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Guest Editor: Judge Paul G. Rosenblatt

This issue is dedicated to the late Judge John M. Roll

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Cover photo: Grand Canyon from South Rim, vertical panorama with shadowed ravine, 1941. Photo by Ansel Adams. (Courtesy of National Archives [ARC519885])
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It seems only a time sprint since we first met in Sun Valley, in 1985, to form NJCHS, yet here we are with volume 26 of the journal. This issue of *Western Legal History* is devoted to two central themes: a memorial and a celebration. First, it is dedicated to John M. Roll. Judge Roll, then chief judge for the District of Arizona, was gunned down, together with five others, in Tucson in 2011. Thirteen others were wounded, including U.S. representative Gabrielle Giffords. Judge Roll was shielding the body of another when he was shot and killed. Presented herein is a short oral history of the judge that gives a brief insight into his life and career. He was a fine judge and a rare individual.

The celebration is the centennial of Arizona's admission, on Valentine's Day, 1912, as the forty-eighth—and "baby"—state, the last of the contiguous territories to be granted statehood. Judge Hawkins' article about the politics and some of the characters leading up to Arizona's admission to the Union gives the reader a clear picture of the era and the long struggle endured by the citizens of the territory, who felt they had been ignored as second class by the U.S. Congress and the states.

Also in this issue, because of the vagaries of journal publication, a secondary celebration is noted in the sesquicentennial of Prescott, Arizona, the first territorial capital established in 1864. My article traces the life of Judge Edmund W. Wells, whose presence covered the entire territorial period. Ultimately, this remarkable man also played a pivotal role in the constitutional convention leading to statehood, as well as the elections held soon thereafter. He led the minority Republican delegation to the constitutional convention, then was the losing candidate for governor.

David Devine provides a fine story that fits well with the centennial celebration as he tells of Robert A. Kirk's race to Washington, D.C., with the legislative paperwork for President Taft to sign to finally admit Arizona to statehood. The painfully slow race—slow because of a variety of circumstances—will keep the reader's full attention. Devine's article also explains why Arizona's admission turned out to be on February 14, 1912, instead of February 12, Abraham Lincoln's birthday. Lincoln had signed the legislation admitting Arizona as a territory, and the people of Arizona wanted statehood to occur on his birthday. Alas, the efforts of Kirk—courier and assistant territorial secretary—failed, but he had tried his very best.
Arizona was a leader in education from its earliest days. It desegregated its public schools well before *Brown v. Board of Education*. Indeed, Laura Munoz's article brings to our attention the litigation, *Romo v. Laird*, that culminated, in 1925, in the end of discrimination for Mexican-American students in the public schools in Tempe, Arizona. Mr. and Mrs. Romo, on behalf of their children, filed a petition for writ of mandamus accusing the Tempe School District of discrimination. A very respected judge, Joseph S. Jenckes, of the Maricopa County Superior Court, issued the writ within days. However, the school board did not appeal his decision, so the precedential value was lost because the Arizona Supreme Court did not get a chance to affirm the order. The question of belonging remained.

When the U.S. Constitution was amended in 1920 to permit women's suffrage, Arizona soon sent a woman representative, Isabella Greenway, to Washington. Yet Katrina Jagodinsky tells us of a much earlier history-making case wherein two women, a Native American and a Mexican, testified before an all-white, all-male jury in the Superior Court of Yavapai County in 1913. Indeed, the women did not speak English. However complicated the issues were in admitting their testimony, however deeply the author probes ethnic, cultural, and societal issues, this guest editor believes the mere fact that it happened was a step forward for all women's rights.

Arizona has twenty-one federally recognized Indian tribes. One-quarter of the land in the state is reservation land. The ever-growing population of the state as it has developed over the years paints a bleak picture as to the future, insofar as water is concerned. There is more need for water than there is water. The state competes with other basin states, while, at the same time, all of the claimants want more of this crucial, limited resource. Recognizing the water rights of the Pima Indians is the subject of Shelly Dudley's article, which traces the evolution of the federal government's role in protecting those rights and gives the reader a picture of the complex nature of the conundrum.

One of the first duties of Arizona's first territorial legislature and the governor in 1864 was to establish territorial law. Prior thereto, the laws of the territory of New Mexico prevailed. Judge William T. Howell was tasked with formulating Arizona's territorial law. The code that bore his name stood for many years and is the subject of John Lacy's article insofar as it addresses mining law. The gold rush miners were upset with Howell's law. After all, it was mining that prompted the creation of the territory in the first place during the Civil War. This discontent was resolved by Congress in 1866, when it adopted a superseding version largely drafted by those same miners.
This memorial and celebration issue of *Western Legal History* gives a glimpse into Arizona's deep and rich legal history. We hope it will encourage other scholars and researchers—indeed all of those interested in history—to explore Arizona's past.

Paul G. Rosenblatt  
U.S. District Judge for the District of Arizona
On February 14, 1912, Arizona officially and formally entered the Union. Large, enthusiastic crowds gathered in downtown Phoenix and in the courthouse plaza in Prescott to mark the event. The celebratory mood was tempered by a sense of relief, for achieving statehood had consumed nearly a quarter-century—lasting through five presidential administrations and well into that of a sixth—one of the longest such periods in American history. The very last of the continental territories to join the Union, Arizona was known as "the Baby State," until the admission of Alaska and Hawaii nearly a half-century later.1

Arizona's somewhat tortured path to statehood reflected the political divisions of the late nineteenth and early twentieth centuries. For most of the period from 1890 to 1912, the United States Senate was in the hands of Republicans who feared the political impact of admitting a new state with a history of electing Democrats. But Arizona's admission had the potential to do more than upset the balance of power in

the Senate; for some Republicans, Arizona's push for statehood symbolized the Populist and Progressive movements, which threatened the very existence of the Republican Party. Late nineteenth-century Republicans such as President Benjamin Harrison worried that "the free coinage [politics] of Western Senators" would move the country toward an inflationary monetary policy favored by the budding Populist movement. Republican advocates of the gold standard saw the addition of Arizona, a mineral-rich state, as a specific boon to the populist Free Silver movement.

