina or if, like Venice, a once-great mercantile city, it will hereafter focus on hospitality and tourism. Ensuing loss emerged as a major issue after Hurricane Katrina in 2005 and Hurricane Sandy in 2012, as insurers and insured disputed whether the flood exclusions in policies applied to the windstorm, water intrusion, mold, and other damage suffered.⁸⁴

The California Wine Association and Percy Morgan met sad but separate endings. The temperance movement and Prohibition spelled the demise of a centralized organization for large-scale commercial distribution of alcoholic beverages. The association was wound up, and the wineries regained their independent means of distributing grapes and wine for medicinal and sacramental purposes.⁸⁵

When Morgan retired in 1911, a grateful association board presented him with a "finely crafted double-barreled shotgun." A member of the "handsome brigade" of millionaires from each state participating in President Taft's 1909 inauguration, husband of a beautiful society debutante, father of two Princeton students, and owner of a grand Elizabethan Tudor mansion in Los Altos Hills, he was a man who seemingly had everything for which someone in his station could wish. But like Richard Cory, one night in 1920 Percy Morgan went home and "took his cherished shotgun and ended his life."⁸⁶

⁸³Winchester, *A Crack in the Edge*, 332–33.

⁸⁴Peter M. Gillon, "Concurrent Causation and Other Key Issues in Today's Disaster Coverage Cases," in *Recent Developments in Disaster Coverage Litigation: Leading Lawyers on Analyzing Disputes, Evaluating Insurance Policies, and Understanding Recent Litigation Trends* (Boston, 2011); "State Insurance Regulators Move to Protect Consumers After Sandy," *Claims Journal* (Nov. 7, 2013), <http://www.claimsjournal.com/news/national/2012/11/07/217027.htm>; Risk Management Solutions, *Hurricane Katrina: Profile of a Super Cat* (Newark, CA, 2005). One commentator even invoked Cuthbert Heath's waiver of defenses in 1906 [Insurance Scrawl blog, http://www.insurancescrawl.com/archives/katrinarita_related/index.htm].

⁸⁵Peninou and Unzelman, *CWA & Member Wineries*, 116–22.

⁸⁶*Ibid.*, 110–14; Carlsmith, "Percy Tredegar Morgan"; Edwin Arlington Robinson, *Richard Cory* (1897). Morgan left no suicide note, and his act might have been the result of the demise of his cherished California Wine Association, or a debilitating leg injury, or some other cause.

What of the insurers? At least twelve companies went bankrupt following the calamity.⁸⁷ The payouts on San Francisco 1906 policies wiped out the underwriting profits from American casualty line premiums collected over the preceding forty-seven years.⁸⁸ The insurers had to sell off their shares of companies to raise cash, which depressed stock prices beyond the initial reverse that the market suffered immediately after the quake. The large outflows of gold from London to California led the Bank of England to increase interest rates to induce the return of bullion to Britain, contributing to the Panic of 1907.⁸⁹

Reinsurers pressed for a clear omnibus exclusion of coverage for fires associated with earthquakes. European countries, the least in need of such a clause, complied. Americans and others on the Pacific Ocean's Rim of Fire objected.⁹⁰ Today's most used policy form nationwide provides coverage for what has come to be known as "ensuing loss": "We will not pay for loss or damage caused by or resulting from any of the following [excluded causes of loss—earthquake, flood, etc.]. But if an excluded cause of loss listed [above] results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss."⁹¹

⁸⁷Bronson, *The Earth Shook*, 115. Some of these companies were woefully undercapitalized. The Trader's Insurance Company held \$1.8 million in capital and surplus but had issued \$160 million in insurance, some \$4.6 million of it in San Francisco alone, and was immediately insolvent in 1906. Kennedy, *The Great Earthquake*, 249. *Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co.*, 166 Fed. 548 (N.D. Ga. 1909), a reinsurance case, stated that the defendant paid only 30 percent to its San Francisco claimants and was promptly deemed insolvent. Sullivan & Cromwell brought a case on behalf of M.J. Bradenstein & Co. (maker of MJB coffee) directly against reinsurers of its primary insurer, which had withdrawn from the American market and left no assets behind. *New York Times*, July 26, 1907.

In 1906, there was very little reinsurance, and what there was often was placed with other companies with San Francisco exposures. There was little regulatory oversight over reserve levels and underwriting practices, and no system of industry assessments to cope with insurer insolvencies.

⁸⁸Swiss Re, *A Shake in Insurance History*, 12; Kennedy, *The Great Earthquake*, 250.

⁸⁹Odell and Weidenmier, "Real Shock, Monetary Aftershock." In response, the United States permitted banks to issue currency backed by commercial paper rather than gold (*Aldrich-Vreeland Act*, c. 229, 35 Stat. 546 [1908]), paving the way for the *Federal Reserve Act* [P.L. 63-43 [1913]].

⁹⁰Tillmann J. Röder, *From Industrial to Legal Standardization, 1871-1914: Transnational Insurance Law and the Great San Francisco Earthquake* (Leiden, Netherlands, 2012).

⁹¹Harrington, "Lessons of the San Francisco Earthquake," 29 (referencing Insurance Services Office [ISO] form CP 1030 0402 [2001]).



Percy T. Morgan was the president of the California Wine Association and a steadfast litigant against the "six-bit" insurance companies that offered compromises or denied liability. (Courtesy of Gail Unzelman)

This language is quite helpful for insureds. Endorsements can limit the effect of the standard clause, however, and can raise questions as to the scope of the ensuing loss coverage.

In 1909, the California State Legislature enacted a standard fire policy that did not exclude earthquake damage. Today, the *California Insurance Code* prohibits exclusion of insurance risks from residential policies unless the policyholder is offered the opportunity to purchase coverage on standard terms. In order to encourage purchase of such catastrophic policies, the code excludes coverage of many earthquake losses from the base policy. But that rule does not "exempt[] an insurer from its obligation under a fire insurance policy to cover the losses of a fire which is caused by or follows an earthquake." No matter how much doctrinal confusion it has sown, the latter statute appears to follow directly from the principal rulings in the 1906 policyholder cases.⁹²

It suffices to say that disputes will likely arise any time that an excluded peril, such as an earthquake or flood, is followed closely in time by a covered peril. Risk managers and insurance professionals focus on risk prevention, design of policy language, procurement of layers of insurance and reinsurance, and other prospective techniques. But after some future act of God, Sutro's and Van Ness's successors, the insurance litigators, will be in court advocating their views of the meaning of policies and statutes drafted much like the clauses of a century ago. On that somber day, a judge will need to undertake the "future consideration" that was predicted by Justice Henshaw in his 1910 supreme court opinion.⁹³

CONCLUSION

The insurance coverage decisions arising from the 1906 San Francisco earthquake and fire were not one-sided affairs by which legal and public opinion uniformly disgorged insurance company assets to rebuild the city. Companies won some cases, even before presumably hostile San Francisco juries. With care if not consistency, the judges scrutinized the language and

⁹²*California Insurance Code* §10088.5. For an overview of the complex California insurance law on concurrent causation and "anti-concurrent causation," see Scott Johnson, "The Efficient Proximate Cause Doctrine in California: Ten Years after Garvey," *Journal of Insurance Coverage* 2 (Autumn 1999): 1.

⁹³Compare Arthur Allen Leff, "The Leff Dictionary of Law: A Fragment," *Yale Law Journal* 94 (1985): 1855, 1915-16. ("The late J.A. MacLachlan of Harvard used to define ['act of God'], impiously but usefully, as 'that which no reasonable God would do.'")

intent of the policies, the causal path between the earthquake and the damage, and the parties' behavior before, during, and after the casualty loss. General principles, canons of construction, and maxims of jurisprudence appear to have been used more as citation sources than as guides to reasoning. The opinions reflect the full range of topics that must be addressed after a natural calamity and provide helpful citations for insured and insurer alike.

At least three general lessons emerge from this review of the opinions. First, venue matters. Having the cases heard by juries and judges literally in the claimants' "home court" made a large difference.⁹⁴ Judgments in California for insurers, as in *San Francisco Savings* and *German Society*, and the *Borgfeldt* judgment in Germany for an insured, stand as shining counterexamples. The Ninth Circuit's opinion in *Richmond Coal* might be the case where a California jurist stretched to the utmost for the policyholder. One need only consider how the results might have varied had the claims been presented to courts or arbitrators in New York or Europe.

Second, facts matter. It is impossible to say in principle that Cuthbert Heath acted purely out of a spirit of generosity, or that the Hamburg-Bremen company always evaded its legal and moral obligations. Contrary to historians' attention to the words spoken or written, many of the loudest "waivers" had no quake-caused fire exclusions to waive, and even Hamburg-Bremen paid 98 or 100 percent of a number of claims. Any specific fire may or may not have been caused by the quake, so any given loss may or may not have been covered by a given policy. The *California Wine Association* cases most clearly stand for the proposition that the trial court is the arena where most cases were won or lost.

Third, advocacy matters. Although most reported decisions were in the policyholders' favor, the verdicts for insurers indicate that each of the victories—on both sides—was a "close-run thing." Clear-headed evaluation of a claim may help a party decide whether to settle or to litigate a coverage dispute. Attenuated subtleties such as artfully drawn special jury verdicts may secure or preserve a win. In high-stakes cases, clients must be steadfast and tenacious, and their lawyers must be vigilant and creative.

⁹⁴For a polite European insurance company perspective on this point, see Swiss Re, *A Shake in Insurance History*, 12. {"Improper, liberal and conflicting interpretations were thus made by many of those who had an interest in the loss settlement."}

APPENDIX

Known 1906 San Francisco Insurance Decisions

The following decisions involving fire insurance policies affected by the 1906 San Francisco earthquake and fire are published in the federal and state court official reports or described in selected newspaper accounts. Since nearly 100,000 claims were filed after the calamity, and since some of these decisions themselves refer to additional decisions with unnamed parties, the list is far from comprehensive.

- Levi Strauss Realty v. Transatlantic Fire Ins. Co. of Hamburg* (N.D. Cal. Sept. 14, 1906), reported in *San Francisco Argonaut* (Sept. 22, 1906) ("first insurance case in court"); *The Standard*, Sept. 22, 1906; *New York Times*, Sept. 15, 1906.
- Newburgh v. Transatlantic Fire Ins. Co. of Hamburg* (S.F. Superior Court Oct. 8, 1906), reported in *New York Times*, Oct. 9, 1906 ("the first decision to be rendered in the Superior Court").
- Bergin v. Commercial Union Assurance Co. of London* (N.D. Cal. Jan. 24, 1907), reported in *New York Times*, Jan. 25, 1907.
- M.J. Brandenstein & Co. v. Rhine & Moselle Fire Ins. Co. of Strasburg* (1906 or 1907), reported as an unsatisfied judgment for the plaintiff in *New York Times*, July 26, 1907, also reporting a new July 1907 filing in *M.J. Brandenstein & Co. v. Helvetia Swiss Fire Ins. Co.* (S.D.N.Y.).
- Baumgarten v. Alliance Assurance Co.*, 153 Fed. 301 (N.D. Cal. 1907).
- Henry Hilp Tailoring Co. v. Williamsburgh City*, 157 Fed. 285 (N.D. Cal. 1907).
- San Francisco Savings Union v. Western Assurance Co. of Toronto*, 157 Fed. 695 (N.D. Cal. 1907).
- Willard v. Williamsburgh City* (N.D. Cal. Nov. 13, 1907), reported in *New York Times*, Nov. 15, 1907.
- Baker & Hamilton v. Williamsburgh City*, 157 Fed. 280 (N.D. Cal. 1908).
- Board of Education of City & County of San Francisco v. Alliance Assurance Co.*, 159 Fed. 994 (N.D. Cal. 1908).
- People v. Di Ryana*, 8 Cal. App. 333, 96 Pac. 919 (1908).
- California Wine Association v. Commercial Union Fire Insurance Co. of N.Y.* (S.F. Superior Court April 16, 1908), reported in *San Francisco Chronicle*, April 18, 1908, aff'd, 159 Cal. 49, 112 Pac. 858 (1910).
- Williamsburgh City v. Willard*, 164 Fed. 404 (9th Cir. 1908), affirming verdict in N.D. Cal. (Nov. 13, 1907).
- Clayburgh v. Agricultural Ins. Co. of Watertown, N.Y.*, 155 Cal. 708, 102 Pac. 812 (1909).

- Richmond Coal Co. v. Commercial Union Assurance Co.*, 159 Fed. 985 (N.D. Cal. 1909), rev'd, 169 Fed. 746 (9th Cir. 1909).
Pacific Heating & Ventilating Co. v. Williamsburgh City, (Cal. App. July 26, 1909), reported in *San Francisco Chronicle*, July 27, 1909.
Commercial Union Assurance Co. v. Pacific Union Club, 169 Fed. 776 (9th Cir. 1909).
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Richmond Coal Co. v. Commercial Union Assurance Co., 169 Fed. 746 (9th Cir. 1909), rev'g 159 Fed. 985 (N.D. Cal. 1909).
California Wine Association, M.T. MacDonald, Mt. Shasta Water Co., Baker & Hamilton v. Commercial Union Fire Ins. Co. of N.Y., Palatine Ins. Co., Alliance Assurance Co. et al. (N.D. Cal. June 12, 1910), verdicts in thirty cases reported in *The Adjuster* 40 (June 1910): 197-98, and *San Francisco Chronicle*, June 13, 1910.
German Savings & Loan Society v. Commercial Union Assurance Co., 187 Fed. 758 (9th Cir. 1910).
Haas Bros. v. Hamburg-Bremen Fire Ins. Co., 181 Fed. 916 (9th Cir. 1910).
Pacific Heating & Ventilating Co. v. Williamsburgh City, 158 Cal. 368, 111 Pac. 4 (1910).
Pacific Union Club v. Commercial Union Assurance Co., 12 Cal. App. 503, 107 Pac. 728 (1910).
Pacific Union Club v. Palatine Ins. Co., 12 Cal. App. 515, 107 Pac. 733 (1910).
California Wine Association v. Commercial Union Fire Ins. Co. of N.Y., 159 Cal. 49, 112 Pac. 858 (1910).
Norwich Union Fire Ins. Soc'y v. Stanton, 191 Fed. 813 (2^d Cir. 1911).
Borgfeldt v. Curry, 25 Cal. App. 624, 144 Pac. 976 (1914).
American Can Co. v. Agricultural Ins. Co. of Watertown, N.Y., 27 Cal. App. 647, 150 Pac. 996 (1915).
Royal Ins. Co. v. Caledonian Ins. Co., 182 Cal. 219, 187 Pac. 748 (1920).

MINING FOR CITIZENS: RACE, RESOURCES, AND THE REPUBLIC IN THE ALASKA GOLD RUSH

MICHAEL SCHWAIGER¹

INTRODUCTION

In 1904, the Gateway City seemed populated with all the peoples of the world. There, on the banks of the Mississippi River, Zulus, Japanese, Ceylonese, and Persians lived in costumes and model dwellings of their homelands. Touted as authentic, the depictions at the St. Louis World's Fair actually reflected and reinforced prevailing racist, self-congratulatory fantasies about the new standing of the United States in world politics. The chairman of the Smithsonian's Anthropology Department unveiled his "Congress of the Races," which displayed live representations of different peoples to exhibit his vision of human progress. And, although the fair commemorated the country's first major expansion—

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the Louisiana Purchase—it celebrated recent expansions just as much: just six years after the Battle of Manila Bay, eleven hundred Filipinos were in costume and on parade in a fifty-acre exhibit in Missouri. Geronimo, a prisoner of war, was showcased in the flesh before thousands of people per day. The fair was a U.S. triumph.²

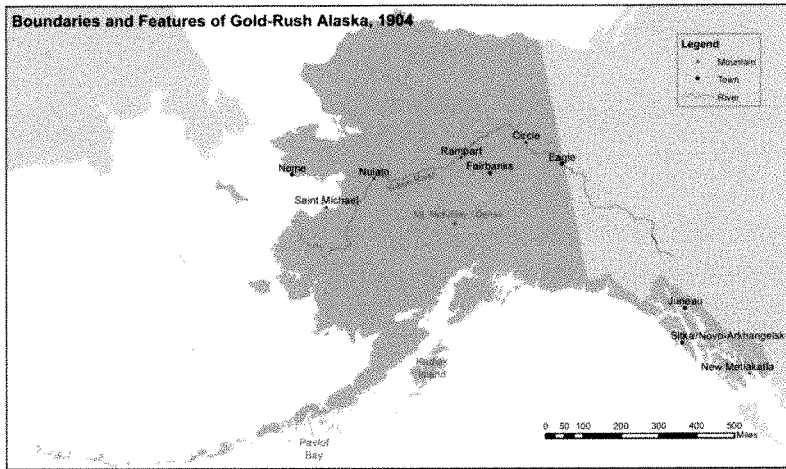
The anniversary of the transfer of Russian America to the United States was celebrated as “Alaska Day” at the fair. Alaska governor John G. Brady marked the occasion by presenting a bust of the late secretary of state William H. Seward, who had negotiated the purchase of Alaska, and by inviting Seward’s family and friends to attend a party in his honor. Attendees toured the Alaska exhibit: a two-story stucco “Alaska Building,” a Haida plank house, and a group of totem poles sixty feet high and four feet wide at the base. Inside the Alaska Building, the exhibit included Alaska Native students’ industrial school projects and English-language manuscripts, along with Alaska Native “curios.” Alaska boasted the largest gold mine in the world, and the exhibit displayed a pyramid of gilded wood representing Alaska gold output since the early 1880s, a tribute that dwarfed nearby tokens representing Alaska output of copper, coal, and oil.³

Thrilled with the Ferris wheel and the “wireless telegraph tower,” James Wickersham, a district court judge in Alaska, loved “this most wonderful aggregation of the material triumphs of man.”⁴ But Wickersham, in his diary, did not dwell on the fair’s many ethnological exhibits, although as an amateur ethnologist he must have been intrigued by them. Nor did he focus on the strongly pro-development rhetoric presented by the Alaska exhibit, where he spent a day out of the rain. Perhaps Wickersham did not note these aspects because he believed that every race had its place and he believed that Alaska’s resources should be tapped to foster its economic and politi-

²Ted C. Hinckley, *Alaskan John G. Brady: Missionary, Businessman, Judge, and Governor, 1878–1918* (Miami, OH, 1982), 338–39; John Spencer, “‘We are not dealing entirely with the past’: Americans Remember Lewis & Clark,” in *Lewis & Clark: Legacies, Memories, and New Perspectives*, ed. Kris Fresonke and Mark Spence (Berkeley, CA, 2004), 160; Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880–1920*, (Lincoln, NE, 2001), 90–92; Richard Drinnon, *Facing West: The Metaphysics of Indian-Hating & Empire-Building* (Norman, OK, 1997), 339–41.

³John G. Brady to Frederick W. Seward, 1 April 1904, John G. Brady Papers, Series 1: Outgoing Correspondence; Hinckley, *Alaskan John G. Brady*, 336–40; Robert Campbell, *In Darkest Alaska: Travel and Empire Along the Inside Passage* (Philadelphia, PA, 2007), 189.

⁴James Wickersham, diaries, Sept. 29, 1904, MS 107, Wickersham Historic Site Manuscript Collection, Alaska State Library—Historical Collections.



The Alaska gold rush began in the late nineteenth century and doubled Alaska's population between 1890 and 1900. (Map by Ryan P. Young)

cal development within the United States. In fact, he had just reaffirmed those beliefs in a legal opinion he had written that hinged on the racist and imperialist structure of U.S. citizenship. That case concerned the citizenship of John Minook.⁵

More than four years earlier, on July 15, 1900, Wickersham had disembarked from a steamboat on the Yukon River just before the Canadian border at Eagle, Alaska, his new judicial headquarters and a remote outpost of U.S. authority. The only judge in an area larger than Texas, Wickersham soon set out to ride his circuit.⁶ His first stop was Rampart, which he later described in his memoirs:

Rampart is built on the north slope of the bluffs along the south river bank. Minook creek emptied into the river just above the long line of log cabins that comprised the town at that time, and a trail led out to the mines up the creek. In addition to the two big mercantile companies, there were small stores tended by Al. Mayo, the old-time fur trader, and John Minook, the half-breed prospector and miner.⁷

⁵Ibid., Sept. 25–29, 1904; *In re Naturalization of John Minook*, 2 Alaska 200 (D.Alaska 1904).

⁶Wickersham, diaries, July 15 and Aug. 17, 1900.

⁷James Wickersham, *Old Yukon: Tales—Trails—and Trials* (Washington, DC, 1938), 47–48.

Wickersham convened court in a warehouse, sat himself behind a "rough lumber counter," and waited. No criminal cases were ready for trial, so Wickersham left Rampart on August 22, 1900, leaving the prosecutor and court clerk behind to handle small matters.⁸

One of those small matters concerned Minook, who declared his intention to become a U.S. citizen on August 25, 1900. That day, Minook formally swore that he was a subject of the Russian czar, but, by his declaration, he renounced forever his allegiance and fidelity to the emperor of Russia and swore to support the Constitution and laws of the United States and the laws of the district of Alaska. He put his mark to the name he gave the clerk, "Ivan Minook," a name that reflected the Russian and Alaska Native influences of his "Creole" heritage.⁹

On July 30, 1903, after many of Rampart's residents had either left Alaska or moved on to Nome or Fairbanks, Minook's friends and neighbors stood with him in another makeshift courthouse in Rampart. They testified that he had lived in Alaska all his life, that he had married and raised a family in the Christian faith, that he spoke English and understood U.S. law, and that they had named the largest mining stream in the Rampart mining district after him in recognition of his value as a man and a miner. Minook's supporters testified that he was a "fit and proper person to be made an American citizen." Abraham Spring, a Fairbanks lawyer and a personal and political ally of Judge Wickersham, even submitted an amicus brief supporting Minook's petition.¹⁰

⁸Ibid., 47; Wickersham, diaries, Aug. 22, 1900; Declaration of Intent to Become a U.S. Citizen, August 25, 1900, NARA-Pacific Alaska Region, RG 21, Declaration of Intention for Citizenship, 1900–1909.

⁹*In re Minook*, 2 Alaska at 200; Declaration of Intent to Become a U.S. Citizen. Gwenn Miller uses the Russian term *Kreol*, rather than *Creole*, contending that the Russian term means something closer to *métis* or *mestizo*. Gwenn A. Miller, *Kodiak Kreol: Communities of Empire in Early Russian America* (Ithaca, NY, 2010), 106. In Russian America, Creoles included individuals who had one parent from the Old World (Russians, Scandinavians, and Yakuts) and one parent from the new world (Alaska Natives or American Indians) and individuals who had a Creole parent. Michael Oleksa, *Orthodox Alaska: A Theology of Mission* (Crestwood, NY, 1992), 145; Andrei Grinev, "Social Mobility of the Creoles in Russian America," *Alaska History* 26:2, trans. Richard Bland (2011): 21; Lydia T. Black, *Russians in Alaska, 1732–1867* (Fairbanks, AK, 2004), 209. But *Creole* did not refer to a biological or hereditary category; rather, it was a social category that included many Alaska Natives regardless of ancestry. Oleksa, *Orthodox Alaska*, 145. I have used *Creole* because that is the term used in Wickersham's opinion.

¹⁰Terrence Cole, *Crooked Past: The History of a Frontier Mining Camp: Fairbanks, Alaska* (Fairbanks, 1991), 49; *In re Minook*, 2 Alaska at 200–202; James Wickersham, diaries, April 28, 1903, Nov. 15–16, 1904, April 3, 1905, and Sept. 24, 1905.



Born in Russian America, John Minook, above, with his family, requested U.S. citizenship through naturalization on the grounds that he had lived in Alaska all his life, he had married and raised a family in the Christian faith, he spoke English, and he understood U.S. law. (Courtesy of Mr. and Mrs. Gregory Kokrine Collection, UAF-897-2a, Archives, University of Alaska Fairbanks)

GROWING THE REPUBLIC

James Wickersham's Ambitions

Born on August 24, 1857, in Illinois, James Wickersham began teaching shortly after graduating from the eighth grade; at nineteen, he began working as a janitor for John McAuley Palmer—a former probate judge, state senator, governor, and presidential candidate—in exchange for access to law books. Wickersham would ultimately match many of Palmer's ambitions, but before moving to Alaska to become a federal judge, a congressional delegate, and a gubernatorial candidate, Wickersham married and moved to Washington Territory in 1883, where he became a prominent attorney, probate judge, state representative, amateur ethnologist, and public spectacle.¹¹

¹¹Evangeline Atwood, *Frontier Politics: Alaska's James Wickersham* (Portland, OR, 1979), 6–41, 58–336; George Pierre Castile, "The Indian Connection: Judge James Wickersham and the Indian Shakers," *Pacific Northwest Quarterly* 81 (1990): 125.