The entrenched senators of the 1890s were not alone in opposing Arizona statehood. In 1890, the U.S. Senate was a collegial body of eighty-eight men, appointed by state legislatures, providing some insulation from the voters' ire. By 1914, fueled by the admission of four new states, the Senate would grow to ninety-six members, all directly elected as a result of the Seventeenth Amendment. Although the territory's government had a strong Progressive bent, even supportive senators had concerns about the power of influential mining and railroad interests doing business in Arizona. Even saloon keepers seemed to have a dog in the fight, wary of a rising Progressive tide and its support for women's suffrage, a policy shift the liquor industry saw as a pathway to Prohibition. For decades, these groups opposed the oftentimes colorful proponents of Arizona statehood.

THE POLITICAL AGENTS OF CHANGE

While many could, with varying degrees of validity, claim some responsibility for guiding Arizona to the goal of statehood, the effort to advance the territory's status would center around two very different men: Marcus Aurelius Smith (1851-1924) and Ralph Henry Cameron (1863-1953). Like most Arizonans of the time, they were born elsewhere—Cameron in Southport, Maine, Smith in rural Kentucky. Their roots defined their politics: Smith was a conservative southern Democrat whose career accomplishments would be marked by a statue at the Arizona state capitol, donated by the Daughters of the Confederacy; Cameron was a flinty New England Republican


3Although not immediately, the saloon keepers' fears came to pass: the Eighteenth Amendment (instituting Prohibition) was ratified on January 16, 1919. The Nineteenth Amendment (women's suffrage) was ratified on August 18, 1920.
so drawn to the self-sufficiency and independence of the West that he sought, with only modest success, to exploit and profit from Arizona’s most precious natural resource, the Grand Canyon. Both used involvement in the creation of new Arizona counties as a springboard to further public service. Both served as Arizona’s territorial delegate to Congress, working tirelessly for statehood. Both would later serve in the U.S. Senate. All similarities ended there. Smith, a dozen years older and a stout bull of a man, had graduated from Transylvania University in Lexington, Kentucky, at the top of his law school class and was a big-city lawyer from San Francisco when he arrived in Tombstone in 1880. Cameron, trim and athletic, described his education as “the school of hard knocks.” Working as a “fisherboy” on Atlantic schooners and as a department store stock boy, he became intrigued with the writings of Colorado River explorer John Wesley Powell. The call of the West proved irresistible to Cameron, who arrived in Flagstaff in 1883, riding the rails to get there.

MARK SMITH: THE SILVER TONGUED SOUTHERN DEMOCRAT

Brought to Tombstone by the lure of a silver-driven boom economy, Smith came with a storyteller’s wit and a fierce, competitive spirit. Early on, he found himself embroiled in local politics. A newfound friend, sometime client, political ally, and frequent drinking buddy was the local sheriff, John H. Behan. Behan was a Democrat, appointed by the territorial governor as the first sheriff of the newly created Cochise County. The U.S. marshal for Arizona was Crawley P. Drake, appointed by the Republican administration in Washington. One of Drake’s deputies was Wyatt Earp. Behan and Drake (and his deputies) had very different views of the state of law enforcement in Tombstone, the county seat, and the now famous and often fictionalized shootout at the O.K. Corral. Mark Smith sided with Sheriff

“Steven A. Fazio, "Marcus Aurelius Smith: Arizona Delegate and Senator," Arizona and the West 12 (Spring 1970): 24. There is some uncertainty as to the year Marcus Smith arrived in Arizona. Some put it as 1880 and others 1881. He was there at least as of May 1881, when the Tombstone courthouse was opened, and Smith is on record as representing Sheriff John H. Behan. John H. Goff, Marcus Smith (Cave Creek, AZ, 1989), 2 (citing The Tombstone Epitaph, May 25, 1881).

Behan, appearing at a public meeting announcing that lives and property were as safe there as anywhere.⁶

In 1882, Smith was elected Cochise County attorney, serving one two-year term and then returning to private practice. He brought a wit and flair to the courtroom. Once, while his opponent was arguing, the sound of a donkey braying (undoubtedly arranged by Smith) could be heard outside the courtroom. Smith objected, arguing that he did not think two attorneys should be arguing at the same time.⁷ One historian described him as “one of the shrewdest judges of men ever to come to Arizona.”⁸

A pair of high-profile cases brought Mark Smith an even wider reputation and the public attention that went with it. The first involved John O. Dunbar, an editor of *The Tombstone Epitaph*, who, while serving as Cochise County treasurer, was indicted for embezzlement of public funds. Abandoned by his Republican friends, Dunbar turned to Mark Smith for his defense. Structuring a defense that left the jury wondering if any public money was missing at all, Smith won an acquittal for Dunbar and gained a lifelong friend and supporter—one with an audience and printer’s ink.⁹

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**MARK SMITH MEETS JUDGE SLOAN**

In September 1889, Mark Smith took on the defense of eight farmers and stockmen accused of robbing a payroll detachment under the command of U.S. Army Major James W. Wham. The case thus became known as the Wham Robbery.¹⁰ Witnesses claimed that the robbers headed in the direction of Solomonville, a largely Mormon community in Graham County. Smith’s aggressive and successful defense, resisting a prosecution many thought was fueled by anti-Mormon prejudice, earned him a lifetime of political support among Arizona Mormons.

The case was presided over by Richard Elihu Sloan. A former prosecutor, Sloan was a justice on the territorial supreme court, sitting on circuit as a trial judge. He would later serve as

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⁷Ibid., 5.
⁹Fazio, “Marcus Aurelius Smith,” 27.
Marcus Smith, who was elected as territorial delegate to Congress eight times, fought hard for Arizona statehood but failed in his efforts. (Courtesy of History and Archives Division, Arizona State Library, 97-8477)
Arizona's last territorial governor and would play an important role in the final march to statehood. A lifelong Republican, Judge Sloan could not help but admire the courtroom skills of the well-known Democrat representing the defendants: “Mark Smith used all of his wit and skill to befuddle the prosecution, and to bring out the truth of the matter. He cleverly maneuvered Major Wham into a nice corner when he took several of the gold pieces alleged to have been stolen, mixed them with other gold pieces on a table and then defied the Major to pick out the gold pieces stolen from him!”

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**Serious Statehood Work Begins**

Although there had been earlier efforts, serious work on statehood came in the wake of Congress's passage of the 1889 omnibus bill proposing the creation of several new states among the Western territories. Elected as Arizona's territorial delegate to Congress in 1888, Mark Smith watched as, within a nine-month period, North Dakota, South Dakota, Washington, and Wyoming were admitted. When Congress turned to the admission of Wyoming and Idaho, removing Arizona from the list in the process, Smith had heard enough. Taking to the House floor on April 2, 1889, he blisteringly addressed the largely Republican opponents of statehood for Arizona:

[I]t is my purpose to say that the people who sent me here have been unfairly and unjustly treated in this regard. . . . [T]he people of the Territory of Arizona, having every qualification for statehood that exists in Wyoming or Idaho or Montana or Washington, or in any one of the Territories, complain that the Territory is unjustly treated in being kept out of the Union and is being kept under Territorial degradation, and this too, with a population larger, with a wealth greater than either Wyoming or Idaho, simply because she has seen

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12Territorial delegates proposed statehood measures in 1872 and again in 1882. The later effort by delegate Grant Oury was not warmly received by editorial commentators (“The people have never, either by petition or otherwise, asked for this recognition. Our delegate could better occupy his official time in the advancement of the local industries and developments of the territory”). *Phoenix Herald*, Feb. 21, 1882.

fit and proper to send a Democrat to represent her in the Congress of the United States. 14

Whatever the members may have thought of this broadside, the House would not budge and adjourned without further action on the issue. At this point, many of the territories in the continental West had been brought into the Union. Along with Utah, Oklahoma, and New Mexico, however, Arizona remained on the outside looking in.

Mark Smith returned from Washington in 1890 to seek reelection as its territorial delegate. His opponent was a well-known Republican, George W. Cheyney, a fellow Cochise County resident, a mine superintendent, and a former territorial superintendent of education. Cheyney ran under the banner, "Death to Mormonism and Statehood for Arizona." Smith won handily, running up large margins in Latter Day Saint communities. 15

THE 1892 CONVENTION

The process by which a territory gains admission to the Union normally sees Congress pass enabling legislation authorizing the territory to draft a constitution. Impatient with attempts at the traditional process, Arizona decided to kick-start the process by proposing a constitution on its own, to see if that might push the statehood agenda forward. Acting on the authorization of the Sixteenth Territorial Legislature, territorial secretary Nathan O. Murphy (for Governor John N. Irwin) called for a May 12, 1891, election of twenty-two delegates to attend a September 7, 1891, constitutional convention in Phoenix. 16 The Tombstone Epitaph, in an editorial (undoubtedly written by Smith's former client) urging voters to put aside any idea that Mark Smith already had a job in Congress, identified Smith as a serious candidate to attend the conven-

15 John S. Goff, The Delegates to Congress 1863–1912, vol. 3 of Arizona Territorial Officials (Cave Creek, AZ, 1985), 135; Fazio, "Marcus Aurelius Smith," 34. For examples of Republican anti-Mormon rhetoric, see the front pages of the Arizona Weekly Citizen, Sept. 27, 1890, and Nov. 8, 1890.
16 Election Proclamation of March 24, 1891, reprinted in The Tombstone Epitaph, April 19, 1891.
tion. Although Democrats outnumbered Republicans (18–5), the gathering had a bipartisan tone. Cochise County voters selected both Mark Smith and George Cheyney as delegates. Although he did not attend, Yavapai County elected prominent Republican and former territorial governor Frank A. Trittle. Secretary Murphy, a Republican appointee and a strong supporter of statehood, welcomed the delegates.

Although geographically diverse, the twenty-one delegates who gathered at the initial meeting in Phoenix on September 7, 1891, reflected the times—no women, no one of color, and certainly no Native Americans. Maricopa and Pima counties sent three delegates; Yavapai, Cochise, Pinal, Graham, and Apache counties sent two each. The remaining counties—Mohave, Coconino, and Gila—each sent one.

Nominated by Alonso Bailey of Globe, Prescott's Winthrop R. Rowe was elected president of the convention. Secretary Murphy swore in the delegates, who wasted little time in getting down to the business at hand. Mark Smith played an active role in the convention proceedings, securing positions on no less than seven committees, including the Committee on the Legislative Department, which he chaired.