Wickersham earned this last title in part because of the crimes he was charged with while working as a probate judge. He, along with dozens of other prominent citizens, belonged to a group dedicated to combating the "yellow peril" in Tacoma. The group encouraged and organized anti-Chinese social discrimination and, on November 3, 1885, forced Chinese residents out of their homes and onto trains bound for Portland, Oregon.¹² Wickersham was arrested that day for "conspiring to insurrection and riot, depriving Chinese subjects of equal protection under the law, and of breaking open houses and driving out the oriental occupants."¹³ At trial, Wickersham claimed he had only tried to help victims keep their belongings as they were forced onto trains, and the jury acquitted him. Privately, he was still proud decades later of his and his group's racist efforts.¹⁴

During the same period that he helped organize anti-Chinese discrimination and violence, Wickersham formed a series of businesses in Tacoma. Several of his corporations speculated in local land on behalf of his family and eastern investors, forging strong links between his family and the Northern Pacific Railway in the establishment of the town of Buckley, which Wickersham named after the assistant to the general manager of the Northern Pacific. Wickersham fought hard to open the Puyallup Indian Reservation to land sales, especially to his businesses and the Northern Pacific. And one of his law practices routinely defended white squatters on Puyallup lands.¹⁵ At times, he wrote in ignoble terms about why the Puyallup land should be opened:

[T]he Indian doesn't care [about retaining reservation land]—clams, a split cedar shanty on the beach, a few mats and kettles, leisure and a bottle of rum once in a while are all he wants—anybody can have the land that wants it. Really why should our govt go to such enormous expense in trying to make a white man out of an Indian?¹⁶

At other times, Wickersham asserted that the reservation was populated by U.S. citizens and only a few "real" Indians.¹⁷

¹²Atwood, *Frontier Politics*, 19–22.

¹³Quoted in *ibid.*, 20.

¹⁴*Ibid.*, 20–21.

¹⁵*Ibid.*, 17; Castile, "The Indian Connection," 123–25.

¹⁶Quoted in Paige Raibmon, *Authentic Indians: Episodes of Encounter from the Late-Nineteenth-Century Northwest Coast* (Durham, NC, 2006), 130.

¹⁷Castile, "The Indian Connection," 125.

As he developed his businesses and law practices, Wickersham began corresponding with famous ethnologists and memorializing the "vanishing" of several American Indian tribes by writing and publishing articles about them. These articles allowed him to cultivate a reputation as a protector of American Indians, even though he sometimes wondered ominously whether American Indians were related to "Mongolians" and even though his portrayals of certain American Indian tribes appear to have been calculated to advance his personal financial interests. Certainly the effect of Wickersham's studies was that many American Indian tribes in Washington Territory lost claims to authenticity, competency, and land. When the Puyallup land sale ultimately began, the Puyallup tribe lost nearly all of its previously allocated land. And Wickersham bought his share. Years later, he would espouse similar American Indian allotments in the Tanana Valley of Alaska.¹⁸

By 1889, a dramatic decade of growth in Washington's population from 75,000 to more than 350,000 had created a pace that finally obviated local boosters' need to tell any more lies to encourage immigration. Despite his scandals and intrigues, Wickersham enjoyed popular support and attended the Constitutional Convention of the Territory of Washington, holding the proxy of a delegate who could not attend. In 1894, Wickersham became the Tacoma city attorney, and he won a seat in the Washington State House in 1898. Although Wickersham lost the contest for speaker of the house, he continued to advance politically, organizing the first Benjamin Harrison Club, which capitalized on the new influence possessed by the six states admitted into the Union under President Harrison's first term. With a deft parliamentary maneuver at a party caucus in 1899, Wickersham was able to secure a narrow victory for his friend Addison G. Foster in a U.S. Senate race, a victory that, in turn, dramatically changed his chances for federal appointments.¹⁹

In 1900, President William McKinley made just such an appointment, making Wickersham a judge in Alaska. The Department of Justice chose Eagle, population three hundred, as the headquarters of Wickersham's judicial division so he could deal with the customs violations of miners floating down the Yukon River from Canada. The department also directed Wickersham to travel as needed to other parts of his division, like Rampart, farther down the Yukon, to conduct the court's business. His travels brought him into contact

¹⁸Ibid.; Raibmon, *Authentic Indians*, 130–33.

¹⁹Robert E. Ficken, *Washington Territory* (Pullman, WA, 2002), 167–68; Atwood, *Frontier Politics*, 24–30.

with a variety of different people, and Wickersham continued to gather and record local legends, learn local vocabulary, and lecture on local customs. As a federal representative, he hosted members of the U.S. Senate Committee on Territories in the summer of 1903. And he occasionally reported to Congress on affairs in Alaska, during which he lobbied to open up Alaska to further mining development through federally funded roads and railroads. Later he would suggest that Congress make citizens of many Alaska residents so that they could obtain riverboat pilot licenses.²⁰

But Wickersham's attempts to realize his ambitions for Alaska were not limited to his formal testimony and reports as a judge and representative of the federal government. Rather, he was a kind of booster for the region. Sold to raise money for a trip up Mt. McKinley, Wickersham's newspaper—the first in the Tanana Valley—had all the hallmarks of a booster promotional. Headlines bragged that Fairbanks rivaled Nome and Dawson, and articles described the discovery and value of mining claims and the burgeoning population down to the number of houses in town.²¹ At times, Wickersham made claims in speeches and statements that were almost delusional in their optimism—that sections of Alaska would match the Dakotas in agricultural production or that “[n]o state in the Union has a better penal and civil code system than Alaska and no amendments are necessary to either.”²² Indeed, Wickersham envisioned Alaska evolving into as many as four territories or states.²³

Like all boosters, Wickersham's puffery was not disinterested political advocacy. Rather, his boosting was meant to benefit both himself and the region. For example, he made a pact with E.T. Barnette that if Barnette would name his new trading site on the Chena Slough in honor of U.S. Senator Charles Fairbanks—a powerful Republican and Wickersham's political creditor—Wickersham would use his own influence to try to

²⁰James Wickersham, diaries, June 8, 1900; *Alaska Civil Code*, 31 Stat. 321 (1900); William R. Hunt, *North of 53°: The Wild Days of the Alaska-Yukon Mining Frontier, 1870–1914* (New York, 1974), 143, 264; James Wickersham, diaries, July 20, 1903; Claus-M. Naske, *Paving Alaska's Trails: The Work of the Alaska Road Commission* (Lanham, MD, 1986), 13; James Wickersham, diaries, Feb. 8, 1904.

²¹Hunt, *North of 53°*, 142; Pierre Berton, *The Promised Land: Settling the West, 1896–1914* (Toronto, ON, 1984), 394–400; Lee M.A. Simpson, “Introduction: Boosters and the Selling of the American West,” *Journal of the West* 42 (2003): 6; “The Fairbanks Mines. Nome and Dawson Rivalled. Discovery and Value,” *The Fairbanks Miner*, May 1903, 1; “Fairbanks,” *The Fairbanks Miner*, May 1903, 3.

²²Quoted in Hinckley, *Alaskan John G. Brady*, 283, 294.

²³*Ibid.*, 297, 302–303.

move his judicial headquarters there. Beyond political gain, Wickersham had a personal, financial stake in development. He acquired at least two mining claims in Circle, Alaska, and he located claims for himself, his wife, and his son on Chitsia Creek in the Rampart Mining District. Wickersham routinely gave power of attorney to prospectors so they could stake claims for him, and at least once had his friend Abraham Spring make claims on behalf of him and his wife.²⁴

Unfortunately for Wickersham, his claims at least initially did not generate substantial income. By March 1905, he seemed to have had enough of Alaska, confessing in his diary, "I hope I can make enough money out of my property and mines to enable me to retire from official life soon, for it is hell in Alaska."²⁵ Then, instead of departing Alaska when he retired from the bench in 1907—still complaining that he was poor—Wickersham began a mining law practice in Fairbanks.²⁶

Despite the occasional resurgence of old political scandals and his continuing financial stress, Wickersham became a prominent politician in Alaska. He had won the esteem of President Theodore Roosevelt, who had given him eight recess appointments²⁷ and said, "As long as I am President of the United States, Wickersham shall be judge in Alaska."²⁸ As a judge, Wickersham had made a name for himself in many villages. In 1908, he was elected Alaska's nonvoting delegate to Congress in a contest where he became the dominant polarizing force in early-twentieth-century Alaska politics.²⁹

As a congressional delegate, Wickersham helped found the Alaska Railroad and the University of Alaska. He introduced the first Alaska statehood bill in 1916. His memoir, *Old Yukon: Tails—Trails—Trials*, was published recently for the fifth

²⁴Atwood, *Frontier Politics*, 102; Circle City Fee Book, 1903, pp. 5–9, Circle City Recorder's Office record books, Alaska State Archives, B401-00126; Rampart Mining Locations, P-M, 1902–1904, pp. 306–309, Rampart Recorders Office record books, Alaska State Archives, B416-00021; Hunt, *North of 53°*, 143; Wickersham, diaries, May 29, 1904.

²⁵Wickersham, diaries, March 15, 1905.

²⁶Donald Craig Mitchell, *Sold American: The Story of Alaska Natives and Their Land, 1867–1959* (Fairbanks, AK, 2003), 198.

²⁷Atwood, *Frontier Politics*, 405.

²⁸Quoted in William R. Hunt, *Distant Justice: Policing the Alaskan Frontier* (Norman, OK, 1987), 93.

²⁹Mitchell, *Sold American*, 199; Atwood, *Frontier Politics*, 179–89.

time. Today he remains famous in Alaska. His birthday is commemorated by state statute as James Wickersham Day.³⁰

The Importance of U.S. Citizenship in Gold-Rush Alaska

Like thousands of others, Wickersham came to Alaska because of the gold rush that began in the waning years of the nineteenth century. By 1900, the population in Alaska was twice what it had been a decade before.³¹ And because this population boom coincided with both a dramatic shift in U.S. territorial policy and Congress's reiteration of its pattern of economic administration for Alaska, U.S. citizenship came to have a special meaning in gold-rush Alaska.

According to political historian Ediberto Román, "The dominant narrative concerning U.S. citizenship does not, even in passing, suggest that some citizens are favored over others."³² Yet, for much of U.S. history, many groups of U.S. citizens lacked rights to full political participation and self-determination that were enjoyed by others. For example, although most American Indians were U.S. citizens by 1905, most still largely lacked personal freedoms and the ability to vote. Conversely, a white resident of Rampart, Alaska, could vote in a municipal election in 1903 even if he was not a U.S. citizen as long as he had declared his intent to become a U.S. citizen. Of course, even Alaska residents with the capacity to vote lacked many officials to elect—Alaska voters could not elect even a nonvoting delegate to Congress until 1906, and they could not elect a territorial legislature until 1912. In sum, U.S. citizenship did not correspond neatly to control over one's own affairs or influence at the polls in gold-rush Alaska.³³

But U.S. citizenship in gold-rush Alaska did mean at least two things: (1) increased chances for the region's political de-

³⁰Senate Committee on Territories, Hearings on S. 1647, 62^d Cong., 1st sess. (May 23, 1911); Atwood, *Frontier Politics*, 272–73, 290–94; Claus-M. Naske, *A History of Alaska Statehood* (Lanham, MD, 1985), 83; Alaska Statute 44.12.030.

³¹James H. Ducker, "Gold Rushers North: A Census Study of the Yukon and Alaskan Gold Rushes, 1896–1900," in *An Alaska Anthology: Interpreting the Past*, ed. Stephen W. Haycox and Mary Childers Mangusso (Seattle, WA, 1996), 213.

³²Ediberto Román, *Citizenship and Its Exclusions: A Classical, Constitutional, and Critical Race Critique* (New York, 2010), 4.

³³Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York, 2000), 165–66; Hoxie, *A Final Promise*, 216; Order, 1903, *In re Incorporation of Town of Rampart, Alaska* (civil case file 102F); Stephen Haycox, *Alaska: An American Colony* (Seattle, WA, 2002), 218, 228–29; John G. Brady, *Report of the Governor of Alaska to the Secretary of the Interior, 1903* (Washington, DC, 1903), 8–9 (hereinafter Brady, 1903 Report).



Judge James Wickersham (standing, center) and members of the U.S. Senate Committee on Territories toured Alaska during the summer of 1903. [Courtesy of Alaska State Library, Perry Moore Photograph Collection, 1900–1903, Perry Moore, photographer, ASL-P487-57]

velopment within the U.S. empire, based on the population of U.S. citizens in the region; and (2) better security for a constellation of individual economic rights.

First, although parts of gold-rush Alaska had largely conformed to the mainstream United States in economy, politics, and society,³⁴ the region as a whole occupied a precarious position in the tiered U.S. political system. Indeed, during the gold rush, Alaska's entire political future seemed to hinge on its population of settled U.S. citizens, a situation that arose from a dramatic change in U.S. territorial policy at the turn of the century.

Congress had passed the Northwest Ordinance in 1787 to establish a republican policy allowing new territories to be incorporated into the United States after periods of colonial rule, limited home rule, and the creation of state government. These stages had broadly corresponded to the initial stages of settlement, with graduation to limited home rule after five thousand

³⁴Ted C. Hinckley, *The Americanization of Alaska, 1867–1897* (Palo Alto, CA, 1972), 218, 224–39.

male voters settled in the area, and the possibility of statehood after a territory became home to sixty thousand people. And this policy had continued for decades; in fact, one of the principal justifications for the purchase of Alaska, according to U.S. Senator Charles Sumner, had been the extension of U.S. republicanism to new lands.³⁵

But U.S. territorial policy changed dramatically during the Alaska gold rush. For nearly a century, the United States had promised U.S. citizenship to at least some residents of newly acquired lands in its cession treaties, but it included no such guarantee of citizenship in the Treaty of Paris of 1898, in which Spain ceded Guam and Puerto Rico and sold the Philippines to the United States. In abandoning these perennial promises of U.S. citizenship, the United States stopped merely questioning the readiness of residents in ceded lands to govern themselves, and instead it began asserting imperial authority based on claims that its new subjects were racially inferior. Not only would the new possessions have no constituencies, but residents there would have no rights: The U.S. Supreme Court soon held in *Downes v. Bidwell* and the rest of the *Insular Cases* that only the most basic aspects of the U.S. Constitution would limit the actions of Congress in the new imperial possessions.³⁶

Because of these developments in U.S. territorial policy, many gold-rush Alaskans wondered whether Congress would develop Alaska into a territory and state or whether the U.S. Supreme Court would declare Alaska to be "unincorporated," thereby refusing to protect constitutional rights that residents had enjoyed elsewhere within the Union and hoped to enjoy in Alaska.³⁷ In some ways, Alaska seemed a lot more like the new U.S. insular possessions than the contiguous U.S. territories. According to Alaska historian Stephen Haycox, "[Alaska] was an opportunity that the United States seized. Unlike Texas, Oregon, and California, where migration by U.S. citizens preceded U.S. sovereignty and government, U.S. citizens did not migrate to Russian America before its purchase by the United

³⁵Richard White, *"It's Your Misfortune and None of My Own": A New History of the American West* (Norman, OK, 1991), 155–56; *Speech of the Hon. Charles Sumner on the Cession of Russian America to the United States* (Washington, DC, 1867), 13.

³⁶Mark S. Weiner, *Americans Without Law: The Racial Boundaries of Citizenship* (New York, 2006), 68–75; Román, *Citizenship and Its Exclusions*, 99–102; Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* (Oxford, UK, 2009), 37–38, 72–86.

³⁷Hinckley, *Alaskan John G. Brady*, 277. Relief from that concern would not come until the Court's 1905 decision, in *Rassmussen v. United States*, that Alaska had been "incorporated" into the United States. Hinckley, *Alaskan John G. Brady*, 307.

States."³⁸ A generation later, white population expansion in Alaska still lagged behind other territories. "What about New Archangel, Russian America's old capital, long since called Sitka?" asks Alaska historian Ted Hinckley. "It still counted its white citizens in the hundreds. In 1895, Alaska's governor, 'by the most careful estimate,' computed the District's total white population to be 8,000."³⁹

On the other hand, the United States contained forty-five states in 1904, and the country was accustomed to expansion, having added seven new states in just the previous fifteen years. Census reports in 1900 had put the total Alaska population at slightly fewer than 65,000, including 30,000 mostly temporary white miners, far fewer than the "official" requirement of 60,000 permanent residents, but within striking distance of the actual populations of the few territories—Oregon, Nevada, and Wickersham's home state of Illinois—that had been admitted as states with fewer than 60,000 people.⁴⁰ In sum, the gold-rush population boom boosted Alaska's chances for political development within the Union but not enough to guarantee statehood or even incorporation as a territory.

Given Alaska's precarious position in the new U.S. empire, if Alaskans wanted limited home rule or statehood and could not draw in permanent white settlers, their only alternative was to make Alaska's existing permanent population become white. For those who, like Governor Brady, were suspicious of territorial government and sought Alaska statehood without a period of territorial governance,⁴¹ the need for U.S. citizens was even greater.

Second, in addition to potentially affecting the political development of the region, U.S. citizenship was important because, as part of Congress's overall pattern of economic administration of its western lands, U.S. citizenship helped secure a

³⁸Haycox, *Alaska*, 159.

³⁹Hinckley, *The Americanization of Alaska*, 242.

⁴⁰Brady, *1903 Report*, 14; Melinda Marie Jetté and Tim Zacharias, "The State of Oregon," in *The Uniting States: The Story of Statehood for the Fifty States*, ed. Benjamin F. Schearer (Westport, CT, 2004), 3:997; Jeffrey M. Kintop, "The State of Nevada," in *ibid.*, 2:754; Michael E. Meagher, "The State of Illinois," in *ibid.*, 1:358.

⁴¹Brady, *1903 Report*, 7.

constellation of individual economic rights.⁴² These included the right to pilot riverboats and the right to file mining claims.

In the first thirty years of U.S. rule, many Yukon riverboats were piloted by Alaska Natives and Creoles. But authorities could at any time enforce formal rules precluding noncitizens from piloting or engineering riverboats, thereby devastating the livelihood of individuals who were not U.S. citizens but who had invested substantial capital and training in their businesses. These consequences, and frustrated attempts to obtain licenses prior to investing substantial capital, occurred often enough in Alaska that they caused numerous formal protests and petitions.⁴³

Although the right to pilot riverboats was important in Alaska, prospecting represented the very essence of U.S. citizenship in the American North. Indeed, the right to mine presented perhaps the most continuously pressing issue related to U.S. citizenship in gold-rush Alaska, as the oft-told story of "The Spoilers" makes plain. In September 1898, three "lucky Swedes"—two naturalized men from Sweden and one Norwegian man who had declared his intent to naturalize—made the gold discovery that was to make Nome famous. In short order, Swedish, Norwegian, and Laplander immigrants who had lived in the area for just a few years filed claims in the surrounding areas. Later, when the gold rushers arrived, the latecomers held a miners' meeting and passed a resolution voiding all prior claims. The military shut down the miners' meeting, but claim jumpers then turned to Congress, which nearly barred aliens from filing mining claims in Alaska when it established a civil code for the region.⁴⁴

⁴²A similar pattern of development—government-sponsored construction of social space, property security, and infrastructure—can be found in connection with gold rushes throughout the history of the American West. Kent Curtis, "Producing a Gold Rush: National Ambitions and the Northern Rocky Mountains, 1853–1863," *Western Historical Quarterly* 40 (2009): 294–97.

⁴³Hunt, *North of 53°*, 261; Mitchell, *Sold American*, 143; George Washington Spicer, *The Constitutional Status and Government of Alaska* (Baltimore, MD, 1927), 42–43; Victoria Wyatt, "Ethnic Identity and Active Choice: Foundations of Indian Strength in Southeast Alaska, 1867–1912" (Ph.D. dissertation, Yale University, 1985), 402; William Duncan to Sheldon Jackson, 16 Nov. 1894, NARA-Pacific Alaska, RG 200, Sir Henry S. Wellcome Collection, box 81, 05/01/12(2), A-L file, folder 10, Jan.–Dec. 1984; William Duncan to Thomas N. Strong, 17 Nov. 1894, NARA-Pacific Alaska, RG 200, Sir Henry S. Wellcome Collection, box 97, 05/01/13(2), A-L file, folder 144, 1894 Duncan-Strong letters.

⁴⁴Campbell, *In Darkest Alaska*, 236; Wyatt, "Ethnic Identity," 395–400; William W. Morrow, "The Spoilers," *California Law Review* 4 (1916): 90–103; Claus-M. Naske, "The Shaky Beginnings of Alaska's Judicial System," *Western Legal History* 1 (1988): 198–204.

Compared to the substantial risks faced by aliens who could naturalize, though, Alaska Natives fared even worse regarding mining rights. Indeed, Governor Brady received many letters from individual Alaska Natives requesting citizenship or inquiring into the process of obtaining citizenship for the express purpose of obtaining, holding, and selling mineral land claims. Many Alaska Native leaders complained that restrictions on the rights of Alaska Natives to own mining claims were especially unfair because Alaska Natives ate the same food, wore the same clothes, and obeyed the same laws as white men. In response, Brady took these complaints to heart, and he advocated on behalf of Alaska Natives. Believing that some of the letters he received from Alaska Natives indicated that their authors could file good test cases to establish the U.S. citizenship of Alaska Natives in court, Brady turned to the judiciary by openly encouraging litigation. After all, U.S. western expansion—even in remote mining communities—had been intended to establish land-holding, self-reliant, republican-minded citizens.⁴⁵ In light of this intention, Minook, as an accomplished Creole miner, would have been an excellent candidate to test the potential paths to U.S. citizenship in Alaska.

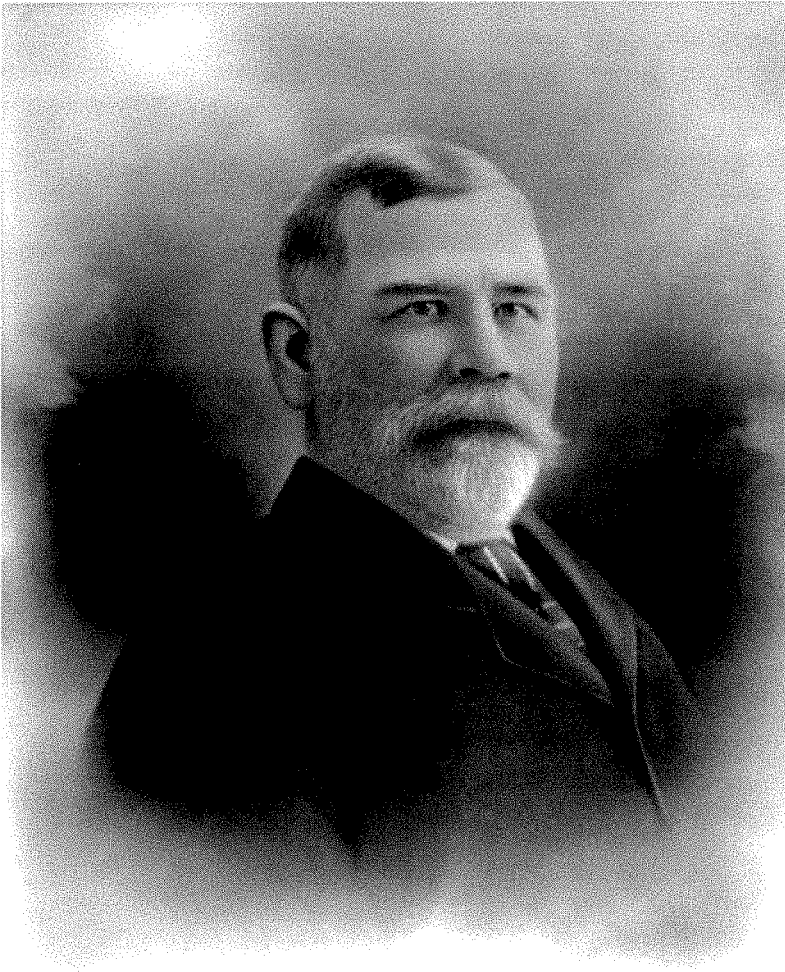
The Paths to U.S. Citizenship in Gold-Rush Alaska

Brady turned to the judiciary because, although Congress had failed to clarify the status of Alaska Natives specifically, Congress had already set a variety of standards and processes for obtaining U.S. citizenship that courts could use. In fact, there were several distinct paths to obtaining U.S. citizenship in gold-rush Alaska courts: naturalization, assimilation, and admission by treaty. Importantly, two of these paths led to U.S. citizenship for individuals, and one led to U.S. citizenship for groups.

The Naturalization of Free White Persons and Persons of African Descent

Beginning in the 1880s and continuing until World War I, millions of immigrants came to the United States. Despite le-

⁴⁵Ted C. Hinckley, *The Canoe Rocks: Alaska's Tlingit and the Euramerican Frontier, 1800–1912* (Lanham, MD, 1996), 343; Mitchell, *Sold American*, 222; John G. Brady, "Peculiar Problems in Alaska," *The Assembly Herald* 2 (1900): 617; Hinckley, *Alaskan John G. Brady*, 276–78; Brady, *1903 Report*, 8–9; Wyatt, "Ethnic Identity," 405–406; Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 2006), 124–33; Claudia Karin Hess, "A Modern View of the General Mining Law of 1872," in *Law in the Western United States*, ed. Gordon Morris Bakken (Norman, OK, 2000), 212.



John G. Brady, territorial governor of Alaska from 1897 to 1906, advocated on behalf of Alaska Natives who complained about restrictions on their rights to own mining claims. (Alaska State Library, Alaska State Library Portrait File, ASL-P01-2814)

gal and social discrimination, more than half a million Chinese and Japanese immigrants arrived in the United States. In the American West, Mexican and Canadian citizens immigrated to lands that their home countries formerly possessed. But U.S.

citizenship through naturalization was available only to "free white persons" or "persons of African descent."⁴⁶

The variety of new immigrants raised questions concerning the legal definition of *white* for naturalization purposes, and the number of new immigrants raised the stakes over the answers to those questions. The process of defining *white* quickly became a political struggle. Many powerful nativist groups sought to dramatically restrict resident alien voting and the groups that could qualify as white for purposes of naturalization. To others, petitions for naturalization by Chinese and Filipino immigrants in some sense made Celtic, Slavic, and Mediterranean petitioners seem more white by contrast.⁴⁷

Despite the practical and legal difficulties of determining who could and could not naturalize under the nebulous standards, Congress did not standardize naturalization procedures until 1906. This left turn-of-the-century Alaska judges, like those in the rest of the country, to determine the citizenship of individuals on an ad hoc basis. And because district court judges could reverse themselves or hold differently from other district court judges, this system was necessarily unpredictable. Moreover, the continued ambiguity of whiteness allowed judges to restrict the expansion of U.S. citizenship to those individuals who most reflected the image that they personally preferred.⁴⁸

John Minook petitioned for naturalization in the midst of this racist republicanism, necessarily claiming to be a white man. This was not an easy claim to prove. Although Wickersham would have had a great deal of discretion in determining Minook's race, it appears unlikely that Minook could have prevailed in arguing he was "white for purposes of naturalization, because his mother was Alaska Native." In a published 1880 case, a Canadian immigrant of "half white and half Indian blood" had been precluded from naturalization on account of race. And Judge M.C. Brown had recently ruled that American Indians

⁴⁶Matthew Frye Jacobson, *Barbarian Virtues: The United States Encounters Foreign Peoples at Home and Abroad, 1876–1917* (New York, 2000), 63–64; *Act of March 26, 1790*, 1 Stat. 103; *Act of July 14, 1870*, 16 Stat. 254.

⁴⁷Jacobson, *Barbarian Virtues*, 193–219; Keyssar, *The Right to Vote*, 136–39; Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge, MA, 1999), 225–26.

⁴⁸J. Allen Douglas, "The 'Priceless Possession' of Citizenship: Race, Nation and Naturalization in American Law, 1880–1930," *Duquesne Law Review* 43 (2005): 389; Wyatt, "Ethnic Identity," 391; Jacobson, *Whiteness*, 32; Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ, 2005), 5.

arriving from Canada were not considered white for purposes of naturalization.⁴⁹ But perhaps most importantly, Minook's petition for naturalization was unlikely to succeed because Congress had enacted specific provisions in 1887—completely apart from naturalization—outlining the requirements for American Indians to secure U.S. citizenship. In short, they had to become white.

The Assimilation of American Indians and Alaska Natives

Although groups of American Indians secured U.S. citizenship through a variety of Indian treaties and statutes before the end of World War I, the core U.S. Indian policy of the late nineteenth century granted U.S. citizenship to individual American Indians based on their assimilation to a white Protestant cultural model. Under the Dawes Act, individual American Indians who severed their tribal ties and adopted white lifestyles could obtain U.S. citizenship and parcels of previously tribal lands, leaving the remainder of those lands available for sale to fund federal American Indian schools.⁵⁰

It was unclear during the gold rush whether the Dawes Act actually applied to Alaska.⁵¹ In fact, ethnologists and bureaucrats could not even agree about whether Alaska Natives were American Indians, calling them "races of questionable ethnical type."⁵² Yet U.S. Alaska Native policy similarly attempted to link assimilation and U.S. citizenship in the late nineteenth century. In the year the Dawes Act became law, U.S. Commissioner of Education N.H.R. Dawson visited Alaska, and he recommended educating Alaska Natives to allow them to become U.S. citizens. In line with prevailing attitudes concerning assimilation, many late-nineteenth-century schools in Alaska included mock trials, legislative hearings, and elections to teach Alaska Native students about U.S. politics. And many

⁴⁹*In re Minook*, 2 Alaska at 200; *In re Frank Camille*, 6 F. 256 (Or. Ct. 1880); *In re Burton*, 1 Alaska 111, 112 (D.Alaska 1900).

⁵⁰Brian R. Dippie, *The Vanishing Indian: White Attitudes & U.S. Indian Policy* (Lawrence, KS, 1982), 193; *Act of Aug. 9*, ch. 818, 25 Stat. 392 (1888); Keyssar, *The Right to Vote*, 60, 164–65; Hoxie, *A Final Promise*, 1–39; Steven J. Diner, *A Very Different Age: Americans of the Progressive Era* (New York, 1998), 116.

⁵¹Compare *In re Minook*, 2 Alaska at 220–23 with *In re Incorporation of Haines Mission*, 3 Alaska 588, 594–95 (D.Alaska 1908). In light of this ambiguity, Congress passed the Alaska Native Allotment Act in 1906 with the intent of acculturating Alaska Natives. Haycox, *Alaska*, 217–18; Hinckley, *The Canoe Rocks*, 339.

⁵²Stephen Haycox, "'Races of a Questionable Ethnical Type': Origins of the Jurisdiction of the U.S. Bureau of Education in Alaska, 1867–1885," *Pacific Northwest Quarterly* 75 (1984): 160–61.

teachers suppressed the speaking or writing of either Russian or Alaska Native languages.⁵³

Although diplomas from these schools did not come with a certificate of U.S. citizenship, the perceived successes of places like the Sitka Industrial and Training School, founded by Governor Brady when he had been a young missionary, changed the rhetoric used by many white and Alaska Native leaders to argue for more expansive rights for Alaska Natives. In 1904, even President Roosevelt began calling on Congress to define the requirements of citizenship for Alaska Natives who had assimilated. That same year, Lt. George T. Emmons researched conditions among Alaska Natives in southeast Alaska, later concluding that many Alaska Natives were already acculturated to U.S. ways but retained a murky political and legal status and that there was no reasonable basis to prevent educated Alaska Natives without tribal affiliation from becoming U.S. citizens. The government, he argued, could use U.S. citizenship as a carrot to induce "self-improvement" by Alaska Natives.⁵⁴

In light of the ambiguous status of Alaska Natives under U.S. Indian policy, Alaska courts applied informal legal tests during the gold rush to determine whether individual Alaska Natives qualified to be U.S. citizens. Different judges used different criteria to draw their conclusions about citizenship. Like naturalization processes, assimilation processes were a mess. So much so that when Minook petitioned for citizenship, he did not even request to become a citizen based on U.S. Indian policy. Instead, it was Abraham Spring, a friend of the court, who argued that Minook had fulfilled the qualifications for U.S. citizenship under the Dawes Act.⁵⁵ But Spring did not limit himself to this argument; rather, he favored another, much more far-reaching argument even more.

⁵³Hinckley, *Alaskan John G. Brady*, 236–62; Wyatt, "Ethnic Identity," 390–94; Richard L. Dauenhauer, "Two Missions to Alaska," in *An Alaska Anthology: Interpreting the Past*, ed. Stephen W. Haycox and Mary Childers Mangusso (Seattle, WA, 1996), 83–87.

⁵⁴Ted C. Hinckley, "We are more truly heathen than the natives': John G. Brady and the Assimilation of Alaska's Tlingit Indians," *Western Historical Quarterly* 11 (1980): 42–44; Theodore Roosevelt, "Fourth Annual Message to Congress," Washington, DC, Dec. 6, 1904; Hinckley, *The Canoe Rocks*, 347.

⁵⁵Stephen Haycox, *The Law of the Land: A History of the Office of the Attorney General and the Department of Law in Alaska* (Juneau, AK, 1998), 5; *In re Burton*, 1 Alaska 111 (D.Alaska 1900); M.C. Brown to William Duncan, 7 Nov. 1902, NARA-Pacific Alaska, RG 200, Sir Henry S. Wellcome Collection, box 97, 05/01/13(2), A-L file, folder 156, Aug.–Dec. Duncan-Strong letters 1900; *In re Minook*, 2 Alaska at 200–202.

The Admission of Inhabitants

While naturalization and assimilation proceedings can grant citizenship to individuals one by one, treaties and statutes can grant U.S. citizenship to entire populations. For example, the Louisiana Purchase Treaty guaranteed U.S. citizenship to the inhabitants of the newly acquired region. Similarly, in a treaty negotiated swiftly in March 1867 by Secretary Seward and Russian diplomat Eduard de Stoeckl,⁵⁶ the United States promised citizenship to certain inhabitants of Alaska if the U.S. purchased Russian America. The pertinent provision read,

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.⁵⁷

But just as swiftly as the parties had negotiated these terms, they grew confused by them. In a short, undated memorandum presented to the president's cabinet before ratification of the treaty, Seward described citizenship under the proposed treaty: "The White population remaining to be citizens [of the] U.S. The Indians to be on the footing of Indians domiciled in U.S."⁵⁸ Stoeckl, too, seemed to break down the population of Alaska into two groups, but, for him, they were Russians and Indian tribes. In the ratification debates, U.S. Senator Charles Sumner broke down the population into yet another arrangement consisting of three groups: Russians, Creoles, and aborigines, dividing the last group into two subgroups depending on their substantive contact with Russians.⁵⁹ In sum, the treaty clearly guaranteed U.S. citizenship to some residents, but even before the treaty was ratified, disagreement arose about which ones.

⁵⁶Treaty Between the United States of America and the French Republic, Art. 3, April 30, 1803, 8 Stat. 200, 202; Walter Stahr, *Seward: Lincoln's Indispensable Man* (New York, 2012), 482–87.

⁵⁷Treaty of Cession, Art. 3, March 30, 1867, 15 Stat. 539.

⁵⁸Quoted in David Hunter Miller, *The Alaska Treaty* (Kingston, ON, 1981), 71.

⁵⁹*Ibid.*, 206–207.

In the summer of 1867, after the treaty was signed but before the exchange of the treaty ratifications, one thousand people from the United States landed in Sitka, Alaska, in hope of a regional economic boom.⁶⁰ A few months later, General Lovell H. Rousseau described the local reaction to the formal transfer of power from Russia to the United States on October 18:

The people of Sitka, seemed to be quiet, orderly and law abiding. Of the Russians proper, there were about 500 on the Island. If kindly treated by our people, most of those will remain as citizens of the United States. Many of them had already made their election to remain under the stipulations of the treaty by which the territory was ceded to our government, generally they were satisfied with the transfer of the territory as were also most of the Indians.⁶¹

Despite Rousseau's rosy predictions, Russian ships carried away almost all of the Russian residents of Alaska over the course of the next year. By 1869, most of the boomers, too, had left, leaving Alaska with a population made up almost entirely of Alaska Natives and Creoles.⁶²

Creoles had varied experiences based on their education, work, family life, and community, making it difficult to generalize about them, but they tended to speak Russian, wear Russian clothing, and have a daily life more similar to that of Russians than Alaska Natives. Many were literate in both Russian and Unangan, the Aleut language. As a Russian-influenced population that had largely worked for the Russian America Company (RAC), the Creoles had always been an important component of Russian colonial power. The RAC magnified that importance by educating many Creole children in schools in Alaska and St. Petersburg to make them into trained workers destined to replace Russians in the colony. By the early 1860s, Creoles had nearly as much social mobility as those born in the Old World. Although they were precluded from reaching the highest levels in government, education, navigation, and religion, by the time the United States purchased Russian America, Creole teachers, priests, doctors, artists, authors,

⁶⁰John S. Whitehead, *Completing the Union: Alaska, Hawai'i, and the Battle for Statehood* (Albuquerque, NM, 2004), 34.

⁶¹Quoted in Miller, *The Alaska Treaty*, 136.

⁶²*Ibid.*, 207; Whitehead, *Completing the Union*, 34.

miners, bureaucrats, cartographers, and navigators had become the main Russian colonizing force in Alaska.⁶³

But although Russia heavily influenced and relied on Creoles, Creoles experienced the transfer of Alaska to the United States differently from those who had come from the Old World. The Creoles, having lived in Alaska for most if not all of their lives and considering Russia as a foreign land, largely remained in Alaska after the transfer. Many worked with the Alaska Commercial Company or other fur-trading enterprises, and many hoped to be identified as white under the new imperial regime. In this effort, they had only some success. When Captain L.A. Beardslee conducted his census of Sitka in 1880, he listed the names and occupations of all those who were U.S. citizens by birth or naturalization, counting Creoles anonymously among the "citizens by treaty." Remarkably, Beardslee did so despite the fact that these "citizens by treaty" constituted the majority of U.S. citizens in Sitka—there were 229 "citizens by treaty," compared to 92 "citizens by birth" and 123 "citizens by naturalization."⁶⁴

Majority though it was, the number of citizens by treaty in Beardslee's account may have included all individuals he thought eligible for citizenship under the treaty in part because federal authorities did not know who was covered by the treaty's guarantees, and the process by which residents would become citizens was not clear. A general military order given by Major General Jefferson C. Davis had announced the enforcement of U.S. laws and directed individuals desiring U.S. citizenship to register at the district's adjutant general's office, but only one hundred or so individuals had signed up, and most

⁶³Ilya Vinkovetsky, *Russian America: An Overseas Colony of a Continental Empire, 1804–1867* (Oxford, UK, 2011), 147; Oleksa, *Orthodox Alaska*, 150; Svetlana G. Fedorova, *The Russian Population in Alaska and California, Late 18th Century–1867*, trans. and ed. Richard A. Pierce and Alton S. Donnelly (Kingston, ON, 1973), 206–209; Andrei Grinev, "'Advanced in Age, Decrepit and Unfit': Colonial Citizens and the Formation of a Permanent Russian Population in Alaska," *Alaska History* 24, trans. Richard Bland (2009): 49; Claus-M. Naske and Herman E. Slotnick, *Alaska: A History of the 49th State*, 2^d ed. (Norman, OK, 1987), 51–54; Miller, *Kodiak Kreol*, 109–18, 127–39; Grinev, "Social Mobility," 23–28; Michael J. Oleksa, "The Creoles and Their Contributions to the Development of Alaska," in *Russian America: The Forgotten Frontier*, ed. Barbara Sweetland Smith and Redmond J. Barnett (Tacoma, WA, 1990), 185–95.

⁶⁴Richard A. Pierce, "Sitka After the Transfer: The Plight of the Creoles," in *Communities in Transition: Papers Given at the 29th Alaska Historical Society Conference, Sitka, Alaska, October 19–21, 1997* (Anchorage, AK, 1997); Miller, *Kodiak Kreol*, 146; L.A. Beardslee, *Reports of Captain L.A. Beardslee, U.S. Navy, Relative to Affairs in Alaska, and the Operations of the U.S.S. Jamestown under His Command, While in the Waters of That Territory*, 47th Cong., 1st sess., 1882, Ex. Doc. 71, 16–17, 34–37.

of them left shortly thereafter. More than a decade later, Beardslee clearly recognized Creoles as "citizens by treaty" in 1880. A.B. Upshaw, commissioner of Indian affairs, informed Alaska Governor Alfred Swineford in 1886 that the Alaska Purchase Treaty admitted some Alaska Natives as U.S. citizens. But the way quickly became lost, and, in 1891, Governor Lyman Knapp asked Congress to define the political and legal status of Alaska Native populations. From then through the 1890s, the U.S. citizenship of these longtime Alaska residents continued to be disputed.⁶⁵

The meaning of the promises of the purchase treaty regarding the U.S. citizenship of Alaska Natives and Creoles had been profoundly unsettled for decades before Minook petitioned for citizenship. Yet, despite the relatively well-worn paths to citizenship through naturalization or assimilation, Abraham Spring argued in an amicus brief that the United States had already promised Minook U.S. citizenship because he was not a member of an "uncivilized native tribe."⁶⁶ This was a great risk because Spring's argument demanded U.S. citizenship for Minook based on his membership in a category, rather than his individual "whiteness," dramatically raising the stakes over Minook's petition for thousands of other inhabitants of Alaska. But just as Minook's petition offered a great risk, it also offered a great opportunity.

IDENTIFYING JOHN MINOOK

John Minook's Prospects

John Minook's obituary, published in the *Anchorage Daily Times* on April 30, 1930, contained no mention of his turn-of-the-century petition for naturalization. But even the short announcement by the Associated Press, "Aged Russian Miner Passes," suggests he was honored throughout his life and counted many friends. Many men were wealthy because of the eponymous Minook: by the year he died, several individual claims on creeks named in his honor had already produced

⁶⁵Valerie Stubbs, "The U.S. Army in Alaska: 1867-77: An Experiment in Military Government" (M.A. thesis, American University, 1956), 77; B.D. Lain, "The Decline of Russian America's Colonial Society," *Western Historical Quarterly* 7 (1976): 148-49; Beardslee, *Reports*, 13; Hinckley, *The Canoe Rocks*, 341-42.

⁶⁶*In re Minook*, 2 Alaska at 202.

more than \$1,000,000 in gold.⁶⁷ According to the *Times*, "All the whites and natives in the vicinity attended the funeral."⁶⁸

Long before the gold rush and the purchase of Alaska, Minook's father, Ivan Pavlof, Sr., was born in Sitka and became a manager for the RAC and a trader prominent enough that a bay was named after him. To some, Pavlof was a Creole; to others, a Russian. Minook's mother, Malanka, was an Alaska Native, born and raised in Nulato. She had nine children with Pavlof, several of whom survived to adulthood and became important in the Yukon gold mining community, including Minook's brother, Pitka Pavlof.⁶⁹ Malanka gave birth to Minook at St. Michael sometime in the 1840s or 1850s.⁷⁰

Like many Alaskans of the era, Minook used multiple names in the course of his life. Minook may have been born "Ivan Pavlof, Jr.," and he may have used "Ivan Pavlof" or "John Minook," depending on the circumstances. As a boy, Minook dealt with Russians, a variety of Alaska Native peoples, and "Bostonian" whalers; as a working adult, he saw the gold rush and canneries draw in people from all over the world. At Old Station, Minook met Yawhodelno, the daughter of Chief Manacowallea. They married and had many children together. When Minook completed a census form in 1900, he identified his children—like himself—as "mixed color."⁷¹

In Alaska, long-time residents generally did little prospecting or mining during the gold rush. But Minook and his family were an exception. He and his children prospected together and made several gold discoveries in interior Alaska, even though it was risky for them to do so. In 1893, Minook's brother Pitka

⁶⁷"Aged Russian Miner Passes," *Anchorage Daily Times*, April 30, 1930; David J. Szumigala, Garth E. Graham, and Jennifer E. Athey, Alaska Resource data file, Tanana Quadrangle, Alaska, USGS Open File Report 2004-1386 [2004]: 142.

⁶⁸"Aged Russian Miner Passes."

⁶⁹*Ibid.*; Erinia Pavaloff Cherosky Callahan, "A Yukon Autobiography," *Alaska Journal* 5 (1975): 127–28; Phyllis Downing Carlson and Laurel Downing Bill, *Aunt Phil's Trunk: An Alaska Historian's Collection of Treasured Tales* (Anchorage, AK, 2006), 1:300; Mitchell, *Sold American*, 141–42.

⁷⁰Dates of Minook's birth vary widely. His obituary indicates that he was born in 1844 or 1845. "Aged Russian Miner Passes." Court testimony indicates he was born in 1849. *In re Minook*, 2 Alaska at 200. The 1900 and 1910 censuses indicate that he was born in September 1858 and September 1850, respectively. Year: 1900; Census Place: Rampart, Northern Supervisors District, Alaska; Roll: T623_1829; Page: 6B; Enumeration District: 8; Year: 1910; Census Place: Fort Gibbon, Division 2, Alaska Territory; Roll: T624_1749; Page: 19B; Enumeration District: 0007; Image: 756; FHL Number: 1375762.

⁷¹Callahan, "A Yukon Autobiography," 127–28; Year: 1900; Census Place: Rampart, Northern Supervisors District, Alaska; Roll: T623_1829; Page: 6B; Enumeration District: 8.

and his brother-in-law Sergei Cherosky made a major gold strike on Birch Creek, near Circle, but white miners did not respect their claims and forced them out. That same year, Minook made the first of several discoveries in the Rampart district. At the creek that was to bear his name, Minook cut a drain, whipsawed sluice boxes, and shoveled gravel for a week before a freshet tore apart his work; the one box he was able to save and process turned out to contain \$150 in gold.⁷²

In stark contrast to how white miners treated his brother in Circle, white organizers of the Rampart mining district recognized Minook's mining claims. Article II, section 1 of the Bylaws of the Rampart Mining District, written on April 20, 1896, read simply, "No Indian with the exception of John Manook shall hold or represent ground in this district."⁷³ When USGS geologist Joshua Spurr ran across Minook in Rampart, Minook had a crew of men working a claim.⁷⁴ Spurr described Minook as "a good-natured fellow with a fair knowledge of English, which he was proud to air, especially the cuss words, which he introduced into the conversation gravely and irrelevantly."⁷⁵ In August 1896, Minook took \$3,000 in gold from a hole only eight feet wide and fifteen feet deep, and Rampart boomed with the news, ballooning to three times the size of Sitka by the next year.⁷⁶ According to gold rush historian Pierre Berton, "Were it not for the Klondike, Minook would himself have caused a stampede from the United States."⁷⁷

In addition to prospecting, Minook obtained town site lots in Rampart when it was incorporated and continued to buy and sell lots in 1897. He ran a business selling goods to white miners. Minook also performed jobs forbidden to Alaska Natives

⁷²Hunt, *North of 53°*, 261; Rosalie E. L'Ecuyer, U.S. Dept. of the Interior, Bureau of Land Management, *Prospecting and Mining Activity in the Rampart, Manley Hot Springs and Fort Gibbon Mining Districts of Alaska, 1894 to the Present Era*, Open File Report 61, Feb. 1997, 5; Mitchell, *Sold American*, 141–42; Callahan, "A Yukon Autobiography," 128; L'Ecuyer, *Prospecting and Mining Activity*, 5; "The Story of Minook Creek," *Rampart Whirlpool*, January 15, 1899.

⁷³Bylaws of the Rampart Mining District, Little Minook Creek and Hunter Creek, By-Laws, 1896–1898, Minook Creek Records Office record books, Alaska State Archives, B416-00062.

⁷⁴Thomas K. Bundtzen, "Ivan John Minook," Alaska Mining Hall of Fame, <http://alaskamininghalloffame.org/inductees/minook.php>.

⁷⁵Quoted in *ibid*.

⁷⁶Pierre Berton, *The Klondike Fever: The Life and Death of the Last Great Gold Rush* (New York, 1958), 207; Carlson and Bill, *Aunt Phil's Trunk*, 1:310; Ducker, "Gold Rushers North," 208.

⁷⁷Berton, *The Klondike Fever*, 207.

in other places, such as piloting riverboats on which he ferried white miners into interior Alaska mining districts. Although it is possible Minook commanded the respect of white miners by asserting his ability to call on his wife's tribe for security, it seems Minook very probably earned respect by maintaining an excellent reputation among his friends and neighbors. He, his wife, and his daughter continued to file mining claims in the early twentieth century, and he continued to prospect with several groups of miners. In 1907, years after his brother lost his claims in Circle, Minook filed claims in Rampart on his brother's behalf, indirectly securing what his brother had not been able to secure directly.⁷⁸

Of course, given the racism of the era, Minook had his share of detractors—some miners considered him an American Indian chief who “thinks he is something like George Washington.”⁷⁹ When voters in Rampart considered whether to incorporate, Minook's leadership may have become a poison pill. A suggestion by a prominent miner that Minook should sit on any city council created after incorporation caused the already controversial idea to be postponed.⁸⁰

Although he had been born and raised in Russian America and had never left home, the ground beneath Minook's feet had become part of the new Pacific empire of the United States. On August 25, 1900, Minook declared his intention to become a U.S. citizen, very likely because he believed he stood a better chance of having his mining claims respected as a Russian alien than as a Creole.⁸¹ It was far from the most important contribution Minook would make to Alaska history, but the fact that he had already contributed so much made his petition all the more important.

The Flexibility of Juridical Racialism

Minook's petition presented Wickersham with an open question because juridical racialism—a rhetoric of social conventions,

⁷⁸Minook Creek (record of town lots), Minook Creek Recorders Office record books, Alaska State Archives, B416-0068; Wickersham, *Old Yukon*, 47–48; “Aged Russian Miner Passes”; Spicer, *The Constitutional Status*, 42–43; Callahan, “A Yukon Autobiography,” 127; L'Ecuyer, *Prospecting and Mining Activity*, 21, 78; Rampart Mining Locations, P-M, 1902–1904, Rampart Recorders Office record books, Alaska State Archives, B416-00021; Notice of Location, Rampart Recorders Office record books, Alaska State Archives, B416-00022.

⁷⁹“Alaska Gold Fields,” *Arizona Silver Belt*, July 13, 1899.

⁸⁰L'Ecuyer, *Prospecting and Mining Activity*, 57.