The delegates worked for nearly a month, from early September through October 3, 1891. The debates were, in the main, polite and respectful. The most contentious issue centered around the so-called Idaho Test Oath, which would have required all voting-age Mormons in Arizona to take an oath.
swearing off the practice of plural marriage.\textsuperscript{20} Supporters of the oath, largely Republicans, may have had more on their minds than religion, since Arizona Mormons of that day tended to be a reliable constituency for Democrats. Mark Smith saw the oath as an attempt to disenfranchise a key voting block, and he successfully prevented its inclusion in the final draft. Smith also played a central role in the inclusion of a provision (article II, section 16) providing that silver—the precious metal that brought him to Arizona in the first place—would be on equal footing with gold for the payment of state debts.

The final product of the 1891 convention, approved and signed by every delegate, was otherwise a straightforward document, proposing three branches of government, incorporating most of the Bill of Rights from the U.S. Constitution, and acknowledging the indissolubility of the Union. The governor and other state officers would serve four-year terms and would be subject to impeachment but not recall. The legislature would be bicameral, with one popularly elected senator from each county and one at-large senator selected by the counties. Each county would have at least one member of the house of representatives, with the larger counties apportioned additional seats. Suffrage would be limited to male citizens over twenty-one years, with the legislature given specific authority to expand the right to vote to "all citizens of mature and sound mind." The document made no provision for citizen-initiated legislation.\textsuperscript{21}

The 1891 constitution was not without its critics. Peter R. Brady, who had served in the territorial legislature, found the document "full of jobbery and injustice."\textsuperscript{22} An ardent Progressive, Brady found the tax provisions inadequate to the needs of a fledgling state and the water rights provision a dead-on giveaway to entrenched interests. The voters of Arizona saw it

\textsuperscript{20}Until removed by the voters in 1982, art. 6, sec. 3 of the Idaho Constitution prevented any person who practiced, supported, encouraged, or belonged to any group that supported plural marriage from voting, serving as a juror, or holding any public office. Merle Wells, "The Idaho Test Oath, 1884–1892," \emph{Pacific History Review} 23 (August 1955): 235–36. The idea of including this provision in the Arizona Constitution had editorial support. See "A Test Oath: That's What the People of Pima County Want," \emph{Arizona Republican}, October 8, 1891.

\textsuperscript{21}The text of the 1891 constitution appears as a March 16, 1892, report accompanying delegate Smith's introduction of H.R. 7204 [proposing statehood for Arizona] and is available at http://azmemory.azlibrary.gov/cdm/ref/collection/statepubs/id/10181. We do not know how the at-large senator would have been selected; the constitution simply provided that the "several Counties" would "elect" one. Ibid., 15.

\textsuperscript{22}Peter R. Brady, letter to the editor, \emph{The Arizona Sentinel}, Nov. 21, 1891.
differently and, in December of that year, approved the proposed constitution by a two-to-one margin.23

Returning to Congress in January 1892, Mark Smith introduced H.R. 3855, proposing statehood for Arizona, this time based on the work of the 1891 convention.24 When the proposal bogged down in the House Committee on Territories, Smith, who had been assigned to the Indian Affairs Committee, asked that his committee assignment be switched to Territories. Two months after his initial proposal, Smith introduced another statehood bill (H.R. 7204), the Arizona Enabling Act.25 Staving off efforts to stall consideration of the measure, Smith watched with satisfaction as the measure was overwhelmingly (173–13) approved in the House.26 Any thought that statehood might be in sight was put to rest when the proposal died in committee in the Senate.

THE OPERA HOUSE CONVENTION (1893–94)

The election of Grover Cleveland to the presidency in November 1892 provided a glimmer of hope to statehood supporters. For the first time in more than thirty years, the Senate, the House, and the executive branch would be in Democratic hands. Confident that the statehood effort could now move forward, Nathan Murphy, now the territorial governor, led an effort to bring together a group of citizens to lobby Congress for statehood. Meeting at the Phoenix Opera House from November 1893 through January 1894, the attendees had no official sanction: some were chosen in county conventions; others could be safely described as self-appointed. Counties in central and southern Arizona were well represented: Maricopa and Pima had ten delegates each. In the north, Yavapai and Mohave were not represented at all, and Coconino sent a lone representative. The gathering nonetheless was determinedly bipartisan, with an equal number of Republicans and Democrats. A small group brought their experience from the 1892 convention: William Barnes and W.A. Hartt from Pima County, Thomas Davis from Pinal, and Art McDonald from Apache. George Cheyney also returned from Cochise County, this time with-

23 Arizona Republican, December 3, 1891; The Tombstone Epitaph, December 5, 1891.

24 A Bill to Provide for the Admission of the State of Arizona into the Union, H.R. 3855, 52d Cong., 1st sess., Congressional Record 23 (January 15, 1892): 338.

25 A Bill to Provide for the Admission of the State of Arizona into the Union, H.R. 7204, 52d Cong., 1st sess., Congressional Record 23 (March 14, 1892): 2071.

26 Ibid., June 6, 1892: 5089–90.
out Mark Smith, who was tending to his duties in Washington. The group was also more diverse, with names like Apadoca, Samanlego, and Velasco appearing on the roster. This convention produced a variation of the 1892 proposal. At Mark Smith's urging, the House acted favorably, passing a new Enabling Act, permitting Arizona Territory to organize into a state. Hopes were buoyed when the measure not only passed the House but secured committee approval in the Senate. Without strong support from the White House, however, the measure died at the end of the session. Contributing to the White House's tepid response was the "Free Silver" provision of Arizona's proposed constitution, which Smith had championed but which the president's gold-centric supporters strongly opposed. Politicians tend to have long memories, and Mark Smith's backing of President Cleveland's opponent at the 1892 Democratic National Convention did not help.

A President Visits

Statehood prospects seemed to brighten with the turn of the century. Meeting to nominate Ohioan William O. McKinley for a second term, the 1900 Republican National Convention in Philadelphia, at the urging of delegate Richard Sloan (the judge from the Wham Payroll Robbery case), passed a resolution advocating statehood for Arizona. Re-elected in November 1900, President McKinley took a long train trip across the country, beginning in Washington, swinging through the South, then

28A Bill to Provide for the Admission of the State of Arizona into the Union, H.R. 4393, 53d Cong., 2d sess., Congressional Record 26 (December 15, 1893): 268.
29In a February 10, 1891, letter responding to an invitation to attend a meeting of the Reform Club, Cleveland referred to Free Silver as a "dangerous and reckless experiment." Quoted in Horace Samuel Merrill, Bourbon Leader: Grover Cleveland and the Democratic Party (Boston, 1957), 154–55. In 1894, Cleveland vetoed a bill that would have allowed the Treasury Department to coin $55 million in silver dollars. Alan Nevins, ed., Letters of Grover Cleveland, 1850–1908 (Boston, 1933), 342–43.
across New Mexico and into Arizona. After an inspection of a
gold mine at Congress Junction, the presidential party proceed-
ed by train to Phoenix. Waiting for the president was a special
escort of Arizonans on horseback, which the president quickly
recognized as Rough Riders. McKinley had sent members of
that force, including a colonel from New York who was now
his vice president, to Cuba during the Spanish-American War.

The press noticed U.S. secretary of state John Hay among
those accompanying the president. At a very young age, Hay
had been a close confidant of Abraham Lincoln and was present
at the Gettysburg Address. President McKinley's May 7, 1901,
speech to a large crowd gathered on the grounds of the Phoenix
Indian School resembled the Great Emancipator's battlefield
dedication gem only in its brevity. He did, however, speak
to the issue most on the minds of his audience, giving what
could only be described as a lukewarm, "good luck convincing
Congress" comment on statehood: "I leave with you my best
wishes for the happiness of your people, for the prosperity of
your statehood, and that you may soon be able to show to the
Congress of the United States that you have builded well, and
wisely, and strongly, this great territory, and that you are ready
to be admitted to the Union of States."

A NEW PRESIDENT

Six months after being sworn in for a second term, President
McKinley was attacked and wounded by a crazed anarchist dur-
ding an appearance at the Pan American Exposition in Buffalo,
New York. He lingered for a few days and then passed away;
any hope that his party's platform promise or his cautious sup-
port might advance the cause of Arizona statehood passed with
him. For succeeding McKinley was vice president Theodore
Roosevelt, the former governor of New York and Rough Rider

31President McKinley would never return to Washington. After first lady Ida
McKinley fell ill in California in May, the McKinleys traveled to their native
Ohio to convalesce over the summer. From Ohio, President McKinley went
to Buffalo to address the Pan-American Exposition, where he was shot by
Leon Czolgosz and died in September 1901. Lewis L. Gould, The Presidency of
William McKinley [Lawrence, KS, 1980], 243–48; H. Wayne Morgan, William
McKinley and His America [Syracuse, NY, 1963], 512–20.
32"Phoenix the Capital of the Nation for One Day," Arizona Republican,
May 8, 1901.
33Ibid. Gary Wills, Lincoln at Gettysburg: The Words That Remade America
34Ibid.
hero of the Spanish-American War. Although T.R. would eventually come around to support the effort, for the bulk of his term the new president turned out to be no particular friend of Arizona statehood.

THE RENEWED EFFORT

After declining to stand for reelection in two successive congressional sessions, Mark Smith returned to Congress and the cause of statehood, introducing statehood bills in December 1901 and again in March 1902. In a floor speech on May 8, 1902, he made the case that territorial status was holding Arizona back from the progress it deserved. In what sounded a bit like the list of grievances from the Declaration of Independence, Smith noted the burdens of territorial status, pointing out that, in many instances, the fact of territorial status prevented Arizonans from addressing the very deficiencies cited by opponents of statehood. Without the approval of Congress and the president, Arizona’s legislature could not raise funds for needed public improvements, such as the creation of badly needed courts. Arizona-based mining companies could not sell products in overseas markets, inhibiting the growth of a critical industry by effectively placing an embargo on its products no state should have to endure. As a territory, Arizona was powerless to tax the large right-of-way grants that Congress had provided to railroads, lands which Congress refused to survey to determine the necessity of expanding rail transportation. Congress had even withheld public land needed for public schools, while, at the same time, opponents of statehood in its midst pointed to the lack of a good system of public education as a reason to

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30 During the two periods when Mark Smith did not seek reelection as territorial delegate, Nathan O. Murphy and John F. Wilson both introduced statehood legislation. Neither proposal moved forward. Murphy, who was a former governor appointed to his post by a Republican administration and who was the brother of a well-known businessman, should have received more favorable attention than his Democratic predecessor, but he did not. Goff, Marcus Smith, 48–49.