⁸¹*Ibid.*, 60.

pseudo-science, and perceived economic necessities—offered a stable of readily acceptable rationalizations for rulings concerning race and citizenship. This was particularly true in the American West. According to Western historian Patricia Nelson Limerick, “The diversity of the West put a strain on the simpler varieties of racism. In another setting, categories dividing humanity into superior white and inferior black were comparatively easy to steer by. The West, however, raised questions for which racists had no set answers.”⁸² There the boundaries of race were based on local conditions, often using cultural fictions created by earlier European colonists to deal with both territorial minorities and immigrants, and often turning on the perceived economic needs of those in power.⁸³

The Social Fiction of Race

Today, it is clear that *race* is a social fiction. But even over a hundred years ago, it was widely understood to be a social fiction.⁸⁴ Voters defined races through their legislatures; juries and judges defined individuals’ races through verdicts and rulings; courts recognized *race* as a social fiction in their evidentiary rules; and the federal government ratified treaties that differentiated groups of people based on both domestic and foreign understandings of them.

After the Civil War, many states throughout the nation defined specific races in their statutes governing everything from marriage to property laws to civil procedure. Different states created different definitions, meaning that the same person could be black, white, American Indian, all of the above, or none of the above, depending on which state he happened to be in.⁸⁵ For example, Oregon law, made applicable in Alaska by Congress in 1884, adopted a “one-fourth” rule defining race for purposes of marriage but barred the sale of firearms and alcoholic beverages to “any Indian or half-breed who lives and associates with Indians.”⁸⁶ Alaska’s 1900 Civil Code contained

⁸²Limerick, *The Legacy of Conquest*, 260.

⁸³Richard White, “Race Relations in the American West,” *American Quarterly* 38 (1986): 397; Weiner, *Americans Without Law*, 1–4.

⁸⁴Daniel J. Sharfstein, “The Secret History of Race in the United States,” *Yale Law Journal* 112 (2003): 1473–1509.

⁸⁵Ian F. Haney López, *White by Law: The Legal Construction of Race* (New York, 1996), 118–19.

⁸⁶*Act of May 17, 1884*, 15 Stat. 240; William Hill, comp. & annot., *The Codes and General Laws of Oregon*, 2^d ed. (1892), 1:958, 967–68 [listing Or. Law §§1891, 1927–28].

no anti-miscegenation provisions but kept Oregon's racial ban on sales of firearms and alcoholic beverages.⁸⁷

In Alaska courts, as in courts in the rest of the country, the determination of race was a question for the fact finder. Sometimes juries made these decisions by visual inspection of physical aspects such as foot shape, eye color, skin color, or hair color and shape. But, overall, juries and judges determined race using social convention—how subjects “performed whiteness”—rather than any objective traits. For example, school officials expelled two young girls from a racially segregated Sitka school in 1906.⁸⁸ The court that dealt with the resulting lawsuit weighed every aspect of their lives: “The use of butter rather than seal oil was measured against the use of Tlingit language; dinner at the governor’s house was weighed against attendance at a potlatch.”⁸⁹ Tellingly, reputation evidence was admissible in cases involving racial determination.⁹⁰

But the importance of social convention was not limited to the perspectives of individuals’ friends and neighbors. Rather, the opinions of nation-states could also affect determinations of race and citizenship. For example, the Treaty of Guadalupe-Hidalgo guaranteed U.S. citizenship to Mexican citizens who remained in the region ceded to the United States by Mexico in 1848. When the United States later sought to establish the wardship of the Pueblo Indians who lived in the region, federal courts recognized the U.S. citizenship of Pueblo Indians because Mexico had granted them Mexican citizenship before the war.⁹¹ In essence, Mexican legal norms determined who was later to be a U.S. citizen.⁹²

The Alaska Purchase Treaty made a similar promise of U.S. citizenship but differentiated between “inhabitants” and “un-

⁸⁷*Alaska Civil Code*, 31 Stat. 321 (1900).

⁸⁸U.S. Attorney to Governor J.F.A. Strong, 28 May 1913 (brief no. 91); Ariela J. Gross, “Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South,” *Yale Law Journal* 108 (1998): 117, 139, 156–76; López, *White by Law*, 6; Raibmon, *Authentic Indians*, 135–36.

⁸⁹Raibmon, *Authentic Indians*, 182.

⁹⁰Gross, “Litigating Whiteness,” 146.

⁹¹Laura E. Gómez, “Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico,” *Chicano-Latino Law Review* 25 (2005): 23–26, 35 (discussing *United States of America v. Jose Juan Lucero*, 1 N.M. 422 [N.M.Terr. 1869]).

⁹²At least, that appeared to be the case until after New Mexico became a state in 1912, when the U.S. Supreme Court reversed course and held that Pueblo Indians could be subjected to federal guardianship. Christine A. Klein, “Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo,” *New Mexico Law Review* 26 (1996): 201, 214.

civilized native tribes." Seward had privately distinguished the two populations in Alaska as "white" and "Indian." And Sumner had distinguished not two but three main population categories in the ratification debates—"Russians," "Creoles," and "aborigines."⁹³ But Russia's understanding of the treaty was different. According to diplomat and historian David Miller,

It is evident that by "uncivilized" tribes are understood the "unsettled" or "independent" tribes of the [Third Charter of the RAC]. The Russian translation of the treaty used instead of "uncivilized" the term "wild native tribes", the French version "tribus sauvages". In other words, the Russian Government secured protection only for that part of the Alaskan population which was protected by the Russian laws.⁹⁴

Just as the United States was bound to enforce Mexican legal norms in the Treaty of Guadalupe-Hidalgo, it was in some sense bound by the terms of the Alaska Purchase Treaty to enforce Russian legal norms.

These Russian legal norms were quite different from prevailing U.S. social conventions. In Russia, the legal status of Creoles had been described by the second and third governing charters of the RAC, which were included in the official *Code of Laws of the Russian Empire*. Under the charters, Creoles constituted a class category, not a race category. Achievement and social position counted for a great deal, and many Alaska Natives were categorized as Creoles. The second charter of the RAC, authorized in 1821, defined Creoles as "Russian subjects" but exempted them from taxation. The third charter of the RAC, authorized in 1844, and Russian law in effect at the time of the U.S. purchase of Russian America recognized several distinct social categories in Russian America: contract employees, colonial citizens, Creoles, settled tribes, and independent and not wholly dependent tribes. Under the third charter, all Russians, Creoles, and members of settled

⁹³Treaty of Cession, art. 3, March 30, 1867, 15 Stat. 539; Miller, *The Alaska Treaty*, 71, 207.

⁹⁴Miller, *The Alaska Treaty*, 211. Other scholars reach different conclusions about the distinction. For example, David Case and David Voluck contend that the treaty did not create any new standards for determining the U.S. citizenship of Alaskans; rather, relying strongly on Seward's undated memorandum to the cabinet, they argue that the treaty used *uncivilized* to describe those Alaska Natives who were not already citizens and who did not meet the then-prevailing criteria for citizenship by assimilation. David S. Case and David A. Voluck, *Alaska Natives and American Laws*, 2^d ed. (Fairbanks, AK, 2002), 47.

tribes were "Russian subjects" and enjoyed the full protection of Russian law. In 1865, the instructions for drafting the fourth charter included establishing Creoles as colonial citizens.⁹⁵ These proposals, however, were never ratified because Russia sold Russian America in 1867. In short, Russian conventions treated Creoles differently over time, and never in a way that directly translated into the race-based classification systems of the American West, leaving open the legal status of Creoles in the United States.

Ethnological Indeterminacy

When political and legal authorities in the turn-of-the-century United States addressed the status of an unfamiliar people, they often enlisted accounts of wildly varying quality from the emerging field of ethnology. Acting as smoke screens for racial decisions in the diversity of the American West, the accounts of amateur and professional ethnologists and ethnographers offered further flexibility to judges like Wickersham.⁹⁶ Indeed, debates over the classification of specific groups, or debates over classification systems themselves provided ready rationalizations for a variety of racial conclusions.

By 1903, Wickersham was familiar with the basics of the emerging field of ethnology. As a lawyer and probate judge, Wickersham had written about American Indian tribes in the Pacific Northwest. He could equally call American Indian tribes "Mongolian" or "white" depending on his personal interests. In Alaska, Wickersham had continued to gather ethnographic information. And he found a ready audience in Alaska, where teachers and missionaries organized the Alaskan Society of Natural History and Ethnology, which published materials, held meetings for amateur and professional ethnologists, and maintained a collection of Alaska Native artifacts.⁹⁷

At the society, as across the United States, debates raged over racial classifications, including the "proper" classification of Alaska Native populations. Such disputes were often grounded in fundamental disagreements about conceptions of

⁹⁵Oleksa, "The Creoles," 185, 188; Vinkovetsky, *Russian America*, 145; Black, *Russians in Alaska*, 215–17; Vladimir Gsovski, *Russian Administration of Alaska and the Status of the Alaskan Natives*, 81st Cong., 2^d sess., 1950, S. Doc. 152, 11–17, 27.

⁹⁶Hoxie, *A Final Promise*, 17–19; Weiner, *Americans Without Law*, 30–37; Limerick, *The Legacy of Conquest*, 261–62.

⁹⁷Raibmon, *Authentic Indians*, 130–33; Castile, "The Indian Connection," 125–29; Hunt, *North of 53°*, 143, 264; Hinckley, *The Americanization of Alaska*, 229.

race. Some figures in the field argued that humans could be grouped based on phenotypic data; that these data reflected moral, dispositional, or mental capacities; that these capacities were heritable and unchangeable; and that these groups could be organized preferentially. Others, like Lewis Henry Morgan and Major John Wesley Powell, believed that human populations moved along a single axis of development largely defined by the population's conception of property. These figures believed that, because the environment or luck explained contemporary differences between groups, groups could be encouraged to develop into another stage or could fall back into a less-developed stage.⁹⁸

In this debate, William H. Dall, the "dean of Alaska studies," believed that outside forces could propel the development of populations. Shortly after the purchase of Alaska, Dall had documented Creoles as a distinct social class and commented on their acceptance and leadership within the RAC.⁹⁹ Based on his perceptions, Dall had written in 1870 that, however politically accepted Creoles had been in Russia, "[i]n their present condition the Creoles are unfit to exercise franchise, as American citizens."¹⁰⁰ By 1896, though, Dall had begun speaking about rapid change in language and technology as many Alaska Natives adopted aspects of U.S. culture to replace aspects of Russian and Alaska Native culture. In 1898, Dall cheered the work of missionary teachers such as Reverend William Duncan, who worked to convert the Metlakatlangs to a white lifestyle.¹⁰¹

Dall's developmentalist views at the turn of the century were philosophically in line with those of Governor Brady, but Brady differed from Dall in that he believed Alaska Natives and Creoles were already prepared for citizenship. In fact, as early as 1878 Brady had asserted that all Alaska Natives ought to be citizens on account of their cultural "enlightenment." Twenty years later, Brady continued to espouse the idea that Congress

⁹⁸Jacobson, *Whiteness*, 32; Hoxie, *A Final Promise*, 17–25. Weiner, *Americans Without Law*, 30–37; Dippie, *The Vanishing Indian*, 164–71.

⁹⁹Morgan B. Sherwood, *Exploration of Alaska, 1865–1900* (Fairbanks, AK, 1992), 36–56; William H. Dall, "Alaska As It Was and Is, 1865–1895," pt. 1, *Science* 3 (Jan. 10, 1896): 40.

¹⁰⁰Quoted in Black, *Russians in Alaska*, 218.

¹⁰¹Dall, "Alaska As It Was and Is, 1865–1895," pt. 2, *Science* 3 (Jan. 17, 1896): 87–93; Dall, "The Metlakatla Mission in Danger," *National Geographic Magazine* 9 (April 1898): 187–89.

should grant citizenship to all Alaska Natives regardless of the distinctions set up in the Alaska Purchase Treaty.¹⁰²

Opposition to such widespread citizenship was strong and included famous missionaries like Duncan and judges like M.C. Brown in Juneau. By 1902, Brady began to refine his arguments concerning U.S. citizenship in response to criticism by some white authorities; he began to suggest that there were great differences among Alaska Native populations and to identify certain groups he believed were prepared for full citizenship.¹⁰³

On one hand, to some ethnologists of the time, Minook's ancestry would appear to preclude his naturalization as a "free white person." On the other hand, developmentalists like Morgan and Powell probably would have considered Minook a paragon of their theories of race. Their preference—like the preference of so many federal authorities—for Minook's apparent similarity to a white Protestant cultural model could probably suffice to establish Minook's eligibility for U.S. citizenship through the Dawes Act's prescribed assimilation process. In short, Wickersham could have used prevailing racial classifications or basic theories of ethnology to either grant or deny U.S. citizenship to Minook.

Perceived Economic Necessities

At the same time that some ethnologists used conceptions of property to measure whiteness, federal and state authorities shifted their notions of whiteness based on their own perceptions of the economic needs of their constituents. For example, in order to foster immigration and foreign investment, several states and territories in the nineteenth-century American West enacted statutes that overruled common law barriers to alien land ownership. But late-nineteenth-century racism and nativism caused a partial reversal of this trend, with states, territories, and even Congress narrowing alien property rights to those aliens eligible and intending to become citizens—white aliens or aliens of African descent. These restrictions pro-

¹⁰²Hinckley, *The Canoe Rocks*, 342–43; John G. Brady, *Report of the Governor of Alaska to the Secretary of the Interior, 1899* (Washington, DC, 1899), 46–48; Brady, "Peculiar Problems," 617.

¹⁰³William Duncan to John G. Heid, 12 Oct. 1903, NARA-Pacific Alaska, RG 200, Sir Henry S. Wellcome Collection, box 94, 05/01/12(5), folder 121, 1903 Duncan Selected Letters; William Duncan to Joseph Murray, 15 Oct. 1895, NARA-Pacific Alaska, RG 200, Sir Henry S. Wellcome Collection, box 94, 05/01/12(5), folder 113, 1895 Duncan Selected Letters; Hinckley, *Alaskan John G. Brady*, 276–78; Hinckley, *The Canoe Rocks*, 343–45; John G. Brady to Ethan Hitchcock, 24 February 1904 (John G. Brady Papers, Series 1: Outgoing Correspondence).

foundly hampered the ability of Western states and territories to develop economically, and many were abandoned in response to changes in local and national economic trends. After ten years of hard lobbying, mining interests in the American West succeeding in exempting mining claims from Congress's alien land restrictions.¹⁰⁴ But the decades of uncertainty over alien landowning echoed into the twentieth century because individual aliens knew that their rights depended on authorities' perceptions of economic needs, and those perceptions could change.

In gold-rush Alaska, the rights of Alaska Natives and Creoles were subject to the same debate. Alaska's governing civil code limited the ability of noncitizens to locate in certain areas, as did the nakedly discriminatory rules of many miners' meetings. Riverboat licenses were given only to U.S. citizens.¹⁰⁵ Because mining claims and pilot licenses were critical to economic development, many authorities believed that Alaska needed more citizens or those with the ability and intent to become citizens. Even after the gold rush brought tens of thousands of people to the region, the lack of citizenry still hindered economic development. Many federal authorities then came to believe that granting U.S. citizenship to Alaska Natives and Creoles would greatly increase economic development in the region by allowing more people to stake mining claims and pilot riverboats.

By that time, Brady had for several years advocated Alaska Native economic rights to release the energy of Alaska. He had traveled widely to educate Alaska judges who were generally reluctant to grant rights to Alaska Natives, and he had publicly petitioned for increased rights for Alaska Natives. But he had been largely unsuccessful. Increasing the pool of eligible mine claimants simply was not in everyone's interests. And many white miners resented the public statements of Governor Brady supporting Alaska Native rights. Putting aside the acts of personal violence that sometimes accompanied claim jumping and obviously discouraged investment, many indi-

¹⁰⁴Polly J. Price, "Alien Land Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm," *American Journal of Legal History* 43 (1999): 152–73; Douglas W. Nelson, "The Alien Land Law Movement of the Late Nineteenth Century," *Journal of the West* 9 (1970): 52–55; Samuel MacClintock, "Aliens under the Federal Laws of the United States," *Illinois Law Review* 4 (1909): 41–48; *Act of March 2, 1897*, 29 Stat. 618.

¹⁰⁵*Act of June 6, 1900*, 31 Stat. 321 [Carter Annotated Code, pt. 3, title I, ch. 1, sec. 26]; Bylaws of the Rampart Mining District, Little Minook Creek and Hunter Creek, By-Laws, 1896–1898, Minook Creek Records Office record books, Alaska State Archives, B416-00062; William Duncan to Thomas N. Strong, 17 Nov. 1894, NARA-Pacific Alaska, RG 200, Sir Henry S. Wellcome Collection, box 97, 05/01/13(2), folder 144, 1894 Duncan Strong Letters; Spicer, *The Constitutional Status*, 42–43.

vidual miners tried to limit the number of people who could file mining claims through resolutions at miners' meeting and even through congressional action. Some members of Congress responded, pushing for further limitations on noncitizen mining claims.¹⁰⁶

In 1903, the General Land Office sent James W. Witten to Alaska for the purpose of examining its natural resources; he returned with the political conclusion that Alaska Natives should be granted all the rights of citizenship but the right to vote. Indeed, the Treadwell mine had become the largest gold mine in the world, and it had originated after several Alaska Natives helped locate ore samples for George Pilz. Lieutenant Emmons shared Brady's and Witten's beliefs after observing that Alaska Natives and Creoles had continued to find minerals but could not gain from sharing their knowledge, much less try to develop new lands themselves.¹⁰⁷ So Emmons wrote to President Roosevelt,

[T]here are those who have found what they think are rich claims, the knowledge of which will die with them, as their location would result in their loss. In addition to being an act of justice, the granting of property rights to Indians would open up a field of labor to a body of hardy prospectors well equipped with local knowledge, who, while advancing their own interests, would contribute to the development of the Territory.¹⁰⁸

During the Alaska gold rush, U.S. citizenship for Alaska Natives and Creoles was hotly contested based on competing perceptions of the region's economic needs among those in power. Surely Minook's brother, Pitka Pavlof, had no incentive to develop more land after his Birch Creek claims had been jumped, but his loss was a boon to the white miners who had stolen his land and developed it. In contrast, individuals like Minook had shown the type of work and investment that others might undertake if their mining claims were secure. Of course, neither white miners nor men like Minook could elect a territorial legislature, a territorial governor, a U.S. representa-

¹⁰⁶Hinckley, *Alaskan John G. Brady*, 276–78; Brady, "Peculiar Problems," 617; Brady, *1903 Report*, 8–9; Atwood, *Frontier Politics*, 55; Morrow, "The Spoilers," 97–103; Naske, "The Shaky Beginnings," 198–204.

¹⁰⁷Hinckley, *The Canoe Rocks*, 346; Campbell, *In Darkest Alaska*, 189, 240; Wyatt, "Ethnic Identity," 399.

¹⁰⁸Quoted in Wyatt, "Ethnic Identity," 399.

tive, or a U.S. senator,¹⁰⁹ a fact that gave federal authorities like Wickersham a freer hand to resist or effect change based on their own views of Alaska's economic necessities.

TAPPING NEW VEINS

The Legal Opinion

When Minook petitioned for citizenship, he asserted that he, as a Russian subject, was eligible to naturalize under the rules already set out by Congress in the Immigration and Naturalization Act of 1790. Abraham Spring separately argued in his amicus brief that because Minook was a Creole, he was covered by provisions of the Alaska Purchase Treaty requiring the United States to grant citizenship to Alaskans other than members of "uncivilized native tribes," to whom the United States was required to apply U.S. law governing American Indians.¹¹⁰

To support the arguments made by Spring, Minook offered testimony that he had never been a member of any uncivilized tribe, and that, if he had, he was nonetheless eligible for citizenship as an assimilated American Indian who had severed all tribal ties and adopted a white man's lifestyle. Although Creoles did not neatly fit into the U.S. racial classification scheme, by the time Minook applied for naturalization, the social conventions surrounding whiteness were sufficiently clear that Minook's friends knew to testify that Minook had married and raised a family in the Christian faith and that he spoke English and understood U.S. law—in short, that he was a "fit and proper person to be made an American citizen."¹¹¹

During the year Wickersham spent considering Minook's petition, he reviewed the briefing and pored over the testimony of witnesses who swore to Minook's good character, worth as a miner, and value as a leader. In December 1903, Wickersham asked Andrei Kashevaroff, a brilliant and independent-minded Russian Orthodox priest and scholar in Sitka, to translate a book on Russian citizenship from Russian to English. Kashevaroff was just the man for the job. Raised in Russian Orthodoxy but living a comparatively western lifestyle, Kashevaroff was

¹⁰⁹Haycox, *Alaska*, 218, 228–29.

¹¹⁰*In re Minook*, 2 Alaska at 202.

¹¹¹*Ibid.* at 200–203.



Andrei Kashevaroff stands (front row, second robed man from the right) with a large group of people in front of St. Michael Cathedral, in Sitka. (Courtesy of Alaska State Library, Michael Z. Vinokourov Photograph Collection, Elbridge W. Merrill, photographer, ASL-P243-1-022)

literate in Russian, English, Unangan, and Tlingit.¹¹² The next month, Wickersham met with Russian ambassador Count Arthur Cassini as a second source on the issue, and, according to Wickersham,

[Cassini] and his aid[e] examined the book of instructions issued in 1844 to the Russian American Co. fixing the status of the people from the Aleutians to Sitka and assure me that it is official and that all the people and tribes therein mentioned as citizens are [were] such under the Russian laws—their opinion is that they became citizens of the U.S. under the treaty of cession.¹¹³

After speaking with Cassini, Wickersham continued to meet and correspond with representatives of the Department of

¹¹²Wickersham, diaries, Dec. 9, 1903; Sergei Kan, *Memory Eternal: Tlingit Culture and Russian Orthodox Christianity Through Two Centuries* (Seattle, WA, 1999), 354; Oleksa, *Orthodox Alaska*, 127.

¹¹³Wickersham, diaries, Jan. 28, 1904 (editing notations in original).

State, the Department of Interior's Office of Indian Affairs, and the Department of Justice to resolve legal questions presented by Minook's petition. When Wickersham went to Washington, D.C., to discuss Minook's naturalization petition with federal bureaucrats, he also arranged to meet with Professor Dall at the Smithsonian. Later, he corresponded with Dall concerning the merits of Minook's petition.¹¹⁴

Wickersham began preparing the opinion on April 23, 1904. On May 11 and 12, he continued drafting the opinion, using new translations of the RAC's Third Charter made by court stenographer and gifted linguist Richard H. Geoghegan. On May 16, he completed his final draft.¹¹⁵

In his written opinion, Wickersham addressed Spring's argument that Minook was a citizen by virtue of the Alaska Purchase Treaty. Wickersham reasoned that Congress exclusively has power over the naturalization of aliens; hence, the president and U.S. Senate lacked the authority to grant U.S. citizenship in a treaty. But Wickersham also held that Congress had implicitly accepted the standards for granting U.S. citizenship contained in the Alaska Purchase Treaty, at least by approving payment to Russia under the terms of the agreement. Moreover, Wickersham held, Congress' passage of the Customs Act of 1868, the Organic Act of 1884, and the Civil Code of 1900 implied ratification of the provisions of the treaty guaranteeing citizenship.¹¹⁶ According to Wickersham, "Those civilized inhabitants resident in the Russian possessions when ceded to the United States . . . who preferred to and did remain in the ceded territory, after three years became thereby, ipso facto, 'admitted to the enjoyment of all the rights, privileges, and immunities of citizens of the United States.'"¹¹⁷

Wickersham next addressed whether Minook was an "inhabitant" who would be guaranteed U.S. citizenship under the treaty, or a member of the excluded "uncivilized native tribes." To do so, Wickersham listed the geographical locations and groups considered "settled tribes," using a legal statement from Dall that "the Aleuts, the Kadiak, Cook Inlet, Peninsular, and Prince William Sound Eskimo . . . were regarded by the Russian law as subjects," as were the peoples of the "mission

¹¹⁴*Ibid.*, Jan. 25–Feb. 3, 1904; *In re Minook*, 2 Alaska at 219.

¹¹⁵Wickersham, diaries, Feb. 2, 1903, April 23, May 11–12 & 16, 1904; David Richardson, *Shamrocks on the Tanana: Richard Geoghegan's Alaska* (Snoqualmie, WA, 2009), 207–28.

¹¹⁶*In re Minook*, 2 Alaska at 207–11.