36 A Bill to Enable the People of Arizona to Form a Constitution and State Government and to Be Admitted into the Union on an Equal Footing with the Original States, H.R. 2015, 57th Cong., 1st sess., Congressional Record 35 (December 3, 1901): 95. A Bill to Enable the People of Arizona to Form a Constitution and State Government and to Be Admitted into the Union on an Equal Footing with the Original States, H.R. 11992, 57th Cong., 1st sess., Congressional Record 35 (March 3, 1902): 2338.
deny statehood. Arizona's delegate closed as if his audience were a jury:

The people request admission to the Union as a State. They understand and estimate the advantages which will accrue to them from such a connection, while they trust they do not too highly compute those that will be conferred upon their brethren. They do not present themselves as suppliants, nor do they bear themselves with arrogance or presumption. They come as free American citizens, by treaty, by adoption, and by birth, and ask that they be permitted to reap the common benefits, share the common ills, and promote the common welfare as one of the United States of America.

According to the official transcript, "long-continued applause" greeted Smith's plea.

A NEW STRATEGY AND A NEW ROADBLOCK

When these proposals failed, as all of them had in the past, Mark Smith seized on an idea to broaden support in the Senate, proposing legislation that would admit three new states, Oklahoma, New Mexico, and Arizona, as a package. In the midst of the debate over the measure, a new roadblock appeared, one that would create not only a defining moment but an unintended opportunity for Arizona's aspirations.

Mark Smith, after all, had famously argued that he "would rather live in a Republican state than a Democratic territory." And Senate Republicans set about reminding him of the old saw, "Be careful what you wish for." Shuddering at the idea of a new state in the West that would almost certainly send two Democrats to the Senate, they came up with a new tactic. On May 9, 1902—the same day that the House approved an omnibus bill authorizing statehood for Arizona, New Mexico, and Oklahoma—Senator Jesse Overstreet (R-Indiana) proposed an amendment that would combine Arizona and New Mexico territories into a single state to be called Montezuma. The Senate Republicans may have thought a combined state would be

37Delegate Smith of Arizona, speaking for the Statehood Bill, on May 8, 1902, to the Committee of the Whole, H.R. 12543, 57th Cong., 1st sess., Congressional Record 35, pt. 8 app'x: 223-26.
38Ibid., 226.
39Arizona Republican, May 10, 1902.
more favorable to candidates of their own party, but Smith saw it as an effort to sidetrack the omnibus bill and further delay statehood for Arizona.

Senator Albert J. Beveridge (R-Indiana), the chairman of the Committee on Territories, became the point man in opposing statehood for Arizona. Publicly Senator Beveridge expressed doubt about whether Arizona was ready to join the Union. In private, he was blunt: Arizona's territorial legislature was dominated by Democrats, and its voters had sent a steady stream of Democrats (mostly Mark Smith) as its delegate to Congress. Beveridge had little doubt but that statehood would send two senators and a representative of the other party to Congress. He also opposed statehood for New Mexico, referring to its large and influential "Latin" population. When Senator Beveridge then came out in favor of joint statehood for the two territories, the storyteller in Mark Smith could not resist, quipping that this was like saying that "two rotten eggs would make a fine omelet."\(^{40}\)

In June 1902, Beveridge led his committee on a tour of the three territories covered by the omnibus bill and then recommended that Oklahoma be admitted but that any action on New Mexico or Arizona be put off. Smith was highly critical of the visit, noting that the committee had been in Phoenix for exactly one day and seemed to have devoted the bulk of its time trying to find illiterates among the locals. A House committee, led by William Randolph Hearst, arrived in October 1905 for a longer and more detailed visit and enthusiastically concluded that Arizona was ready for statehood.\(^{41}\)

**THE PEOPLE GET A SAY**

Statehood for Arizona now seemed to be at a complete stalemate. The House, having rejected joint statehood and approved separate status for Arizona, was in no mood to budge. Senator Beveridge and many of his Republican colleagues in the Senate seemed equally adamant that for Arizona it was either joint statehood or nothing at all. When Congress resumed debate on the proposal, Senator Joseph Benson Foraker (R-Ohio) came to the rescue, armed with a compromise proposal, slipped to him on the Senate floor by Mark Smith: put the issue of joint statehood to a vote in both New Mexico and Arizona in the 1906

\(^{40}\)Lamar, *The Far Southwest*, 428, and footnote 22.

\(^{41}\)Protest Against Union of Arizona with New Mexico, 59th Cong., 1st sess., 1906, S. Doc. 216, 17–18.
elections. Under what would become known as the Foraker Amendment, if either territory objected, joint statehood would become a dead letter. In the ensuing debate, Senator Foraker and his colleague Thomas R. Bard (R-California) pointed out that the very act of Congress that had created the Arizona Territory in February 1863 effectively promised that the people of Arizona would have a voice on statehood: "Provided, further, that said Government shall be maintained and continued until such time as the people residing in said Territory shall, with the consent of Congress, form a state government, republican in form, as prescribed by the Constitution of the United States, and applied for and obtained admission into the Union as a State on equal footing with the original States." The argument, however tenuous, proved to be pivotal, and the Foraker Amendment passed easily on March 6, 1906.

Separate statehood for Arizona, however, was not out of the woods just yet. Ahead was a political campaign, with no less than the president of the United States weighing in on the side of joint statehood. In a letter to Dr. Mark A. Rodgers, the secretary of the Arizona Statehood Association, President Roosevelt called opposition to joint statehood "mere folly" and warned, "[t] is my belief that if the people of Arizona let this chance go by they will have to wait very many years before the chance again offers itself, and even then it will probably be only upon the present terms—that is, upon the condition of being joined with New Mexico." When the president's letter was made public, it so angered the Phoenix City Council that it voted to change the name of Roosevelt Street to Cleveland Street.