¹¹⁷*Ibid.* at 212.

settlements on the lower Yukon."¹¹⁸ Wickersham discussed indicators of Russian social acceptance of specific Alaska Native tribes and Creoles, including intermarriage, integrated formal education, and institutional respect for Creoles within the RAC and the Russian Orthodox Church. He specifically noted that Russian-influenced Aleuts had been respected by Russian law and that one Creole man, Arvid Adolf Etolin, had become governor of Russian America. Given the information from Dall and the translation of Russian law, Wickersham held that Russian law defined "Russian subjects" to include all colonists, Creoles, and settled tribes that were Christian. In contrast, Wickersham also held that independent Alaska Native tribes that practiced "pagan" religions and lived without regard to Russian authority were "uncivilized native tribes" under Russian law. Under this reasoning, Minook, as a Creole, was guaranteed U.S. citizenship by the treaty.¹¹⁹

Finally, Wickersham reasoned that if Minook was not covered by the treaty's guarantee of U.S. citizenship, Minook was subject to U.S. law governing American Indians. The treaty stipulated that the "uncivilized native tribes"—excluded from the guarantee of citizenship—would be governed by U.S. law regulating "aboriginal tribes." Wickersham held that, just as Congress had implicitly ratified promises of citizenship in Alaska, Congress had implicitly ratified the application of U.S. law in Alaska, including the Dawes Act of 1887, which granted citizenship to individuals who voluntarily severed tribal affiliations and, in the words of the statute, "adopted the habits of civilized life." In evaluating Minook's evidence in support of Spring's argument that Minook was qualified for citizenship under the Dawes Act, Wickersham noted Minook's background, English proficiency, Christian marriage, Christian child-rearing, industriousness, understanding and obedience of U.S. law, and habits in dress, manners, and habitation. According to Wickersham, even if he had been a member of an "uncivilized native tribe," Minook had fulfilled the requirements to become a U.S. citizen under the Dawes Act. In sum, Wickersham declared that Minook was a U.S. citizen by virtue of the treaty provisions guaranteeing citizenship or requiring application of the Dawes Act.¹²⁰

¹¹⁸Ibid. at 219. Dall's interpretation broadly corresponds with the view of at least one modern Russian scholar's understanding that Russia considered its subjects to be those in the Russian settlements or under Russian control: "the Unangan Aleuts, the Koniags, some of the Native inhabitants of the Alaska peninsula, the Chugaches, and the Dena'inas." Vinkovetsky, *Russian America*, 75.

¹¹⁹*In re Minook*, 2 Alaska at 218–19.

¹²⁰Ibid. at 200, 204–12, 220–24.

The Political Decision

Minook was a U.S. citizen, but Wickersham did not end it there. Rather, he took a step further, noting the contemporaneous rule that if Minook was a "white man," then his wife, an Alaska Native woman, was "by such marriage a citizen of the United States."¹²¹ And then he took a leap:

The United States and Russia are civilized nations, and every person being a citizen of either, although individually lacking in education or other civilized standards, is a civilized person. We do not recognize a legal difference between members of the same nation based on standards of culture. While one may stand at the bottom and another at the top, if they belong to the same race or nation they are classed together.¹²²

That is, if Minook and his wife were citizens, so too were other Alaska Natives and Creoles—men and women who might never have qualified for U.S. citizenship through naturalization or assimilation but who might now be able to file mining claims, pilot steamboats, and perhaps together propel Alaska toward territorial status or even statehood.

Judge James Wickersham held that Minook was a U.S. citizen in order to make that leap—in order to foster Alaska's economic growth and political development within the U.S. empire. As a judge well versed in the flexible and widely accepted rhetoric of race and citizenship, Wickersham had the ability to take that leap. As a politically and financially ambitious person, he had every reason to use his position to do so. And given how little his decision might have varied from the wishes of his distant and fawning political master, Wickersham had the chance to do so. Even the scope, reasoning, and errors of *Minook* indicate that Wickersham used the rhetoric of juridical racialism to declare John Minook a U.S. citizen in a calculated effort to boost Alaska.

During the late nineteenth century, fundamental questions repeatedly arose about race and U.S. citizenship because the U.S. flag stretched across the Pacific Ocean, American Indians refused to vanish, and millions of immigrants arrived in the United States. These questions often had to be answered in individual cases—naturalization cases or assimilation processes—that did not answer other individual cases. Even where

¹²¹*Ibid.* at 223 [citing *Act of Aug. 9*, ch. 818, 25 Stat. 392 [1888]].

¹²²*Ibid.* at 212.

questions could be answered concerning entire groups, the variety of ethnic groups meant that these questions had to be answered again and again and again.

At the same time, the language used to answer these questions was not in dispute. Juridical racialism—a discourse that tracked and defined the changing racial limits of U.S. citizenship—had been accepted by authorities and constituencies in the United States for decades. In 1904, juridical racialism still relied on various social conventions and schools of ethnological thought for its stable of tropes, and it often mediated the relationship between race and citizenship in a manner believed to foster economic growth.¹²³

But juridical racialism was a rhetoric—not a reason—to determine the boundaries of race and citizenship. Differences among local social conventions—especially in western mining towns—meant that a single person's race might change as he traveled. Ethnologists often disagreed over the proper method of categorizing human populations. And states and territories alternated between granting and denying rights based on purely political tides. In general, the closer an individual conformed to the preferred culture of those in power, the more likely that individual was to be able to obtain citizenship. But the continual ambiguity of whiteness allowed individual federal authorities to grant U.S. citizenship to those individuals who reflected the image of the nation they personally preferred.¹²⁴

In the territory and state of Washington, where Wickersham had been a lawyer, judge, and lawmaker, the ability of noncitizens to hold land had fluctuated with the territorial and state legislature's views of economic necessities.¹²⁵ Later, when Wickersham arrived in gold-rush Alaska to help build and secure the social and legal conditions for economic development, he had fewer options to affect resident property rights than he would have had in Washington State. In Alaska, he could not use elected officials to advocate change in congressional statutes, pass a territorial law, or help write a new state constitution to allow people like Minook to file mining claims. But he could still use his courtroom to change non-citizens into citizens.

Wickersham had two basic reasons to do so: economic development and political development. First, he wanted

¹²³Weiner, *Americans Without Law*, 1–4, 22–50.

¹²⁴Jacobson, *Whiteness*, 139–42; Ngai, *Impossible Subjects*, 5.

¹²⁵Mark L. Lazarus III, "An Historical Analysis of Alien Land Law: Washington Territory & State, 1853–1889," *University of Puget Sound Law Review* 12 (1987): 197–246.

economic development in Alaska. He prized economic development. To that end, he talked to Congress about building roads and railroads and securing more pilot licenses. He personally published a newspaper that trumpeted the virtues of Fairbanks in classic booster fashion.¹²⁶ In Alaska, Wickersham's desire for economic development counseled in favor of greater rights for Creoles and Alaska Natives if only because there was more than enough land for everyone. Alaska had plenty of potential mines, but it desperately needed miners. Governor Brady's 1903 report made clear the situation: "This at present is Alaska's real trouble—lack of population. A great and rich country with only a few souls possessing it—a manless land—one person to about every 10 square miles of area."¹²⁷

Second, Wickersham wanted political development for Alaska. He himself was later elected a nonvoting delegate to Congress in large part on his platform of calling for a territorial legislature. Once in Congress, Wickersham introduced the very first Alaska statehood bill. In 1904, he and Brady opposed establishing a territorial legislature, but both clearly wanted some political development toward Alaska home rule or federal representation. Brady dreamed of statehood without a probationary period as a territory. Perhaps Wickersham shared this dream because he had attended the Constitutional Convention of the Territory of Washington in 1889, and he was familiar with territorial government and the transfer to state government.¹²⁸

But to Alaskans like Brady and Wickersham, Alaska's window of opportunity for any political development appeared to be closing at the beginning of the twentieth century as the U.S. Supreme Court outlined surprising decisions concerning whether territories were "incorporated" into the Union. Regional boosters had a tradition of overstating regional populations. And many in gold-rush Alaska understood that being home to more U.S. citizens and patriots would generate more respect for Alaska in the Union. So gold rushers in Nome asserted their "Americanness" in loud ways, naming businesses after U.S. locations and flying U.S.

¹²⁶Naske, "Paving Alaska's Trails," 13; Wickersham, diaries, Feb. 8, 1904; Senate Committee on Territories, Hearings on S. 1647, 62nd Cong., 1st sess. (May 23, 1911); Berton, *The Promised Land*, 394–400; *The Fairbanks Miner*, May 1903; Simpson, "Introduction," 6.

¹²⁷Brady, *1903 Report*, 14.

¹²⁸Haycox, *Alaska*, 217–18; Naske and Slotnick, *Alaska*, 141; Wickersham, diaries, Feb. 8, 1904; Brady, *1903 Report*, 6–8; Hinckley, *Alaskan John G. Brady*, 297; Atwood, *Frontier Politics*, 16–30.

flags in an attempt to boost Nome's and Alaska's standing.¹²⁹ Statehood was decades away, but it still seemed a possibility in 1904, if only Alaska could boost its population of U.S. citizens. More importantly, Alaska needed more U.S. citizens to keep alive its chances for any political development within the U.S. empire.

U.S. citizenship for Creoles and many Alaska Natives was a prize worth pursuing, although it was not clear, even at the time, how many people might be affected by the *Minook* decision. The Russians had considered more than 7,500 Alaska Natives "dependent," and therefore Russian subjects, in 1841. As more and more Aleuts married Russians and Creoles, the number of people categorized as Aleuts had dropped as the number of people categorized as Creole had increased. After the sale of Russian America, the social category of Creole disappeared, and this trend reversed: Creoles became Aleuts in U.S. culture.¹³⁰ In 1888, Alaska governor Alfred Swineford estimated the population of Alaska in an effort to gauge U.S. colonization and categorized people similarly to the old Russian class distinctions: "Whites, 6,500; Creoles (practically white), 1,900; Aleuts, 2,950; Natives (partially educated and those who have adopted civilized ways of living), 3,500; Natives wholly uncivilized, 35,000. Total 49,850."¹³¹ The 1900 census indicated at least modest growth in the Creole population, noting 2,499 "persons of mixed parentage—that is, of native Indian and Russian parentage."¹³² The number of Alaska Natives declined over the next few years, particularly in northern and western Alaska, due to epidemics brought by gold rushers. But these populations were less likely to be affected by *Minook* because they were less likely to have been considered Russian subjects under Russian law. In contrast, the number of "mixed race" individuals in Alaska increased from

¹²⁹Raustiala, *Does the Constitution Follow the Flag*, 83–86; Berton, *The Promised Land*, 394–400; Hinckley, *Alaskan John G. Brady*, 304–305; Preston Jones, "At the Edge of Empire: Forging Americanness in Nome, 1899–1905," *Alaska History* 19 (2004): 27–28, 38.

¹³⁰Vinkovetsky, *Russian America*, 150, 158.

¹³¹Quoted in Hunt, *North of 53°*, 258.

¹³²John G. Brady, *Report of the Governor of Alaska to the Secretary of the Interior, 1901* (Washington, DC, 1901), 54.

the turn of the century.¹³³ Altogether, Wickersham could have projected conservatively that *Minook* would establish the U.S. citizenship of between 5,000 and 7,500 people—a substantial number given Alaska's small population.

Because the entire Alaska territorial legal system was “borrowed” from the federal government, Wickersham's decision could not be substantially out of step with the overarching goals of those who held power over it. As a member of the peripheral elite serving at the pleasure of the president through a series of recess appointments, Wickersham personally had to cleave closely to his core political master.¹³⁴ But both the federal government's overarching goals and the president's views gave Wickersham the chance to use his courtroom to transform Alaska residents into U.S. citizens.

During gold rushes, the government's main goal was resource extraction. To achieve that goal in Alaska, Congress had to establish adequate market connections and protection of land claimants. As I have argued elsewhere, Congress did so in part by establishing a court system to protect areas that were important in the gold rush. Indeed, Wickersham's very presence as a territorial judge was designed to establish U.S. legal and cultural regimes necessary to develop industry by resolving disputes in locations key to the gold rush.¹³⁵

But the overarching goal of resource extraction permitted Wickersham to do more than resolve disputes over mining claims. Just as he could advocate the establishment of physical infrastructure for resource extraction by talking to Congress about building roads and railroads and securing more pilot licenses, Wickersham himself could adjust the borders of U.S. citizenship in order to foster the social and political infrastructure necessary for economic development. This action, while perhaps unanticipated, would not have been substantially out

¹³³Robert Fortune, *Chills and Fevers: Health and Disease in the Early History of Alaska* (Fairbanks, AK, 1992), 209–26; Campbell Gibson and Kay Jung, U.S. Census Bureau, *Historical Census Statistics on Population Total By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States*, U.S. Census Bureau (Sept. 2002), tab 16, <http://www.census.gov/population/www/documentation/twps0056/tab16.pdf>.

¹³⁴Alan Watson, *Society and Legal Change*, 2^d ed. (Philadelphia, PA, 2001), 98–111; Atwood, *Frontier Politics*, 405; Alexander J. Motyl, *Imperial Ends: The Decay, Collapse, and Revival of Empires* (New York, 2001), 13.

¹³⁵Curtis, “Producing a Gold Rush,” 294–95; Michael Schwaiger, “Salmon, Sage-brush, and Safaris: Alaska's Territorial Judicial System and the Adventures of the Floating Court, 1901–1915,” *Alaska Law Review* 26 (2009): 104–10.

of step with the overarching goal of establishing transportation and security for resource extraction.¹³⁶

Only slightly less clear is that Wickersham's decision was not substantially out of step with those of his core political master—President Roosevelt. Roosevelt's position on the specific issue of home rule for Alaska was unclear until November 1907, when he urged a limited and simple self-government. In 1904, Roosevelt, at least formerly, had had a racially charged vision of the frontier as a battleground on which Anglo-Saxon heroes tested themselves. But his views on the general issues of race and citizenship had become more complicated by the time he became president.¹³⁷ In his annual message to Congress in 1904, Roosevelt included a call to Congress, saying,

[Alaska Natives] who have come under the influence of civilization . . . have proved their capability of becoming self-supporting, self-respecting citizens, and ask only for the just enforcement of the law and intelligent instruction and supervision. . . .

. . .

The Alaskan natives should be given the right to acquire, hold, and dispose of property upon the same conditions as given other inhabitants; and the privilege of citizenship should be given to such as may be able to meet certain definite requirements.¹³⁸

This view, voiced seven months after *Minook*, appears to be somewhat at odds with Wickersham's categorical approach guaranteeing citizenship to entire classes of people. But Wickersham could not have been substantially out of step with Roosevelt, since the president appears to have said nothing against *Minook* and gave Wickersham another recess appointment on November 16, 1904.¹³⁹

Wickersham left no smoking gun to indicate that he decided *Minook* in the way that he did in order to boost Alaska's

¹³⁶Naske, "Paving Alaska's Trails," 13; Wickersham, diaries, Feb. 8, 1904; Senate Committee on Territories, Hearings on S. 1647, 62^d Cong., 1st sess. (May 23, 1911); Curtis, "Producing a Gold Rush," 294–97.

¹³⁷Naske, *A History of Alaska Statehood*, 26–27; Spencer, "'We are not dealing entirely with the past,'" 164; Edmund Morris, *Theodore Rex* (New York, 2002), 37, 52–54.

¹³⁸Theodore Roosevelt, "Fourth Annual Message to Congress" (Washington, DC, Dec. 6, 1904).

¹³⁹Atwood, *Frontier Politics*, 405.

economic and political development. But he had the means, motives, and opportunity to do so, and the circumstances of the *Minook* decision strongly suggest that he made such a calculated decision. In light of existing precedent, Minook's petition should have seemed very unlikely to be granted, and Minook stood to lose his entire livelihood if his petition was denied. Thus, either he was willing to bet his entire livelihood in an unlikely effort to secure rights formally that he already possessed functionally, or, more likely, he knew the outcome of the case before he proceeded. Indeed, all participants—petitioner, amicus, and judge—may have known the outcome of the case before the petition was heard.¹⁴⁰ After all, Governor Brady had for years been examining petitions and letters from individuals like Minook in hopes of finding a suitable "test case" to establish U.S. citizenship for Alaska Natives and Creoles. Abraham Spring, one of very few attorneys within hundreds of miles, filed a brief in support of Minook's petition. Spring was a close friend and political ally of Wickersham; he owed his bar license and appointment as license inspector to Wickersham.¹⁴¹ Minook offered evidence in support of arguments Spring had made, even though that evidence did not apply directly to his own petition; this suggested that Spring and Minook discussed legal strategy well before Minook's hearing.

Regardless, the best evidence that *Minook* was a political calculation by Wickersham is Wickersham's treatment of the case itself. In *Minook*, he held that, if the Dawes Act applied to Minook, then Minook qualified as a citizen under its provisions. Strictly speaking, this was the only necessary holding—Wickersham did not need to determine whether the Purchase Treaty guaranteed U.S. citizenship to anyone in order to grant Minook the relief he sought because Minook already qualified for citizenship under the most onerous standard established under the treaty and U.S. Indian law. A judge interested in resolving merely the question at hand would have put down his pen and been satisfied with the quite narrow holding recogniz-

¹⁴⁰From the archival record, it appears unlikely that Wickersham, Minook, and Spring engaged in the court procedure in order to facilitate business dealings with one another. Spring did have business dealings with Wickersham—he staked claims on behalf of numerous people, including Wickersham, Wickersham's wife, and the court clerk, Richard Geoghegan. Wickersham, diaries, May 29, 1904. But neither Minook nor anyone with his last name appears to have had any land deals with Wickersham or Spring within five years of the decision.

¹⁴¹Wickersham, diaries, Aug. 9, 1902, April 28, 1903, April 30, 1904, Nov. 15–16, 1904, April 3, 1905, Sept. 24, 1905.

ing Minook's citizenship not based on his race or class but on his individual assimilation.

But that kind of precedent would not go far. It could serve as precedent permitting other Alaskans, one by one, to apply for U.S. citizenship under the criteria in the Dawes Act, but it could never be used as precedent, without more, to grant U.S. citizenship to another person. In contrast, deciding that the treaty guaranteed Minook citizenship because of his membership in a class of people would have broader implications. That sort of ruling could be used by any member of Minook's class to obtain U.S. citizenship even if he or she would not otherwise have received citizenship under the Dawes Act. That is, because of the additional ruling in *Minook*, thousands of Creoles and Alaska Natives could suddenly become U.S. citizens without individual assessments of their assimilation.

Wickersham's treatment of Minook's petition was also extensive in another way that suggests that Wickersham's *Minook* decision was a political one. Wickersham went to astounding lengths to research the facts and the law of Minook's petition; this may have reflected his work style or ego; his determination to resolve the questions posed by Minook's petition for the benefit of other judges in Alaska; his personal academic interest in Alaska ethnology and history; or an attempt to prevent his ruling from being overturned on appeal. This level of research allowed Wickersham to find good reasons for his rulings.¹⁴² But if any of these motives was really driving Wickersham's work, he probably would not have made the specific errors that he did.

Indeed, Wickersham's historical and legal errors—mischaracterizing some Alaska Native groups and Creoles to make them more politically palatable to mainstream U.S. authorities—reveal his motives in ruling that Minook was a U.S. citizen. For example, Wickersham noted that Russia respected Creoles so much that one Creole man, Arvid Adolf Etolin, became governor of Russian America. Although it is true that many Creoles had become respected leaders within the RAC, Etolin was not a Creole—he was a Finn. In fact, no Creole ever became governor or even vice governor of Rus-

¹⁴²For example, despite Wickersham's abiding personal interest in ethnology, his access to an Alaska authority like Dall, and his knowledge of Governor Brady's understandings of Alaska Natives, he decided not to base *Minook* on the level of development of Alaska Natives and Creoles. Rather, he used Dall's perception of Alaska history to understand the Alaska Purchase Treaty from Russia's perspective. That is, regardless of how "developed" Alaska Natives and Creoles were, the only ethnological question that Wickersham chose to consider concerned Russian conventions.

sian America. Similarly, despite multiple translations of specific Russian laws by local experts such as Andrei Kashevaroff and Richard Geoghegan and despite personal discussion and correspondence with the Russian ambassador to the United States, Wickersham erroneously wrote that all individuals guaranteed citizenship by the Alaska Purchase Treaty were Christian, when in fact Russia had protected groups of Alaska Natives regardless of their religious beliefs.¹⁴³ Given the briefing, the numerous translations, and the research, it is impossible to believe this error was simply negligence; rather, it seems Wickersham sought political cover for an expansive decision. In sum, his errors suggest that *Minook* was actually written to endow thousands of Alaskans with U.S. citizenship.

Wickersham's decision, like *Minook's* petition for naturalization, was a push for economic opportunity and political recognition on equal footing with others. Alaska was heir to indigenous cultures and Russian education and religion and was bursting with potential energy, but it required acceptance by U.S. authorities to thrive economically and politically. And such acceptance would not be won easily. Congress was deeply concerned that Alaska was not "American" enough. So Congress weighed Alaska's ethnic composition and the territory's readiness for self-government for decades before it determined that its own commitment to the promise of republican government would compel it to admit Russian America—a Creole land.

CONCLUSION

Eighteen months after Wickersham decided *Minook* and sent the decision far and wide, Governor Brady pleaded with district court Judge Royal A. Gunnison concerning a petition for citizenship of Ralph Young, a Creole man who was educated at the Sitka Industrial and Training School, owned his own home, worked for wages, and discovered gold while vacationing with friends on a nearby island. Young had petitioned for citizenship because, despite the widespread publication of the *Minook* decision, he could not risk staking a claim in his own name because he felt his citizenship was in doubt. Young's caution was warranted. After all, *Minook* was a decision of a

¹⁴³*In re Minook*, 2 Alaska at 218; Vinkovetsky, *Russian America*, 108; Grinev, "Social Mobility," 34; Gsovski, *Russian Administration*, 12; Miller, *The Alaska Treaty*, 210.

trial court, never dealt with on appeal, that did not bind any court—even Wickersham's. In 1908, Gunnison held that the Dawes Act did not apply in Alaska and that Congress had yet to establish any process of obtaining citizenship for Alaska Natives. Three years later, the Ninth Circuit Court of Appeals disagreed, holding that the provisions of the Dawes Act controlled Alaska Native citizenship. Four years after that, the fledgling 1915 Alaska territorial legislature established a cumbersome and unclear process by which Alaska Natives who had severed tribal ties and adopted a "civilized" life could become U.S. citizens.¹⁴⁴ Any vestige of *Minook's* legal significance was eliminated in 1924 when Congress granted citizenship to all American Indians, including Alaska Natives. In 1959, *Minook* became a decision of a court that ceased to exist. As precedent, *Minook* was and is legally insignificant.

Nor did *Minook* have a strong political impact. The year 1904 could have been a watershed for Alaska Native citizenship. *Minook* was published, and Wickersham sent copies to Senator Fairbanks, Ambassador Cassini, and Governor Brady,¹⁴⁵ writing, "[I]t is some satisfaction to know that the law recognizes that these people have rights of citizenship which are to be protected by the courts."¹⁴⁶ Governor Brady was elated with *Minook*; he wrote to Wickersham to tell him the decision would be of "great benefit to native Alaskans."¹⁴⁷ Brady appended the opinion to his annual report to the secretary of the interior. Emmons, who had championed economic rights for Alaska Natives for more than twenty years, investigated and

¹⁴⁴John G. Brady to Royal A. Gunnison, 6 November 1905 (John G. Brady Papers, Series 1: Outgoing Correspondence); *In re Haines Mission*, 3 Alaska at 594–95; *Nagle v. United States*, 191 F.141, 145–46 (9th Cir. 1911); Session Laws of Alaska, ch. 24 (1915). Stephen Haycox, "Alaska Native Brotherhood Conventions: Sites and Grand Officers, 1912–1959," *Alaska History* 4 (1989): 40. Official correspondence from the Bureau of Education indicates that the standards for evaluation were not always clear: "[J]udge Jennings informs me that he does not have any set questions, but that he bases his judgment mostly on the recommendations of the five white citizens and on the personal evidence presented by the applicant at the time." Chas. W. Hawkesworth to Bureau of Education Acting Chief William Hamilton, 6 April 1917, NARA-Pacific Alaska, RG 200, Sir Henry S. Wellcome Collection, box 86, 05/01/12(3), folder 46, part 1, April–May 1917.

¹⁴⁵Wickersham, diaries, May 17, 1904; John G. Brady to James Wickersham, 27 August 1904 (John G. Brady Papers, Series 1: Outgoing Correspondence).

¹⁴⁶Quoted in Hinckley, *Alaskan John G. Brady*, 278.

¹⁴⁷John G. Brady to James Wickersham, 27 August 1904 (John G. Brady Papers, Series 1: Outgoing Correspondence).

prepared his major report detailing the national and local economic need to grant citizenship to Alaska Natives,¹⁴⁸ writing,

The status of the native has never been decided. He is . . . debarred from the privileges extended to strangers who come to the country for self-gain, without any thought for permanent settlement, and who take up land and mining claims or fishing rights and dispose of them to the first comer and leave the country the next day. While the native . . . who knows no other home . . . has practically no legal rights that the stranger has to respect.¹⁴⁹

In his Annual Message to Congress, Roosevelt even called on Congress to define the requirements for U.S. citizenship for Alaska Natives. But Congress did not act; instead, it waited until 1906 to pass a confusing and ineffective allotment act for Alaska Natives.¹⁵⁰ As the confusion over Alaska Native citizenship persisted, the political promise of *Minook* was lost.

But despite its legal and political unimportance, *Minook* retains a historical significance. For historians of substantive U.S. law and its influences, *Minook* is one of very few cases to decide a question of U.S. law based on Russian law.¹⁵¹ For comparative historians of race and the law, *Minook* provides a new way of understanding the legal determinations of race in a relatively unexplored region during a particularly noteworthy era. For students of New Western history, *Minook* reiterates that the American North echoes the American West.

Perhaps most importantly, *Minook* is significant because it represents an otherwise-missing moment in the history of the U.S. empire. Historian Richard Drinnon described it cleanly in retrospect: "[W]hen the metaphysics of Indian-hating hit salt water it more clearly became the metaphysics of empire-building, with the woodsman-become-mariner out there on the farthest wave."¹⁵² *Minook*—in dealing with a political but not

¹⁴⁸Hinckley, *Alaskan John G. Brady*, 278; Mitchell, *Sold American*, 135–36.

¹⁴⁹Quoted in Hinckley, *The Canoe Rocks*, 347.

¹⁵⁰Theodore Roosevelt, "Fourth Annual Message to Congress" (Washington, DC, Dec. 6, 1904); Hinckley, *The Canoe Rocks*, 339.

¹⁵¹A year later, Wickersham considered Russia's understanding of other Alaska Native tribes in *U.S. v. Berrigan*, in which he held that certain Alaska Native tribes had not been protected by Russia under Russian law, and he concluded that they were not guaranteed citizenship by the treaty but were instead subject to Congress' will as wards. 2 Alaska 442 (D.Alaska 1905). Thus, Russian law again determined whether U.S. residents were or were not U.S. citizens.

¹⁵²Drinnon, *Facing West*, 215.

a geographic island and "races of questionable ethnical type," rather than "little brown brothers"—in some sense captures that moment when Indian-hating hit salt water. As such, *Minook* demonstrates that Alaska represents not an aberration in the course of U.S. empire to be ignored, but an important stepping stone both geographically between continental and overseas expansion and conceptually between governing American Indians and the inhabitants of new, insular possessions.¹⁵³

¹⁵³Mary Alice Cook, "Manifest Opportunity: The Alaska Purchase as a Bridge Between United States Expansion and Imperialism," *Alaska History* 26 (2011): 1–10.

THE CITIZEN-WARD: *UNITED STATES V. HEYFRON* AND THE MEANING OF INDIAN CITIZENSHIP UNDER ALLOTMENT

AARON HYAMS

In the administration of the affairs of this office I am constantly confronted with difficult problems arising out of the unsettled political status of the Indians. These perplexities will increase rather than diminish, and therefore it is of the utmost importance that the real relations which the Indians sustain to the Government of the United States should definitely and finally be settled.¹

—Thomas Jefferson Morgan,
Commissioner of Indian Affairs, 1891

Signed by Grover Cleveland on February 8, 1887, the Dawes Act, or General Allotment Act, holds a dubious distinction as one of the greatest domestic policy disasters in American history. During its forty-six year tenure as the guiding standard in United States federal Indian policy, an estimated sixty million acres of Indian land passed into the

¹Taken from the opening preamble to the 1891 Annual Report of the Commissioner of Indian Affairs, written by Thomas J. Morgan, appointed commissioner of the Bureau of Indian Affairs in 1889 by President Benjamin Harrison. Marquette University Archives, Bureau of Catholic Indian Missions Records (hereafter cited as BCIM), 1839, 1848, 1851, Annual Reports of the Commissioner of Indian Affairs, series 16-1-1, box 7, folder 1, p. 9.

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public domain and then into the hands of non-Indian owners. The bill caused immense suffering for the roughly 200,000 American Indians living on hundreds of reservations, many of whom were completely unprepared for the swift assault on their few remnants of familiar life. Tribal leaders, shocked by the summary abrogation of most treaties, organized commissions to Washington, D.C., in an attempt to forestall allotment and return to the tradition of "treating" with the United States. In spite of Native resistance, the public and private interests that desired access to tribal property and advocated the assimilation of Indian tribes grasped at the borders of Indian Country like "a mighty pulverizing machine intended to break up the tribal mass," to borrow a phrase from Theodore Roosevelt.²

Tracing the aftermath of that very "machine," the dominant historical narrative emphasizes misguided and paternalistic—if well-intentioned—reform, coercive assimilation, cultural destruction, and Native resistance. But while the Dawes Act certainly exacted a human and material toll on Indian Country, its consequences also established an exclusionary form of Indian citizenship in the United States, one that denied Native Americans power and many rights but exempted them from state law. In the decades prior to the passage of the General Allotment Act, the federal government largely squeezed individual states out of the administration of Indian affairs. The government in Washington, D.C., accomplished this through its direct control over the western territories where many new reservations were located, and through legislation that gave the United States Congress direct jurisdiction in both civil and criminal matters involving Indians and that made "domestic, dependent Indian nations" wards of Congress. Allotment and the campaign to assimilate the American Indian population, however, startlingly reversed this trend. The Dawes Act was intended to subdivide Indian reservations into private land holdings; it established conditions for Indians to be assimilated into the U.S. citizenry; and it aimed to make tribal members subject to the laws of the states and territories where they resided. In assaulting the boundaries of the reservations, the

²See Janet A. McDonnell, *The Dispossession of the American Indian, 1887–1934* (Bloomington, IN, 1991), 1. For the Roosevelt quote, see Virgil Vogel, ed., *This Country Was Ours: A Documentary History of the American Indian* (New York, 1972), 193.

Dawes Act also, unintentionally, broke down the boundaries of federal authority.³

State and local governments responded to the Dawes Act with a flurry of activity, extending their direct authority over reservations in new ways: imposing taxes, passing new laws, and refusing to enforce federal laws. As state and local authorities aggressively exploited the collapse of the reservations and of federal jurisdiction over Indian lands, federal authorities in the Bureau of Indian Affairs scrambled to limit states' interference in these matters. Since the Dawes Act intended to assimilate Indians and prepare them for U.S. citizenship, however, neither side in the debate could clearly delineate the limits of its power. Indians' prior legal status as wards under the protection and power of Congress gave them immunity from state law and state power, but this arrangement was diametrically opposed to the goals of Indian policy reformers bent on culturally and legally assimilating Indians into mainstream American society. Extending citizenship to Indians, on one hand, served a useful purpose as a tool of assimilation and imperialism, but it also placed too much faith in the willingness of municipal and state authorities to extend social services, rights, and equal protection under the law to Indian populations. In short, it was a debate in which there was no advantage for Indians but high stakes for state officials and federal politicians.⁴

In order to settle the legal and administrative complications that arose as a consequence of the Dawes Act, authorities in the Bureau of Indian Affairs turned to the federal court system. Using the U.S. Attorney's Office, reservation superintendents and other B.I.A. officials entered into suits on behalf of the tribes under their supervision to block attempts by local officials to extend their authority onto reservations and over

³Regarding dispossession and the material costs of allotment, refer to Janet A. McDonnell, *The Dispossession of the American Indian*. Also see Emily Greenwald, *Reconfiguring the Reservation: The Nez Percés, Jicarilla Apaches, and the Dawes Act* (Albuquerque, NM, 2002). In regard to Indian policy prior to the Dawes Act, Deborah Rosen argues that in the early nineteenth century, individual states served as the primary actors in administering Indian tribes. With the rapid advance of settlement in the western territories and the expansion of the federal government after the Civil War, the administration of Indian affairs became the responsibility of the War Department, Congress, and the Bureau of Indian Affairs. See Deborah A. Rosen, *American Indians and State Law: Sovereignty, Race, and Citizenship* (Lincoln, NE, 2007).

⁴Regarding the effort to assimilate Indians through allotment, refer to Frederick Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1888–1920* (Lincoln, NE, 1984). Also see Francis Paul Prucha, *The Great Father: The United States Government and the American Indians*, 2 vols. (Lincoln, NE, 1984), and Tom Holm, *The Great Confusion in Indian Affairs: Native Americans and Whites in the Progressive Era* (Austin, TX, 2005).

Indians. As these cases worked their way through the federal courts in the early twentieth century, the federal judiciary consistently checked the expansion of state power in the administration of Indian affairs, so that by the 1920s, states had once again been effectively forced out of Indian policy and reservation administration. Furthermore, these court decisions formed the basis of modern tribal law and tribal sovereignty, separating tribal administration from state law.⁵

Among the earliest of the court decisions to limit state power over Indian tribes was *United States v. Heyfron*, decided in the federal district court in Helena, Montana, in 1905. The case was opened in 1904 by the U.S. Attorney's Office on behalf of a man from the Flathead Indian Reservation who had been taxed by an assessor working for Daniel Heyfron, the treasurer of Missoula County, Montana. As a whole, Flathead Agency and the incident involving Heyfron demonstrated the confusion and the legal ambiguity concerning Indians that was engendered by allotment and assimilation. Through the era of allotment, the Flathead Reservation and the *Heyfron* case demonstrated both the consequences of the Dawes Act throughout the American West and the highly variable nature of the local experience. The advancement of allotment without a concrete settlement of Indians' relationship to local governments and the limits of federal protection emboldened local officials, in Montana and elsewhere, to test the limits of their power and subject certain Native American individuals, willing or not, to the obligations and duties of state citizenship. In response, the federal courts limited state power over Indians and re-imposed direct federal control over Indians and Indian property. In doing this, the courts effectively subordinated Indian citizenship, attaching it to a continuing status as "domestic dependent nations" and federal wards.⁶

WASHINGTON

Prior to the reforms of the Dawes Act, Native Americans lived as semi-sovereign "nations" under the oversight of the federal government. *Cherokee Nation v. Georgia*, decided

⁵For an overview of modern tribal law, see Amanda J. Cobb, "Understanding Tribal Sovereignty: Definitions, Conceptualizations, and Interpretations," *American Studies* 46 (2005): 115–32.

⁶For general background on Flathead Agency, see Robert Bigart and Clarence Woodcock, *In the Name of the Salish and Kootenai Nation: The 1855 Hellgate Treaty and the Origin of the Flathead Indian Reservation* (Pablo, MT, 1996).

by the John Marshall Supreme Court in 1831, established the operative framework of this arrangement. In the short term, the court's decision to dismiss the case on the grounds that Indians possessed no right to enter suit either as citizens or foreign nations aided the state of Georgia's efforts to remove the Cherokees; after the Civil War, however, the legal designation of "domestic, dependent nations," given to Indian tribes by John Marshall, allowed the federal government to take on a paternalistic role as the guardian of Indian tribes and tribal property. Although the federal government protected tribes against state law after the Civil War, the guiding assumptions in Indian affairs still held that Indians would never be included in the United States and that they would exist under federal administration until tribal peoples simply disappeared from the North American landscape, either through assimilating, scattering, or dying out. Long-standing and widely accepted nineteenth-century racial science bolstered these assumptions, positing that some intangible deficiency in Native Americans' biological inheritance left them ill-suited to cope with the rigors of the modern world. As Indian peoples and reservations persisted into the early 1880s, however, Congress and the Supreme Court extended the aegis of federal protection against state and territorial law.⁷

The most significant of these reforms was the Major Crimes Act, passed in 1885. The background of the legislation revolved around the trial of Crow Dog, a Brulé Sioux man charged with murder in the Dakota Territory in 1883. The full incident extended back to 1881, when Crow Dog shot and killed the Brulés' principal chief, Spotted Tail, after a long-standing feud between the two men. Although the incident occurred on the Rosebud Reservation, the territorial court in Deadwood arraigned, charged, and tried Crow Dog for murder, sentencing him to death by hanging, and scheduling his execution to be held in 1884. Crow Dog's lawyers appealed, however, and succeeded in having the case brought before the Supreme Court in 1883. The Supreme Court overturned Crow Dog's conviction, ruling that the provisions of the Fort Laramie Treaty of 1868, signed by representatives of the Brulé Sioux and approved by Congress, denied the Dakota territorial court jurisdiction in the case. In order to prevent further complications in state and

⁷Deborah Rosen, *American Indians and State Law*, 100.

territorial courts, the Major Crimes Act established federal jurisdiction in virtually all criminal cases involving Indians.⁸

A murder case involving a Klamath man, Kagama, almost immediately tested the constitutionality of the Major Crimes Act. In June 1885, only weeks after the legislation had been signed into law, Kagama stabbed and killed another Klamath man, Iyouse, over a property dispute on the Hoopa Valley Reservation in California. Attempting to sort out who would have the power to try Kagama—the state of California, tribal courts, or the United States—the case moved to the Supreme Court. The Department of Justice submitted the case, *United States v. Kagama*, in 1886, and the justices rendered their decision in May of the same year. Kagama's defense strongly argued that he was beyond prosecution because the state of California had denied its jurisdiction and because the defendant was protected by the stipulations of the Klamath treaty with the United States. The Court, however, upheld the constitutionality of the Major Crimes Act and upheld the power of the federal government to try Kagama for murder. Furthermore, Justice Samuel Freeman Miller, who authored the majority opinion, strengthened the ruling John Marshall had made in *Cherokee Nation*, labeling Indians "dependent wards of the federal government" and asserting that Congress alone possessed plenary power over all Indian tribes and tribal property.⁹ Only a few short months later, however, Indian policy reformers set about dismantling (not altogether intentionally) this entire arrangement, ending treaties, tribal recognition, sovereignty, and federal protection.¹⁰

The plan to assimilate the western Indian population through allotment in severalty emerged at the Annual Lake Mohonk Conferences of Friends of the Indian, first held in upstate New York in 1883. Gathering each year, the United States' foremost public and private advocates of Indian policy reform laid out

⁸For more information on *Crow Dog*, refer to Sidney Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (Cambridge, UK, 1994).

⁹*United States v. Kagama*, in *Digest of the United States Supreme Court Reports*, vol. 2 (New York, 1908), 2297. Also, Rosen, *American Indians and State Law*, 216.

¹⁰The immediate consequences of *Cherokee Nation* allowed Georgia to remove the Cherokees, but later Marshall's decision would be used to establish federal jurisdiction over Indians. Rosen, *American Indians and State Law*, 216. From the 1830s through the 1880s, widely held popular opinion believed that Indians in the West would die out within a few generations. The influence that this belief exerted over policy stymied any attempt to include or assimilate Indians as part of the United States. Even with the great expansion of citizenship after the Civil War, Indians remained ignominiously excluded. Tom Holm, *The Great Confusion in Indian Affairs*, 1–22.

their plans to bring Indians—forcibly or otherwise—into the United States citizenry, and to replace the reservations and communally owned property with pastoral agrarian communities. The idea was simple enough in theory: breaking up reservations into subdivided farming communities and awarding the head of every household a 160-acre homestead. There was an undeniable element of Jeffersonian romanticism in the whole concept of allotment, with clear links between the duties of citizenship and the ownership of private property, independence, and republican virtue. There was also an undercurrent of control attached to the Dawes Act. The “private” allotments held in trust, so that they could not be sold for a period of twenty-five years, would also function as shackles and as a tool of forced assimilation. In that sense, then, the extension of U.S. citizenship to Indians through allotment served as a tactic of detribalization, a means to break the cycle of treating with tribal elders, and a way of breaking tribes’ unique legal status in the American state. All of this comprised a system that Indian policy experts blamed for perpetuating poverty on Indian reservations and for retarding the advance of Christian “civilization.”¹¹

Philip C. Garrett, an Indian rights lawyer from Philadelphia, typified late-nineteenth-century Indian policy reformers. Born in 1834, he came from staunchly elite, northeastern stock, the son of Thomas C. Garrett and Francis Biddle Garrett, who could trace their origins to the first settlers of Pennsylvania. As a young man, Garrett found himself sucked into the orbit of Republican politics by the cause of anti-slavery, although his abolitionist impulses in no way corresponded to a belief in racial equality. By the 1880s Garrett had built a successful Philadelphia law practice and wielded considerable political influence, which landed him on the executive committee of the Indian Rights Association, a powerful Washington, D.C., lobby in favor of allotment in severalty. A regular in attendance at the annual Lake Mohonk Conferences, Garrett emerged as one of the most eloquent spokesmen for the ideology of federal Indian policy reform.¹²

In “Indian Citizenship,” a paper that Garrett delivered to the fourth annual Lake Mohonk Conference in the summer of 1886, as the General Allotment Act stood poised for debate on the Senate floor, he clearly laid out the intended purpose of subdividing Indian lands and extending U.S. citizenship.

¹¹Hoxie, *A Final Promise*, 83–113. Also, Francis Paul Prucha, ed., *Americanizing the American Indians: Writings by the “Friends of the Indian,” 1880–1990* (Cambridge, MA, 1973), 1–10.

¹²John W. Jordan, *Colonial and Revolutionary Families of Pennsylvania* (Baltimore, 1978), 180.

Garrett called for the derecognition of virtually every Indian treaty. "If the termination of a treaty by the United States is undeniably against her own interests," Garrett posited, "does that not alter the moral question involved?"¹³ Since the treaties were illegitimate, he stated, and were entered into with malice on the part of the United States, they could be legally broken. Garrett further called for an end to the recognition of sovereign tribes: "The great mistake has been one which it is now too late to avoid, that of dealing with these numerous races of savages within our borders as nations, as if there could be nations within nations without some organic provision of constitutional law, such as that which regulates the relations of the States of our Union to the Federal Union."¹⁴ Only by ending the reservation system, he argued, which isolated Indians as "curios" of a bygone past, could Native peoples be lifted into the "dignity" of citizenship and "partnership" in the American nation.¹⁵

Indeed, similar sentiment regarding the problems of nations with "*the nation*" can be found with striking frequency throughout the writings and speeches of other "friends of the Indian." Henry Laurens Dawes himself, perhaps the most forceful and certainly the most prolific Indian reformer in the late nineteenth century, wrestled with this question. Much like Garrett, Dawes was also a member of the educated northeastern elite. Massachusetts-born and Yale-educated, Dawes first emerged in state politics in 1848 before being elected to the House of Representatives for Massachusetts' tenth congressional district in 1856. In the House, Dawes accumulated a reasonably progressive voting record serving on the Appropriations and Ways and Means Committees. He played an instrumental role in the establishment of the United States Commission on Fish and Fisheries in 1871—a forerunner of the Fish and Wildlife Service—and the creation of Yellowstone National Park in 1872. In 1875 his legislative achievements earned Dawes the inheritance of Charles Sumner's seat in the U.S. Senate, and his record on conservation won him the chairmanship of the Committee on Indian Affairs.¹⁶

An idea for allotting Indian lands had already been echoing through the House and Senate chambers well before Dawes arrived in the northern wing of the Capitol building in 1875. When

¹³Philip C. Garrett, "Indian Citizenship," in Prucha, *Americanizing the American Indians*, 63.

¹⁴The Dawes Act abrogated every Indian treaty except those signed by the Five Civilized Tribes. *Ibid.*, 64.

¹⁵*Ibid.*, 65.

¹⁶Andrew R. Dodge and Betty Koed, ed., *Biographical Directory of the United States Congress, 1774–2005*, 16th ed. (Washington, DC, 2005), 933.



The Senate bill written and introduced in 1887 by Henry Laurens Dawes, above, opened all reservations to allotment, pending a presidential recommendation. (Courtesy of Library of Congress Prints and Photographs Division, LC-BH83-1784)

he first heard the proposal as Indian affairs committee chairman, he regarded it with the utmost skepticism, but he eventually warmed to the idea of allotment in severalty: "[T]here has been found a way to solve a problem which hitherto has been found to be insoluble by the ordinary methods of modern civilization, and soon I trust we will wipe out the disgrace of our past treatment, and lift [Indians] up into citizenship and manhood, and co-operation with us to the glory of the country."¹⁷

¹⁷Henry L. Dawes, "Indian Policy Reform," in Prucha, *Americanizing the American Indians*, 30.

Dawes, much like Garrett, with whom he maintained a close personal relationship, came to regard the end of tribal recognition, the breakup of reservations as separate jurisdictions and political entities, and the extension of U.S. citizenship to the entirety of the domestic aboriginal population as a necessary next step for progress in Indian-white relations.¹⁸

The allotment bill that Dawes wrote and introduced in the Senate in 1887 put this rhetoric into action. It opened all reservations to the possibility of allotment, pending a presidential recommendation. Once implemented, the act dissolved tribal councils and set guidelines for the appointment of special commissions charged with surveying tribal property, completing a tribal roll of all eligible land recipients, and assigning all tribal members a parcel of land. Finally, the Dawes Act extended U.S. citizenship to all Indians who dissolved their tribal relations, either by establishing a permanent residence off of tribal property or by relinquishing their right to tribal property, and promised citizenship to the rest of the Native American population on their acceptance of an allotment.¹⁹

The reforms of the Dawes Act posed serious problems for the existing system of Indian policy. The independence of Indian tribes from state governments was contingent on Indians' existing as "domestic dependent nations" or wards of the federal government, and both classifications explicitly denied the possibility of Indian citizenship. If citizenship indeed replaced tribal recognition, then this arrangement was no longer tenable, at least under the present conditions. By establishing that all Indians who were declared citizens "be subject to the laws, both civil and criminal, of the State or Territory in which they may reside," the Dawes Act certainly seemed to be ending the role of Congress as paternal guardian.²⁰ It was no secret that allotment intended to end tribal separation from the states and immunity from state law, although whether the law called for

¹⁸Prucha, *Americanizing the American Indians*, 27, 100.

¹⁹Along with Dawes and Garrett, Henry S. Pancoast, a colleague of Philip Garrett and fellow executive member of the Indian Rights Commission, and Merrill E. Gates, president of the Board of Indian Commissioners, believed wholeheartedly in ending federal dealings with Indians as tribes or groups, and instead empowering individuals with the rights and privileges of citizenship. Pancoast discussed this belief in a pamphlet distributed by the Indian Rights Association in 1884, and Gates argued for citizenship in the 1885 annual report of the Board of Indian Commissioners. Henry S. Pancoast, "The Indian Before the Law," and Merrill E. Gates, "Land and Law as Agents in Educating Indians," in Prucha, *Americanizing the American Indians*, 46, 158. The Dawes Act is reprinted in Prucha, ed., *Documents of United States Indian Policy* (Lincoln, NE, 2000), 170–72.

²⁰*Ibid.*, 172.

an immediate or incremental implementation of these reforms remained up for debate. In practical terms, Indians' legal status would be ambiguous and contested, and the extent to which individual states would wield decisive power in Indian affairs after the Dawes Act would have to be settled in the courts.²¹

MISE EN SCÈNE

First assigned to the Confederated Salish and Kootenai Tribes of the Flathead Nation in 1877, Peter Ronan served as Flathead Agency's superintendent until his death in 1893. To whites, the "home of the Flatheads" was a pastoral paradise, bordered by the Bitterroot Mountains to the west, Flathead Lake to the north, the Mission Mountains to the east, and the great basin of ancient Lake Missoula to the south. Situated in a fertile glacial valley, through which the Lower Bitterroot and Jocko Rivers meandered among thousands of acres of naturally irrigated alfalfa, the reservation possessed coveted pastureland. In his final report as Indian agent of Flathead, filed in summer 1892, Major Ronan described the sweeping changes in the daily lives of the reservation's inhabitants. When he had first arrived in 1877, life on the reservation—at least to the outside observer—continued much as it had since horses first arrived in the northern Rocky Mountains in the mid-eighteenth century. "As the buffalo and other large game were [still] plentiful," Ronan wrote, "the Indians resorted to the chase on their ancient hunting grounds for sustenance rather than to the toil of a settled life."²² The "primordial" Salish homeland, however, stood on the precipice of a cultural and economic revolution.²³

In 1882, the Salish and Kootenai chiefs negotiated the sale of a thirty-three-mile-long and two-hundred-foot-wide strip of land on the southern tip of the reservation to the Northern Pacific Railroad for the price of \$21,000. The sale was finalized in September of that year. Along with the railroad came the cattle industry, which rapidly altered the biological, geographic, and economic makeup of the reservation. Because of hunting and the invasion and destruction of grasslands by domesticated cattle herds, within a few years the bison population on Flathead Agency shrank to several carefully managed herds.

²¹Frederick Hoxie discusses the intent to integrate Indians into state law in "The Appeal of Assimilation," in Hoxie, *A Final Promise*, 1–40.

²²Peter Ronan, Annual Report to the Commissioner of Indian Affairs, BCIM, box 7, folder 2, p. 291.

²³*Ibid.*, 291.

By 1891, the aggregate stockholdings on Flathead Agency totaled nearly 6,000 horses and some 12,000 head of cattle, largely owned by a small handful of Métis ranchers. Salish and Pend d'Oreilles accounted for the vast majority of Flathead residents, roughly 1,200 of the reservation's total population of about 1,900 individuals. By and large, the Salish majority on the reservation was more intermarried with the local white population than were the remainder of Flathead Agency's residents. Having had a close relationship with Jesuit missionaries, the Salish were also relatively well adapted to living among white communities. According to the B.I.A.'s count, the vast majority of the reservation's 700 fluent English speakers came from the Salish and Pend d'Oreilles. The Kootenais formed the largest minority group on the reservation, totaling about 300 individuals. Reputedly, at least according to the reservation's administrators, the Kootenais were also more generally disposed to resist assimilation than their Salish neighbors. In 1891 the Bureau of Indian Affairs also moved Chief Charlot's band of Bitterroot Salish, some 250 individuals, onto Flathead Agency from the Bitterroot Valley, south of Missoula, Montana. The reservation's remaining population consisted of a smattering of other Salish-speaking groups—Kalispells and Spokanes—and individuals from other tribes who had been adopted into the Confederated Flathead Nation.²⁴

By the time of Ronan's death in 1893 "the dwelling house and barn [had replaced] the lodge, and well-fenced fields of meadow, grain, and garden [dotted] the valley."²⁵ As the bison herds dwindled, the vast majority of Flatheads, according to Ronan's last report, turned to the "civilized" embrace of herding and agriculture. Over the course of the late 1880s the majority of Salish and Pend d'Oreilles settled on farmsteads along the Jocko River and had at least taken to raising small gardens on privately settled plots and tending to small stockholdings—mostly horses. Chief Charlot's Bitterroot Salish, on the other hand, lived almost entirely off hunting and government rations. The Kootenais settled along the western edge of the reservation

²⁴A great deal of blame for the disappearance of the bison can be placed on the burgeoning free-range cattle industry. Whereas bison by and large were browsers, cattle were wholesale grazers who left little remaining sustenance in their wake. See Andrew C. Isenberg, *The Destruction of the Bison: An Environmental History, 1750–1920* (Cambridge, UK, 2000), 144. For a discussion of the sale of land to the railroad, see Ronan, Annual Report to the Commissioner of Indian Affairs, BCIM box 7, folder 2, p. 291. For his statistics regarding stockholdings on the reservation, see Ronan, Annual Report to the Commissioner of Indian Affairs, BCIM box 7, folder 1, p. 78.