Then as now, Arizona voters had no appetite for listening to Washington. Michael G. Cunniff, born in Boston and educated at Harvard, came to Arizona sometime in the 1890s and was a rising star on the territory's Democratic scene. Cunniff, who somehow was both a Progressive and a mining company owner, observed that it mattered not whom he spoke with, what their party affiliation might be, what their station in life might be, 

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44President Theodore Roosevelt to Dr. Mark A. Rodgers, 27 June 1906, State of Arizona Archives.


the people of Arizona were not simply against the idea of joint statehood, they were outspokenly opposed to it.

Asking that question was like touching a match to a cannon cracker. Men did not merely say, "We don't want joint statehood." They made speeches. They shot forth reasons. They told stories. They made parables. Lawyers overwhelmed me with arguments, doctors analyzed the situation, storekeepers detained me to tell me all about it, conductors hung over rear seats of cars to discuss it; mining men, business men, teachers, editors, Democrats, Republicans, Prohibitionists, were all in the same mood.47

By advocating joint statehood with New Mexico or no statehood at all, Senator Beveridge and his colleagues set off a firestorm in Arizona. Mark Smith returned home and appeared before a joint meeting of Democratic and Republican territorial committees, who promptly pledged to work together to defeat joint statehood. Smith also received a boisterous reception by the convention of his fellow Democrats who promptly renominated him for another term as delegate. In November 1906, the voters spoke, overwhelmingly rejecting joint statehood, 16,265 to 3,141.48 They also reelected Mark Smith as delegate for the eighth and what would turn out to be the final time.

If supporters of Arizona statehood thought that statehood would surely follow defeat of joint statehood, they were mistaken. In January 1908, Smith introduced another statehood bill to no avail. When he returned home from Congress, he had labored hard, but did not have the prize of statehood to show for his twenty-year effort to achieve statehood for his adopted state. Mark Smith was fifty-two years old and seemed exhausted by the effort.

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**THE REPUBLICANS TURN TO A NEW FACE**

Mark Smith had enjoyed a string of successes against Republican opponents, broken only by three terms when he had


chosen not to run (1894, 1898, and 1902).49 But now waiting in the wings was Ralph Henry Cameron. While Mark Smith was at work in Congress from 1886 to 1906, Cameron ran a sheep ranch with his brother Niles and opened a mercantile store in Flagstaff. Still intrigued by the Powell expeditions, he also explored the Grand Canyon. This was long before the canyon was protected as either a wilderness area or a national park, and Cameron was determined to take full advantage, opening a hotel on the South Rim, developing mining interests there, and, at one point, claiming ownership of the Bright Angel Trail. He also built a home on the South Rim of the canyon, where, from time to time, hikers who had underestimated the difficulty of negotiating the canyon’s trails would stumble in to recuperate.

In addition to his Grand Canyon interests, Cameron also had a hand in public service, aiding in the creation of Coconino County and then serving two terms as its sheriff. A delegate to the Republican National Convention in 1896, he was elected to the Coconino Board of Supervisors and served as its chairman from 1905 to 1907.

Meeting in Phoenix, Republicans decided to turn to a fresh face in 1908. Described by a biographer as a “trim, handsome man with a clear gaze, a youthful face, an ingratiating smile and an outstanding personality,” Cameron made a strong candidate.50 Mark Smith knew and liked Cameron and pledged a campaign free of personal attack. The one-time “fisherboy” ran a smart and, by the standards of the day, modern campaign, touring Arizona by automobile and pointing out that for all his efforts, Mark Smith had not brought home the prize of statehood. The voters had the chance, Cameron argued, to show the Republicans in Congress that Arizona was not as solidly Democratic as they thought and that the desire for statehood was, in fact, bipartisan.

Even in a day when methods for measuring the mood of voters were not widely available, a seasoned politician instinctively knew when public support was waning. Mark Smith, whose margin of victory in 1906 was smaller than it had ever been, must have had some sense of his decreased popularity when, with just three weeks left in the campaign, he unexpectedly

49Beginning with his 1886 upset win over incumbent delegate Curtis C. Bean, only five years after arriving in Tombstone Smith had defeated every candidate the other party had run against him: Thomas F. Wilson (1888), George W. Cheyney (1890), W.G. Stewart (1892), A.J. Doran (1896), Nathan O. Murphy (1900), Benjamin Fowler (1904), W.F. Cooper (1906), and even William O. “Buckey” O’Neil, the wildly popular mayor of Prescott, who ran on the Populist ticket in 1896. Wagoner, Arizona Territory, 254.

announced he would be leaving the state to campaign in the Midwest for William Jennings Bryan, the Democratic nominee for president. Smith returned to Arizona shortly before election day and lost the delegate's race to Cameron by some seven hundred votes.

It is no small irony that the final push to statehood for Arizona was strengthened by the departure of what had been its single strongest advocate, and that Mark Smith had to leave public life in order for Arizona to achieve the goal for which he had worked so long and hard. Smith, after all, had been intimately involved in the two-tiered tactical decision that kept statehood hopes alive: "packaging" Arizona in an omnibus bill that included New Mexico and Oklahoma, thereby expanding support for statehood and suggesting to Senator Foraker the amendment that gave Arizonans the opportunity to show their bipartisan opposition to joint statehood with New Mexico.