²⁵Ronan, Annual Report to the Commissioner of Indian Affairs, BCIM box 7, folder 2, p. 292.

and on the Little Bitterroot River, scratching a living from a mixture of hunting, fishing, horticulture, and herding.

As a rule, poverty ran rampant on "civilized" Flathead Agency. Apart from the relatively primitive road that connected the reservation's administrative headquarters in Arlee and the Jesuit Mission in St. Ignatius to the towns of Missoula and Kalispell, Flathead Agency had precious little infrastructure. With no hospital anywhere on the reservation, the Catholic nuns in St. Ignatius offered the only available emergency medicine. Unsurprisingly, infant mortality and death from disease far exceeded the norms for white communities at the turn of the century.²⁶

Similar to other reservations throughout the West, Flathead Agency stood trapped between two worlds at the end of the nineteenth century. Despite the rapid pace of change in many Indians' lives, the reservations remained largely isolated. A chronic lack of funds and frequent turnover among reservation officials prevented any coherent development of modern infrastructure, even as the railroads, cattle and timber industries, and other forces of modernity surrounded the boundaries of western reservations. For white observers in Montana, the result was that Flathead Agency appeared to be a vast and untapped resource-rich country squandered on its Indian inhabitants, who lacked the means or knowledge to unlock its potential. The fact that the reservations lagged so far behind in terms of modern development justified, in the minds of whites, dispossession and exploitation.²⁷

"Of No Use to the Indians," read an editorial published by Missoula's state senator Frank Worden, in the *Helena Independent* in January 1899.²⁸ Worden's sentiments mirrored a popular conviction among Montana whites about the potential of Indian lands if placed in white hands, and spoke to a common misconception about the status of the Flatheads living on the agency. "There is no occasion to waste any sympathy upon the [Flatheads], if they should be induced to part with some of their

²⁶Demographic statistics contained in the annual report of the commissioner of Indian affairs for 1890, BCIM box 7, folder 1, p. 78. In his annual report filed in August 1895, Joseph T. Carter, Ronan's replacement as superintendent of Flathead Agency reported that the Kootenais, by and large, remained more dependent on hunting than their Salish and Pend d'Oreilles neighbors. See Carter, Annual Report to the Commissioner of Indian Affairs, BCIM box 8, folder 2, p. 189. Carter also appraised the status of the reservation's infrastructure in his first report as superintendent, filed in August 1894. Carter, Annual Report to the Commissioner of Indian Affairs, BCIM box 8, folder 1, p. 174.

²⁷Burton M. Smith, "The Politics of Allotment: The Flathead Indian Reservation as a Test Case," *Pacific Northwest Quarterly* 70 (1979): 133.

²⁸Frank Worden, "Of No Use to the Indians," *Helena Independent*, January 25, 1899.

lands," Worden continued, "for they now have more by far than they can possibly make use of."²⁹ Worden's words gave voice to the prevailing form of small-town politics, which Philip Garrett, a decade earlier, had defined as the general "satanic avarice" of local politicians and business interests whose "selfish clutch [tolerated] no bar of humanity nor morality between it and the gratification of its cupidity"; men who "unblushingly" preferred extermination "to any Christian settlement of this vexed question."³⁰

Indeed, the issue of Indian administration found itself woven into the vast array of local resentment toward federal authority found in popular politics. Throughout the Rocky Mountain West, and in Montana and Nevada in particular, the 1880s and 1890s brought a surge of popularity for Free-Silver Republicans and Populist Democrats as crashes in the silver and copper markets sent local economies into a tailspin. In Montana, specifically, Free-Silver Republicans made huge gains in the state senate throughout the 1890s as collapse of the silver market all but crushed the young state's economy. While on a national scale these populist politics tied into a broader anti-monopolist agenda—specifically against the special treatment railroads received from the federal government—on a local level they pressed for the opening and development of Indian lands as the most expedient solution to economic stagnation. By the end of the 1890s, as one of the largest western reservations still closed to white settlement, Flathead Agency increasingly found itself the object of populists' desires. By 1900, Free-Silver Republicans in the state senate in Helena, Montana, even argued that if Flathead stayed closed to white settlement, Montana could lose population to Canada, as homesteaders moved north in search of land.³¹

These popular politics intertwined with Montana officials' dismissive attitudes toward the boundaries of state and federal jurisdiction on the borders of Indian Country. Among the most striking examples of this phenomenon was the way in which state courts handled the trafficking that emerged in response to federal bans on the sale of liquor to Indians in the 1890s. Although federal agents enforced the bans and the United States attorney handled indictments, defendants stood trial in municipal courts in front of locally appointed judges, neither

²⁹Ibid.

³⁰Philip C. Garrett, "Indian Citizenship," 59.

³¹Burton Smith, "The Politics of Allotment," 134. Also, Robert W. Larson, "Populism in the Mountain West: A Mainstream Movement," *Western Historical Quarterly* 13 (1982): 143–64.

of which were much inclined to convict opportunistic white liquor dealers. A reservation officer who preferred confiscation over bribery posed the greatest punishment for Montana liquor traders, since receiving an acquittal from a local judge was virtually guaranteed. In his annual report for 1895, superintendent Joseph Carter complained that the Indian police officers—fourteen total on Flathead Agency—proved all-too-willing to accept bribes and ignore the liquor ban, a problem he linked to the restlessness of Chief Charlot's "drinking, boisterous lot" of Bitterroot Salish.³² Worse yet, Carter complained, the two liquor dealers that he had arrested and indicted in 1895 both were acquitted in municipal courts. Carter succeeding in having six more liquor dealers indicted over the next two years, and all six received acquittals in Kalispell and Missoula courtrooms.³³

While Montana judges worked to defend the interests of their state residents, even when those interests interfered with federal law, local authorities turned a blind eye to white crime committed on the boundaries of Indian Country. In December 1891, a posse of twenty-five armed white men encroached onto the western edge of Flathead Reservation near Dayton Creek, chasing off several Kootenai families that had set up homesteads there. The claim jumpers intended to squat in Dayton Creek, and Agent Ronan lacked the manpower to drive them away. When the Lake County sheriff refused to get involved, Ronan requested assistance under duress from the U.S. marshal's office in Helena, giving the claim jumpers time to abscond with stolen property and without legal consequences.³⁴

Throughout the 1880s and 1890s, federal agents, Indian police working on the reservation, and local non-Indian law enforcement remained thoroughly unhappy with each other. Local authorities resented federal jurisdiction in cases involving Indians and desperately wanted to prosecute accused Native American criminals in municipal courts. Meanwhile, both agents Ronan and Carter regarded the Missoula and Lake County sheriffs as criminals, hardly better than the fugitives they were supposed to control. Even before allotment reared

³²Carter, Annual Report to the Commissioner of Indian Affairs, BCIM box 8, folder 2, p. 190.

³³For the indictment and acquittal of two white liquor dealers on the Flathead Reservation in 1895, see Carter, Annual Report to the Commissioner of Indian Affairs, BCIM box 8, folder 2, p. 190. For further indictments, see Carter, Annual Report to the Commissioner of Indian Affairs, BCIM box 8, folder 4, p. 169.

³⁴The case involving claim jumpers in Dayton Creek proved to be high profile enough to gain coverage in newspapers around the United States. See "Trouble Brewing in the Flathead Reservation," (New Orleans) *Daily Picayune*, December 15, 1891.

its ugly head as an administrative issue, the tensions between different forms of authority were palpable.³⁵

MISSOULA

Unruly sheriffs and uncertain boundary lines between federal and state jurisdiction regarding crime and law enforcement presented a persistent administrative annoyance for Flathead Agency's federally appointed officers in Arlee, Montana. The struggle between Montana and the federal government on the fringes of Indian territory, however, never amounted to a serious challenge of federal authority over the Flatheads until allotment made its way into state politics. Then the boundaries of federal authority became more porous. Local governments suddenly found themselves able to expand their power into new arenas and get away with it. Tensions between local and federal authorities concerning Native populations and reservations had existed for a long time, but allotment reshaped this debate altogether.

In western Montana, the allotment of Flathead Agency began relatively late, at the turn of the twentieth century. Under the administration of superintendents Peter Ronan and Joseph Carter (1877–1896), allotment remained a fringe issue. In their correspondence with the Office of Indian Affairs in Washington, D.C., both Ronan and Carter reported quite frequently that the majority of both “full-blooded” Salish and Kootenais and mixed-blood Métis on Flathead stood adamantly opposed to allotment. Neither agent pushed to have the reservation surveyed. Writing in 1892, Ronan reported that “[g]reat prejudice prevails against a survey of any kind,” and that “the chiefs and Indians constantly state that a ‘measurement’ of land means a robbery of the Indians”; he recommended that allotment be

³⁵Regarding overlapping jurisdictions, in June 1889 the Missoula County sheriff and several deputies stormed into Arlee in search of three Flathead men accused of murdering a white ranch hand; the men were captured, tried in Missoula, and hanged. See “The Indian Troubles: A Fight on the Flathead Reservation,” *Daily Picayune*, June 25, 1889. Also, both Ronan and Carter recorded their less-than-flattering views of the local sheriffs’ offices in their reports to the commissioner of Indian affairs, Ronan, Annual Report to the Commissioner of Indian Affairs, BCIM box 7, folder , p. 78; Ronan, Annual Report to the Commissioner of Indian Affairs, BCIM box 7, folder 2, p. 291; Carter, Annual Report to the Commissioner of Indian Affairs, BCIM box 8, folder 1, p. 175; Carter, Annual Report to the Commissioner of Indian Affairs, BCIM box 8, folder 2, p. 190.



A posse of twenty-five armed, white claim jumpers encroached onto the Flathead Reservation near Dayton Creek, above, chasing off several Kootenai families that had set up homesteads there. (Courtesy of Department of Special Collections and University Archives, Marquette University Libraries)

postponed.³⁶ Revisiting the issue in 1895, Joseph Carter advised that "civilization" for the tribes on Flathead Agency "had certainly advanced" regardless, and that allotment was not "immediately needed."³⁷

The discussion of whether to allot Flathead Agency changed direction, however, with the appointment of William Henry Smead as the agency's superintendent in 1897. From the outset of his administration, Smead pressed hard to have the reservation surveyed and subdivided. He ignited the issue both in Montana politics and in Washington, D.C. In his first annual report, Smead wrote,

No allotments have been made. The reservation should, however, be surveyed, with a view of making allotments in the future. The half-breeds are generally anxious to have their farms surveyed, that they may know where the permanent lines will be located. With an Indian, as with his white neighbor, it is but natural that he should desire to know that the improvements that he is making will be

³⁶Ronan, Annual Report to the Commissioner of Indian Affairs, BCIM box 7, folder 2, p. 294.

³⁷Carter, Annual Report to the Commissioner of Indian Affairs, BCIM box 8, folder 2, p. 191.

upon his own property when it is eventually allotted, and there can be no certainty about this until surveyed.³⁸

Smead either grossly embellished or horribly misunderstood the mood of the reservation's mixed-race population. Successful Métis ranchers had nothing to gain from allotment, given that under the extant system of the 1890s, the reservation offered tens of thousands of high-quality, open range acres with restricted access for whites. Nonetheless, Smead pushed the matter, claiming that the land that was "productive without irrigation [was] largely in the hands of white men and the more advanced mixed bloods."³⁹ The superintendent argued that allotment would speed the process of assimilation and redistribute property in a more equitable manner.⁴⁰

While William Smead was one of the key figures responsible for raising the issue of allotting the Flathead Reservation, he also embodied the localism creeping into the administration of Indian affairs by the General Allotment Act, and his dubious record as superintendent served as an excellent example of why the position was usually given to disinterested parties. Unlike his predecessors appointed from out of state, William Smead was a prominent Missoula lawyer and politician with business connections to the Missoula Mercantile Company and the First National Bank of Missoula. Both businesses were extensions of the vast economic empire of A.B. Hammond, the notorious lumber baron of the Pacific Northwest, and both were infamously corrupt. Smead won a seat in the Montana state senate as a Republican in 1894 and promptly introduced a petition to the Montana legislature the following year for the allotment of the Flathead Reservation. The recommendation passed and was sent to Washington, D.C., with the disapproval of Superintendent Carter. After a relatively brief and undistinguished senate career, Smead found his way into the good graces of the McKinley administration and was appointed superintendent of the Flathead

³⁸William Henry Smead, Annual Report to the Commissioner of Indian Affairs, BCIM box 9, folder 1, p. 190.

³⁹From the report submitted in September 1900. Smead, Annual Report to the Commissioner of Indian Affairs, BCIM box 9, folder 3, p. 268.

⁴⁰Smead, Annual Report to the Commissioner of Indian Affairs, BCIM box 9, folder 2, p. 37. Also, Smead, Annual Report to the Commissioner of Indian Affairs, BCIM box 9, folder 3, p. 268.



From the beginning of his administration in 1897, Superintendent William Henry Smead pressed hard to have the Flathead Reservation surveyed and subdivided. (Courtesy of Montana Historical Society Research Center-Photograph Archives, Helena, Montana, PAC 99-36.67)

Reservation in 1897, a position he held until 1904, when he was dismissed for accepting large bribes from white cattlemen illegally using Flathead land.⁴¹

⁴¹After his dismissal, Smead published a survey of the Flathead Reservation in 1905 that also doubled as a rather self-aggrandizing account of his record as a Montana senator and as superintendent of Flathead Agency. William H. Smead, *Land of the Flatheads: A Sketch of the Flathead Reservation, Montana, Its Past and Present, Its Hopes and Possibilities for the Future* (Missoula, MT, 1905), 141. Smead's record as a Montana state senator also is covered in Burton M. Smith, "The Politics of Allotment," 131-40.

Ironically, Smead, acting as a federal agent, would have to contend with forces he was largely responsible for setting in motion when he was a state senator. As Montana congressmen turned the allotment of the Flathead Reservation from state politics into national politics, local government officials, anticipating the imminent breakup of Flathead's tribal guardianship, extended their authority directly onto the reservation. Joseph M. Dixon, another Missoula lawyer and a friend and colleague of Smead's, took the issue of allotting the Flatheads to Congress. He won election to the U.S. House of Representatives in 1900 and introduced a surplus lands bill, opening Flathead to settlement, in the House in 1901. Simultaneously, state officials found themselves embroiled in a legal battle with the federal government over the limits of state power on Flathead Agency. The headline issue involved taxes that Missoula County collected from enrolled members of the Confederated Salish and Kootenai nations.⁴²

The Missoula County treasurer's office started targeting and taxing certain Métis individuals in 1897, when a Missoula County assessor attempted to collect \$14.75 from Lewis Clairmont. He refused, and in August 1898 the county assessor returned to confiscate his cattle and horses with the intent of selling them to satisfy the claim. Clairmont relented and paid "under written protest" the demanded sum plus \$12.50 added in fines and interest.⁴³ In 1899, Missoula County stepped up its aggression. That year, Smead recorded in his report to the commissioner of Indian affairs that an assessor from the county treasury had accosted eight Salish men of mixed ancestry and demanded they pay taxes on their owned property. Smead reported that "six persons paid their taxes under protest, and in two other cases cattle were sold by the county treasurer to satisfy their tax claims."⁴⁴ Moving through the U.S. District Court in Helena, Smead opened suit on behalf of his reservation residents against Missoula County to recover money taken in four cases, Clairmont's among them.⁴⁵

Emboldened by their partial success, however, Missoula County continued pursuing tax revenue from Flathead Res-

⁴²The effort of Joseph M. Dixon to have Congress pass an act allotting Flathead Agency is covered in Burton M. Smith, "The Politics of Allotment," 131-40.

⁴³This story and the following lawsuit were covered by local newspapers. "County Collected Taxes and Government as Indian's Guardian Sues to Recover," *Helena [MT] Independent*, July 9, 1899.

⁴⁴Smead, Annual Report to the Commissioner of Indian Affairs, BCIM box 9, folder 2, p. 219.

⁴⁵*Ibid.*

ervation's Métis population. Lake County decided to mirror the practice in the northern portion of the reservation. This left an enraged W.H. Smead utterly flabbergasted. "I cannot see the justice in the attempt to tax these people," a furious Smead wrote to the Office of Indian Affairs. "[I]t would seem that if the mixed bloods are taxable the counties should supply schools for their children and build and maintain roads and bridges on the reservation."⁴⁶ Indeed, Smead was pointing to the critical issue: since Missoula and Lake counties were not responsible for the costs of managing the reservation, those counties were reaching far beyond their rights to collect revenue. Smead's objection had nothing to do with the question of legitimacy to collect taxes in general on the relatively poor reservation, since he was drawing revenue from the same individuals with a grazing tax. Concerning more than the right to tax, the issue cut directly to the question of the right to govern. Smead's grazing tax levied on some of the reservation's most wealthy cattle ranchers paid for road maintenance and funded an irrigation project on the Jocko River. The county property taxes, on the other hand, siphoned funds off the reservation for the benefit of white communities.⁴⁷

The matter went to trial in the winter of 1904 and into the spring of 1905, as the U.S. Attorney's Office brought suit against the Missoula County treasurer, Daniel Heyfron, in the federal district court in Helena. The actual plaintiff in the case was Michel Pablo, a Métis man born in the 1840s in central Montana. Pablo's mother was Piegan Blackfeet, and his father was Spanish. Pablo's father died while he was still a child, whereupon his mother relocated to Colville Agency in central Washington state. In the late 1850s, Pablo once again moved back to Montana, briefly taking up residence in the town of DeSmet before moving onto the Flathead Reservation in 1864, after his adoption into the Flathead Nation by a council of chiefs. From that time forward, Pablo settled permanently on the Flathead Reservation, married a Salish woman, and had three children. In the 1880s Pablo rose to prominence as one of the most successful herders on the agency, owning roughly six thousand head of cattle in addition to herds of horses, ponies, and bison. No longer willing to take just paltry sums of money

⁴⁶Smead, Annual Report to the Commissioner of Indian Affairs, BCIM box 9, folder 2, p. 220.

⁴⁷The grazing tax caused a minor uprising in 1903, led by Joe Morrigneau, a man whose father had been white and his mother Salish. Morrigneau's standoff with reservation police forced Agent Smead to call for aid from the military garrison at Fort Missoula. Smead, Annual Report to the Commissioner of Indian Affairs, BCIM box 9, folder 6, p. 230.

from small-time ranchers, Missoula County was now attempting to stick its hands into the pockets one of the wealthiest individuals on the reservation.⁴⁸

In Daniel Heyfron's defense, his lawyers set about trying to prove two things: first, that Michel Pablo was not a ward of the federal government, and, second, that state and county jurisdiction extended onto reservations in cases involving individuals not under the guardianship and direct jurisdiction of Congress. In trying to prove the latter point, Heyfron's lawyers cited *Stiff v. McLaughlin*, a case decided two years earlier in the Montana supreme court, where the opinion had been that state jurisdiction applied to reservations in cases involving non-Indians and that, legally, "non-Indian" status applied to individuals who had dissolved—voluntarily or otherwise—their tribal relations. In trying to prove that Pablo had relinquished his tribal status, Heyfron's defenders cited the citizenship clause of the Dawes Act arguing that by adopting "the habits of civilized life" Pablo surrendered his tribal status.⁴⁹

The United States attorney, however, maintained that at the time that Missoula County assessed the tax, Michel Pablo was a fully entitled member of the Flathead Nation by virtue of his legal adoption and his permanent residence within the confines of the Flathead Reservation. Federal Judge William Henry Hunt, who rendered the decision in April 1905, agreed and sided with the prosecution, placing a permanent injunction against the county treasury. In his written opinion, Judge Hunt declared that "the executive authority of the general government has recognized the status of persons situated as Pablo is as that of tribal Indians."⁵⁰ Going further, he ruled that, regardless of Pablo's status as a citizen or otherwise, "I may say that [Indians] never have been treated as white people entitled to the right of American citizenship."⁵¹ Judge Hunt added that "special provision has been made for [Indians]" as "tribes possess[ing] attributes of nationality, holding them to be not

⁴⁸*United States v. Heyfron*, in *Digest of Decisions of United States Courts*, vol. 9 (Eagan, MN, 1914), 964–66.

⁴⁹The case of *Stiff v. McLaughlin* specifically concerned the prosecution of a Métis man who was one-quarter Chippewa but had been legally adopted into the Flathead Nation. The defendant claimed that he was beyond prosecution in the state court because of his tribal affiliation; however, it was ruled that the defendant had legally dissolved his tribal relationship and was, as such, subject to state law and prosecution. See *Stiff v. McLaughlin*, in *Digest of the Decisions of the Supreme Court of Montana*, ed. Robert Smith (Seattle, WA, 1915), 384.

⁵⁰*United States v. Heyfron*, 968.

⁵¹*Ibid.*

foreign, but domestic, dependent nations."⁵² Thus the court opinion posited that Indian citizenship in the United States did not, in fact, upset federal guardianship over Indians, since, as Hunt put it, Native Americans, even as citizens, were to be classed altogether differently from non-Indians. Indian tribes, in the opinion of the court, held no special privileges or power but were at least immune to local interference.⁵³

United States v. Heyfron proved to be a quite early and earnest reassertion of federal primacy in the administration of American Indian tribes and tribal property. It anticipated a series of court decisions that would move through the federal circuits and into the Supreme Court in the following decade. In 1913 and 1916, the reputedly conservative Edward Douglass White Supreme Court handed down a pair of decisions further barring local meddling in Indian affairs.⁵⁴ The first of these cases, *United States v. Sandoval*, concerned federal bans on the sale of liquor to Indians. The defendant in the case, Felipe Sandoval, a Hispanic man and a U.S. citizen from New Mexico, argued that his sale of whiskey to several Pueblo Indians in San Juan Village, New Mexico, was legal on the grounds that the sale took place off tribal property, and therefore outside of Congress' protective jurisdiction. Justice Willis Van Devanter, the author of the majority opinion, firmly reapplied the precedent of *United States v. Kagama*, that Congress held plenary power over Indian tribes. Extending that further, Van Devanter posited that Congress alone was vested with the power to determine the limits of its guardianship and that this power was not bound to the limits of tribal land.⁵⁵

The power vested in the federal government by the *Sandoval* decision would be enlarged three years later by *United States v. Nice*, another case involving an indicted liquor dealer. The majority opinion, coauthored by justices Van Devanter, Oliver Holmes, Mahlon Pitney, James Reynolds, and Chief Justice Edward D. White, ruled that, taken together, the Dawes Act and the amendments made to it by the Burke Act of 1906 established that allotment in severalty had not ended congressional guardianship over Indians. Further, the court held that U.S. citizenship was

⁵²Ibid.

⁵³Ibid., 963–68.

⁵⁴Edward Douglass White was a Roman Catholic Democrat from Louisiana. He was first appointed to the Supreme Court by Grover Cleveland in 1891, and then in 1910, William Taft controversially passed over Charles Evans Hughes to nominate White chief justice. Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (New York, 1995).

⁵⁵*United States v. Sandoval*, <http://supreme.justia.com/cases/federal/us/231/28/case.html>.

compatible with both tribal sovereignty and Indians' continued protected status. Thus the court ruled that even in cases where tribal members had received allotments or been granted U.S. citizenship, Congress still held power to govern "in Indians' benefit and interest." The courts laid the legal groundwork for "domestic dependent nations" to become dependent citizens.⁵⁶

THE CITIZEN-WARD

The ironies of the *Heyfron*, *Sandoval*, and *Nice* decisions, as well as related cases settled in other federal courts, were that they undercut much of the intended purpose of the Dawes Act. Although Congress planned to extinguish tribal recognition, the federal judiciary upheld it. Congress intended to detribalize Native Americans by extending U.S. citizenship to them, but the federal judiciary made tribal status and citizenship compatible. The courts accomplished this by establishing that, regardless of their legal relationship to the government in Washington, D.C., Indian peoples and their property occupied a space outside state and local jurisdiction. While in many ways this arrangement harkened back to an era before allotment, and particularly to the early 1880s, it also anticipated the reforms of federal policy in the 1920s and 1930s, culminating with passage of the Indian Reorganization Act in 1934, which made way for the structural accommodation of Indian tribes as confederated sovereign nations whose members enjoyed U.S. citizenship. This arrangement also produced a number of unanticipated consequences that emanated from the conscious decision of the courts to emancipate Indian tribes from state law: tribal gaming, disputes over hunting and fishing rights, disputes over mineral rights, and special tribal tax exemptions.⁵⁷

That the earliest legal foundations of structural accommodation were already in place in the first two decades of the

⁵⁶The Burke Act (also known as the Forced Fee Patenting Act), passed in 1906, significantly amended the citizenship clause of the Dawes Act. The act established that no Native American individual whose allotment was still being held in trust would be eligible for citizenship. This would effectively stall the issue of citizenship, since the standard patent period was twenty-five years, and the Burke Act created a special commission under the Department of the Interior vested with the power to extend patents indefinitely. *United States v. Nice*, in *United States Supreme Court Reports*, vol. 60 (New York, 1915), 1192–95.

⁵⁷The Indian Reorganization Act overturned the Dawes Act, reinstated all tribal treaties, tribal courts, and tribal councils, reorganized reservations, and set provisions for the recovery of lost tribal property. See Graham D. Taylor, *The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934–1945* (Lincoln, NE, 1980).

twentieth century certainly frustrates any attempt to neatly periodize the history of U.S.-Indian relations into an evolutionary progression from conquest and removal to assimilation, accommodation, and self-determination. Such a schematic not only ignores the considerable overlap but also inherently introduces a somewhat self-defeating notion of moral progress. Very few reforms undertaken by the federal government in the twentieth century successfully conferred more power, self-determination, and agency to Indian peoples. Even the Indian New Deal, which sought to recover lost land and reconfigure tribes and tribal government retained paternalistic federal government oversight.⁵⁸

A close examination of law and politics in the era of allotment suggests that perhaps Indian policy in the United States is better understood in terms of a tension between two poles: recognition and abolition. Such a viewpoint accounts for the vacillation between policies of war, removal, assimilation, and termination, and policies of treaty-making, cultural retention, and tribal self-determination. Taken from that vantage point, the Dawes Act should be seen as an early forerunner to the policy of termination, advanced by the Department of the Interior in the late 1940s, '50s, and '60s. Both policies originated from a clearly distinguishable desire among Indian policy officials in Congress and in the cabinet to wash the government's hands of responsibility for maintaining relations with Indian tribes. In both cases, the desire to end tribal relations emanated from urges to stop tribal annuity payments, cut government budgets, and simplify the political implications of Indian affairs by dealing with Indian peoples as citizens rather than as sovereign tribes. Furthermore, this perspective accounts for the historical and continuing confusion, indecision, and conceptual and practical difficulty posed by the existence of nations within a nation.⁵⁹

In some sense the *Heyfron*, *Sandoval*, and *Nice* decisions should be understood as an attempt to reconcile that conceptual difficulty by opening legal ground for Native peoples to be both Indian and American. This was not, however, a necessarily positive development from the Native perspective. Despite providing Indian peoples legal protection from local abuse, federal court rulings in the 1910s and '20s by no means overturned assimilation—by any means necessary—as the official law of the land. The full-scale effort to assimilate Indian children forcibly, by removing them from their homes and placing

⁵⁸Tom Holm, *The Great Confusion in Indian Affairs*, 182–98.

⁵⁹Donald Fixico, *Termination and Relocation: Federal Indian Policy, 1945–1960* (Albuquerque, NM, 1990).

them in boarding schools, continued for decades. Although the decision in *United States v. Heyfron* protected Indians' rights to their property, it did not defend their rights to their culture or identity. Furthermore, the citizenship given to Native Americans, first conditionally by the Dawes Act and then generally by the Indian Citizenship Act of 1924, offered little in terms of real political power. It also did not guarantee equal rights or equal protection under the law. That Native individuals could be both Indian and American did not mean that they had a choice as to whether they wanted to be Americans. This left Native peoples hard pressed between local interests that sought to dispossess them of their property and federal interests that sought to dispossess them of their identity.⁶⁰

The *Heyfron* case also suggests new understanding of the Dawes Act. Although land dispossession certainly still accounted for the bulk of property damages incurred by Indian tribes in the course of allotment, the toll also extended to tribal property and tribal funds siphoned into local government coffers. Furthermore, when assessing the costs of allotment, historians must consider the vast sums of public and personal money spent on litigation, and the lives disrupted and ruined while personal property remained tied up in legalities. This suggests a somewhat deleterious role played by local governments and local constituencies in the history of U.S.-Indian relations. Although federal vacillation between policies of recognition and abolition certainly produced widespread and damaging consequences for indigenous peoples, municipal and state polities often functioned in opposition to Indians and Indian Country. By and large, local communities and politicians craved access to Indian property and coveted Indian lands while remaining wholly ambivalent about the prospect of integrating Indian and non-Indian communities, providing infrastructure, and extending social services.

While white-controlled business interests and local governments forcefully articulated what they could gain if they had access to Indian lands, in reality white communities in the early twentieth-century American West also comfortably depended on the segregated status quo that the reservations held in place. The reality of life on reservations posed a set of harrowing social, civic, and moral problems for which most municipal and state governments happily renounced responsibility. Too often widespread poverty, deplorable living conditions, horribly inadequate infrastructure, and staggering mortality

⁶⁰For the boarding school effort, refer to Brenda Child, *Boarding School Seasons: American Indian Families, 1900–1940* (Lincoln, NE, 1998).

rates—which plagued many western reservations—posed a set of problems that few, if any, local authorities wanted to tackle. The shameful irony was that while mainstream America shared in a consensus that Indians could not continue supporting themselves through hunting and gathering, the federal government lacked the funds and local governments lacked the will to provide Indians with the necessary infrastructure to support themselves in “civilized” pursuits. Inasmuch as non-Indian communities could not envision a middle ground with their Native neighbors, the need for tribal self-determination was firmly impressed upon indigenous populations as the only means of cultural survival. It is little wonder that a place such as Flathead Agency and similarly situated Indian communities, precariously placed between the competing realms of state and national politics, produced among the most forceful and committed champions of tribal self-reliance and self-determination in the twentieth century: D’Arcy McNickle, Vine Deloria, and Russell Means.

BOOK REVIEWS

A Clamor for Equality: Emergence and Exile of Californio Activist Francisco P. Ramírez, by Paul Bryan Gray. Lubbock: Texas Tech University Press, 2012. 390 pp.; notes, bibliography, index; \$39.95 cloth.

In this work of biography and political history, independent scholar Paul Bryan Gray explores the life and times of the intrepid Mexican American newspaperman/lawyer/activist Francisco P. Ramírez in the unsettled decades following the end of the U.S.-Mexico War. Ramírez's exploits were first brought to public view in 1966 with the publication of Leonard Pitt's classic social history, *The Decline of the Californios*. In that path-breaking work, Pitt situated Ramírez as a key player in the uneven transition from Mexican to American rule in Southern California as white American settlers slowly but surely established hegemony over Mexico's former northern frontier provinces.

Pitt's study provided intriguing glimpses of Ramírez's activities in Los Angeles in this era, but Gray's exhaustive research has resulted in a much fuller depiction of the life of a prominent member of the region's original Mexican American population—although, as Gray demonstrates, Ramírez's own sense of personal and political identity was probably significantly more complicated than contemporary understandings of that seemingly simple ethnic label.

Indeed, the strength of the book lies in Gray's ability to explore the complexities of changing cultural identities and political orientations in the region. Southern California had provided the backdrop for epic struggles that took place first between Spanish colonists and indigenous residents in the eighteenth century, between beleaguered Mexican republic administrators and American interlopers in the early part of the nineteenth century, and, finally, between and among the hundreds of thousands of Americans, Europeans, Asians, and Latin Americans who ended up in California after the Gold Rush.

Ramírez's life unfolded in the midst of these dramatic transitions. Born in Los Angeles in 1837, Ramírez proved a quick study in languages, learning Spanish from his parents, French from his godfather (the well-known Los Angeles vintner Louis Vignes), and English from the American immigrants who began

drifting into Southern California after the Mexican War. By his teen years, he was able to utilize his language skills by becoming a translator for the *Los Angeles Star*, the region's first English-language newspaper. He quickly learned the ropes of the newspaper business, working as compositor, typesetter, and then editor of the *Star*'s Spanish-language page.

Ramírez is best known, however, as the founding editor-publisher of a Spanish-language weekly he dubbed *El Clamor Público*—"The Public Outcry." As its title indicates, the paper, established in 1855, served as a mouthpiece for Southern California's Spanish-speaking population after the American takeover. Outraged by the erosion of Mexican influence and by what he viewed as the alarming increase of racial and cultural hostility toward ordinary Mexicans, Ramírez used his newspaper as a platform to articulate Mexican American grievances and to advance what was probably the earliest Mexican American civil rights campaign in California history.

Leonard Pitt's earlier study demonstrated how Ramírez hoped to inspire the Spanish-speaking population to become more involved in protecting and advancing their rights as U.S. citizens and to convince the region's Mexican elite landowners to be more politically proactive (and less conservative). But Gray adds nuance and new detail about Ramírez's political activities (both as an editor and later as an attorney and minor Republican Party functionary) by exploring his farsighted views on slavery, his criticism of California's corrupt railroad oligarchy, his evolving ideas about the prospects for a functioning democracy in Mexico, and, of course, his insights about race relations and the future of Mexicans in the United States. It is not clear how Ramírez came by his worldview, but Gray argues persuasively that whatever its original source, Ramírez drew inspiration from the ongoing struggle between conservatives and liberals that raged in Mexico between the 1820s and the 1850s, in the reverberations of that bitter struggle in northern Mexico, and in the kind of progressive American politics that eventually led to the emergence of the Republican Party in the United States.

Given the paucity of archival records related to Mexicans in California after the Gold Rush (and the evidentiary unevenness of the court records and case files analyzed in this study), Gray is inevitably forced to fill in some of the gaps in Ramírez's biography with what amounts to informed historical speculation about his activities and motivations, especially after Ramírez suddenly left Los Angeles for Baja California in 1881 after his apparent involvement in a check forging scheme. Still, readers interested in following the volatile and violent nineteenth-century history of California through the perspective of the

complex and compelling figure of Francisco P. Ramírez will find this volume a rich resource.

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The Colorado Doctrine: Water Rights, Corporations, and Distributive Justice on the American Frontier, by David Schorr. New Haven: Yale University Press, 2012; 235 pp.; notes, index; \$65.00 cloth.

David Schorr stirs up the waters of prior appropriation in this intellectual and thought-provoking history of western water law. Schorr, a senior lecturer at Tel Aviv University, where he chairs the Law and Environment Program, takes a deep look into the formation of water rights law in the state of Colorado. His inquiry concludes that water law in Colorado served the goal of social justice and not that of economic efficiency.

Prior appropriation has been a settled doctrine for so many years that it is hard to imagine today that water rights law in the western states could have ended up differently. A key aspect of prior appropriation law is that water rights are not incidental to the land as is the case with riparian rights in the eastern United States. In the West, a new doctrine emerged in which landowners could acquire water rights only by use, whether or not the lands developed were close to a stream. This became settled law in Colorado when its supreme court rendered the decision in *Coffin v. Left Hand Ditch Co.* (1882). Courts in other western states reached similar conclusions. Schorr calls this a victory for the community as a whole, since it prevented speculators from controlling the water supply in arid areas by owning swaths of land along streams.

A second key aspect of prior appropriation is that water use is appurtenant to specific tracts of land. In the early days of the West, Gilded Age barons desired to make water rights fungible, similar to stock in a corporation. That way, speculators could buy and sell water rights and sever those rights from the land. This raised the specter of monopoly. Early court decisions in Colorado sided not with the barons but with small landowners and farmers who argued that water rights must be tied to the land. That way, water rights could not be diluted by selling shares to the point where there was no longer enough available to provide sufficient water for irrigation.

Schorr bases his study firmly in the realm of property theory, reflective of an interest in how the public domain

became privatized. He begins with a review of the origins and development of water law in Colorado, concluding that it was closely related to mining law. This is followed by a chapter that shows how these early mining district rules and regulations were codified in territorial statutes, the Colorado state constitution of 1876, and early judicial decisions culminating in *Coffin*. The following two chapters examine the application of prior appropriation law post-*Coffin*, documenting how farmers wielded the decision to curb the power of speculators and corporations. Schorr concludes with a sophisticated analysis of how well his results compare with several property law theories.

While prior appropriation has its critics today who claim that it prevents water from being transferred to a higher and better use or tends to foster waste, the system has worked so well for more than a hundred years that few have delved recently into the arcane depths of its origins. Schorr is one of those few; unlike others, however, he comes not to bury prior appropriation, but to praise it. He notes that prior appropriation created a distinct property regime that achieved the desired outcome of distributive justice, meaning that a scarce resource was allocated equitably across the entire community.

Although Schorr is successful in bringing a high level of analysis to his topic, one criticism of the work is that it overlooks the contribution of Hispanic legal theory to prior appropriation. In the West, both water and mining law trace their origins to Mexico and Spain. In these arid locations, communal use of a scarce resource required equal access and distribution. While these desires meshed well with the reform impulse that challenged potential water barons in Colorado, they also represent concepts with lengthy historical precedent.

The Colorado Doctrine is an excellent work with a thought-provoking thesis. Schorr has delved deep into the historical archives, so his conclusions have a sound footing in original source documents. His conclusions are intellectually challenging and will find the most appeal for those interested in the origins of property law and resource allocation. Readers with more general interests in law, the environment, and western history will find useful information as well.

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Circle of Greed: The Spectacular Rise and Fall of the Lawyer Who Brought Corporate America to Its Knees, by Patrick Dillon and Carl M. Cannon. New York: Broadway Books, 2010; 532 pp.; acknowledgements, notes, index; \$28.00 cloth.

In the informative treatise *Circle of Greed*, authors Patrick Dillon and Carl M. Cannon blend the narrative of William Lerach, formerly of the California Bar, with aspects of class action securities litigation. Presenting a historical approach and spotlighting one of the foremost litigators to show how securities litigation evolved, the book offers differing views on corporate structure and the litigation pertaining to them.

William Lerach, who was a San Diego-based partner in the New York law firm that became Milberg Weiss Bershad Hynes & Lerach, is presented as a preeminent practitioner in the field of securities litigation, earning him the enmity of many a corporate boardroom for his aggressive litigation practices. The authors delve into corporate greed and the malfeasance of owners, directors, and employees of certain firms who promoted and sold shares in publicly traded companies regarding which they held "inside" information. Lerach and his associates at Milberg Weiss and other law firms undertook legal action against those companies that employed insider information for financial gain, to the detriment of non-insider shareholders which, at various times, included not only ordinary share purchasers but also pension funds, government entities, and others who were defrauded by these insider violations of security laws.

The "circle of greed" from which the book takes its title would eventually ensnare Lerach, members of his law firm, and other participants in what the U.S. government called a conspiracy to commit securities fraud. The conspiracy eventually led to the disbarment of Lerach and several of his law partners and the imprisonment of many other participants. Numerous major American companies were affected by the settlements of billions of dollars for aggrieved and wronged shareholders and investors in those firms. Lawsuits rested on legislation enacted and enshrined in securities law, especially the federally enacted Securities Exchange Act of 1934, which required that all publicly sold companies file disclosures relating every important and essential element of those shares.

It was into this milieu that Lerach, his associates, partners, and other law firms entered. By doing so, Lerach "came to do good, and did well." The authors contribute a history of securities law and case law, interpreting those statutes and the resulting impact on what came to be known as corporate securities fraud. As practiced, class action lawsuits became the preferred entry into the courtroom and the key to some elements

of recovery of the losses caused by insider trading. Attorneys who brought these lawsuits on behalf of investors/shareholders also had to be compensated for their time and effort. To be sure, the class action field was competitive, and the race to the courtroom and the attendant signing of "clients" was an important part of the process. In this practice Lerach did very well for himself. This narrative in *Circle of Greed* contains instances of Lerach's soaring expectations for himself and his associates. His exceptionally strong work habits and personal attributes give new meaning to the words hard charging; indeed these traits are the ones that eventually caused Lerach's downfall.

As noted, the supply of plaintiffs was the cornerstone of the continuance of these securities litigations. The cast of characters is extensive, from passive shareholders to "manufactured" plaintiffs (who bought shares in a corporation so that they could be named plaintiffs in a class action lawsuit), to the defense bar that defended companies against the plaintiffs' bar and their expert witnesses, the government attorneys who learned of offenses committed by the plaintiffs' bar for violations of SEC rules. Authors Dillon and Cannon do an excellent job of keeping the participants and their respective roles clear and understandable. The subject matter is complex but the authors make it accessible to those not intimately familiar with securities law. The reliance of some aspects of the plaintiffs' bar on "contrived and manufactured" witnesses, as well as evolving statutory and case law, limited and, in many respects, abrogated the opportunity to bring class action lawsuits.

The authors' attention to detail and their description of changing legislation and case law involving securities litigation make this book necessary reading for an understanding of present-day securities law (to be sure, an evolving process), especially in light of the subprime lending and banking scandals that erupted in 2008 and thereafter. In an epilogue to this work, the authors observe that in 2009 Lerach wrote an article entitled "How Tort Reform Paved the Way for the Financial Meltdown." By that date, Lerach had been disbarred and had finished a two-year prison term for a felony conspiracy to violate federal law involving payments to plaintiffs who, as agents of his law firm, received kickbacks and other illegal remuneration. The court opined that Lerach and his associates participated in the "circle of greed."

This book provides a great service in examining the extent of corporate fraud that led to the fleecing of thousands of individuals and pension funds. That William Lerach was able to call to account some of these abuses is to his credit. That he used, in some instances, unlawful practices is surely not to his credit. He remains disbarred in California. *Circle of Greed*

provides a balanced and insightful look at viewpoints regarding class action securities litigation.

James P. Spellman
Long Beach, California

Prisons and Patriots: Japanese American Wartime Citizenship, Civil Disobedience, and Historical Memory, by Cherstin M. Lyon. Philadelphia: Temple University Press, 2012; 239 pp.; notes, bibliography, index; \$30.95 paper.

The treatment of Japanese Americans during World War II marks one of the darkest hours of this country's history. Japanese Americans, or *Nikkei* (the term used for all Japanese Americans regardless of citizenship status), were forced to swear loyalty to the United States while interned in camps or ordered to enlist in the military. This blatant contradiction led some Japanese Americans to prove their patriotism by challenging American democracy. "Lessons in Citizenship," the title of the first chapter, aptly conveys the underlying issue raised by this book.

Prisons and Patriots is a provocative account of the efforts of a few Japanese Americans who chose to resist rather than submit. Lyon engages the reader with individual memoirs as she examines democracy, war, and society from the perspective of Japanese Americans during World War II and beyond. The result is a disturbing picture of racial inequality in the West that rivals the prejudice toward African Americans in the South. In the western states, even before mandatory relocation, Japanese Americans were educated in segregated schools, barred from owning property, and subject to limitations on immigration and citizenship.

The early chapters of the book explain the prewar history of *Nikkei*, providing insight into the prevalent and organized anti-Japanese sentiment. Anti-Japanese rhetoric excited voters, motivating politicians to support bills limiting *Nikkei* rights and privileges. Despite the fact that Japanese land ownership was minimal, California enacted the Alien Land Laws in 1913. At that time, Japanese Americans owned less than .001 percent of improved farmland. Following California, Washington State enhanced its laws to bar aliens from owning shares in corporations whose purpose was real estate. Consequently, Japanese parents purchased property or bought stock in the names of their *Nisei* (first generation Japanese Americans who were U.S. citizens) children. Local governments frequently challenged these transactions in the courts, with mixed results.

George Hirabayashi, a conscientious objector during the time of the Tucsonians, experienced the escheat of his family's land to the state of Washington when he was a child. The Hirabayashis and others jointly owned their farmland with a stock corporation, with the shares held by their Nisei children under the guardianship of their parents. The Hirabayashis and other families were charged with violating the alien land laws. The Washington Supreme Court held that the families intended to violate the law and ruled that the state was entitled to retain the property, reducing the families to tenants who paid rent to remain.

By studying the cultural nuances of the Nikkei, including the cultural doctrine that loyalty begins at home and radiates outward, Lyon develops a map leading the Tucsonians and others like Gordon Hirabayashi to challenge the government. When Japanese families were forced to register for detention, George Hirabayashi refused to do so. He was convicted of curfew violations and failure to register for the draft. After he lost on appeal, he hitchhiked to Arizona through restricted zones like the one he violated when he was arrested in order to serve his sentence. When he appeared at the jail, the warden was not prepared for a prisoner without an escort or papers, and he sent Hirabayashi away. Ultimately, Hirabayashi was incarcerated in the Tucson Federal Prison Camp as a conscientious objector at the same time as a group of Nisei resisters known as the Tucsonians. The parallels between Hirabayashi and the Tucsonians are numerous, and together they reflect the efforts of Japanese Americans to question the meaning of citizenship and duty.

Hirabayashi's personal tale exemplifies the clarity of purpose of the Nisei resisters. Readers are forced to ask themselves how democracy could fail so miserably after being tested repeatedly.

Citing historians, judges and countless primary sources, *Prisons and Patriots* should appeal to a broad range of readers. The examples of lawsuits and criminal prosecutions involving Japanese Americans provide a fresh and provocative perspective of the experience of Japanese Americans before, during, and after World War II. The stories of the young men who sought to define their citizenship through resistance and litigation contain insights often overlooked in writings about this period of American history, leaving the reader to wonder whether such a failure of American democracy could happen again.

Deborah L. Weiss, Esq.
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ARTICLES OF RELATED INTEREST

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

Abel, Joseph. "African Americans, Labor Unions, and the Struggle for Fair Employment in the Aircraft Manufacturing Industry of Texas, 1941–1945," *Journal of Southern History* 77 (August 2011).

Alexander, Toni. "Citizenship Contested: The 1930s Domestic Migrant Experience in California's San Joaquin Valley," *South-eastern Geographer* 51 (Spring 2011).

Andres, Benny J., Jr. "Invisible Borders: Repatriation and Colonization of Mexican Migrant Workers along the California Borderlands during the 1930s," *California History* 88:4 (2011).

Batlan, Felice. "The Birth of Legal Aid: Gender Ideologies, Women, and the Bar in New York City, 1863–1910," *Law and History Review* 28 (November 2010).

Chisholm, Brad. "Okabena: A Bank Robbery Revisited," *Minnesota History* 62 (Winter 2010–2011).

Dumont, Clayton W., Jr. "Contesting Scientists' Narrations of NAGPRA's Legislative History: Rule 10.11 and the Recovery of 'Culturally Unidentifiable' Ancestors," *Wicazo Sa Review* 26 (Spring 2011).

Edmondson, Aimee. "In Sullivan's Shadow: The Use and Abuse of Libel Law Arising from the Civil Rights Movement, 1960–89," *Journalism History* 37 (Spring 2011).

Goossen, Benjamin W. "'Like a Brilliant Thread': Gender and Vigilante Democracy in the Kansas Coalfield, 1921–1922," *Kansas History* 34 (Autumn 2011).

Hall, Phillip S. "Reasonable Doubt: The Trial and Hanging of Two Sticks," *South Dakota History* 42:1 (Spring 2012).

Irvin, Thomas. "The Political and Journalistic Battles to Create Nebraska's Unicameral Legislature," *Nebraska History* 92 (Spring 2011).

Kastellec, Jonathan P. "Panel Composition and Voting on the U.S. Courts of Appeals over Time," *Political Research Quarterly* 64 (June 2011).

Kellough, William. "Judge Royce H. Savage," *Chronicles of Oklahoma* 89 (Spring 2011).

Lamoreaux, Naomi R. "The Mystery of Property Rights: A U.S. Perspective," *Journal of Economic History* 71 (June 2011).

Lane, K. Maria D. "Water, Technology, and the Courtroom: Negotiating Reclamation Policy in Territorial New Mexico," *Journal of Historical Geography* (London) 37 (July 2011).

May, Matthew S. "Hobo Orator Union: Class Composition and the Spokane Free Speech Fight of the Industrial Workers of the World," *Quarterly Journal of Speech* 97 (May 2011).

McArthur, Marcus J. "'There Can Be No Neutral Ground': Samuel B. McPheeters and the Collision of Church and State in St. Louis, 1860-1864," *Journal of Presbyterian History* 89 (Spring-Summer 2011).

Mead, Rebecca. "Votes for Women! How Winning the Vote for Washington Women Helped Turn the Tide for Women's Suffrage on a National Scale," *Columbia* 24 (Winter 2010-2011).

Noel, Linda C. "'I am an American': Anglos, Mexicans, *Nativos*, and the National Debate over Arizona and New Mexico Statehood," *Pacific Historical Review* 80 (August 2011).

Napier, Rita G. "Origin Stories and Bleeding Kansas," *Kansas History* 34 (Spring 2011).

Roberts, Darwin P. "The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's 1871 Shift," *University of Colorado Law Review* 82:4 (2011).

Rosenfeld, Alan. "'An Everlasting Scar': Civilian Internment on Wartime Kaua'i," *Hawaiian Journal of History* 45 (2011).

Roth, Randolph, Michael D. Maltz, and Douglas L. Eckberg. "Homicide Rates in the Old West," *Western Historical Quarterly* 42 (Summer 2011).

Van Valkenburg, Carol. "Axis Nation 'Detainees' and Japanese Enemy Aliens in the West during World War II," *Montana The Magazine of Western History* 61 (Spring 2011).

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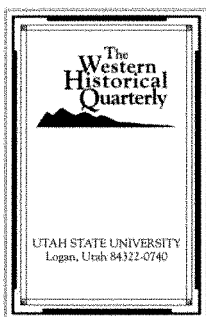
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