There was more work to be done, and the job was now up to Ralph Cameron. The effort was not without momentum: Cameron's election seemed to break down the conviction in Washington that Arizona was an entrenched Democratic stronghold. The wind was now at the back of the Arizona effort: both the Republican and Democratic national conventions in 1908 took platform positions in favor of separate statehood for New Mexico and Arizona. Within a month of Cameron's election, and mindful of the strong sentiment against joint statehood, Theodore Roosevelt, in his last message to Congress, came out in favor of separate statehood for Arizona: "I advocate the immediate admission of New Mexico and Arizona as States. This should be done in the present Session of Congress. The people of the two Territories have made it evident by their votes that they will not come in as one state. The only alternative is to admit them as two, and I trust this will be done without delay."
A NEW PRESIDENT AND A NEW CHALLENGE

Of course, Congress did not act immediately. And Colonel Roosevelt was out of the White House and off to Africa to collect big game samples for the Smithsonian. In came President William Howard Taft, who would prove to be the gatekeeper for Arizona statehood. Taft had been born into a prominent Ohio legal family. His father, Alphonso Taft, was the last attorney general in the Grant administration, and the future president had served as solicitor general and a circuit judge on the newly created Court of Appeals for the Sixth Circuit. Taft, who realized his life's goal of becoming a Supreme Court justice after his presidency, thus developed a strong appreciation for the courts from an early age.

When Roosevelt had announced that he would not seek a third term, Republican attention focused on two men: Taft and a fellow Ohioan, none other than the author of the Senate floor amendment that allowed Arizona voters to escape joint statehood: Senator Joseph Foraker. Roosevelt backed Taft over Foraker, in no small part because of a personal feud between Roosevelt and the senator from Ohio. Taft was nominated easily and soundly defeated Democrat William Jennings Bryan in the 1908 election. Mark Smith's efforts, it turned out, helped neither Bryan's nor his own cause.

TAFT VISITS ARIZONA

Shortly after his inauguration, President Taft appointed Richard Sloan territorial governor. Sloan, after leaving the bench, had practiced law in Prescott from 1894 to 1900, then served on the territorial supreme court as a McKinley, then a

54Edmund Morris, Colonel Roosevelt [New York, 2010], 8.
56Taft's margin of victory was substantial: two million popular votes and a handy margin (321–162) in the Electoral College. Taft would serve one difficult term as president, challenged in 1912 for his party's nomination by none other than his predecessor and former good friend Teddy Roosevelt. When Taft secured renomination, T.R. mounted a third-party candidacy under the Bull Moose banner, effectively handing the White House to Democrat Woodrow Wilson. Taft would not return to public life until May 1921, when President Warren G. Harding named him chief justice of the United States, the only job he had ever really wanted. In declining health, he resigned from the court in February 1930, and passed away one month later. Ibid., passim.
The last territorial supreme court met in Phoenix. Justice Richard Sloan is second from the left. (Courtesy of the History and Archives Division, Arizona State Library, 95-2501)

Roosevelt appointee. In 1908, the Republican Party readopted the platform plank advocating statehood for Arizona, which Sloan had first suggested eight years earlier. Sloan’s appointment as governor signaled President Taft’s willingness to get serious about Arizona statehood.

In October 1909, six months into office, President Taft planned a visit to Arizona. News of the visit sparked a rush on hotel rooms in Phoenix: mining men deferred their vacations, and socialites from San Diego poured into town. “Frying Pan” Lewis, one of Arizona’s first chefs, came up from Guaymas, Sonora, to add Taft to the list of the presidents he had seen since 1850.51

Waiting in Yuma as the president’s train left California and entered Arizona was Governor Sloan. The group traveled to

57In 1907, Judge Sloan presided over the trial of Henry Vincent (“Winnie”) Rosenberger, who was acquitted of murder charges arising out of the death of Rock Hockdeffer, a member of a prominent Flagstaff family, after a gunfight at the Windmill Ranch in Yavapai County. Prescott Journal-Miner, May 13, 16, and 17, 1907. The defendant was the author’s great uncle.

58“Flock Here to See Taft,” Los Angeles Times, October 8, 1909.
Tempe for a brief speech by the president, then on to Phoenix for a gathering at City Hall and finally to Courtyard Square in Prescott, where Taft was greeted by a receptive crowd. Among them was Mary Ray Cullumber, a retired school teacher who had once taught the president in Cincinnati and referred to him as "Willie Taft" when interviewed by a local newspaper.59

Introduced by Prescott mayor Morris Goldwater,60 Taft emphasized his support for Arizona statehood, as he did at every stop in the territory, reminding those gathered that he had run on the promise of the 1908 Republican platform calling for separate statehood for Arizona.61 But he also had a straightforward message for Arizonans: propose a simple constitution using the U.S. Constitution as a template, not one that would tie down future legislatures. The president had seen the Oklahoma constitution, which he said read like "a zoological garden of cranks."62 For Arizona, the president's tone was supportive and encouraging, and seemed to assume that statehood would be forthcoming: "Your assumption of Statehood throws upon you a responsibility that will not enable you thereafter to charge it all to the Federal government. When you get into difficulty out here and have bad officials or your legislature gets you into it in a county or city, you cannot say it is all Washington, because Washington does not understand it. Then the fault will be on your own head."63

After a reception at the local Masonic hall in Prescott, the president said his goodbyes and boarded the train that would take him to Ash Fork, where he would spend the night. The next day he was off to the Grand Canyon, where, after lunch at the El Tovar Lodge, he spent twelve hours touring the canyon.64

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THE 1910 ENABLING ACT

Although possessed of none of the natural wit or flourish of his predecessor, delegate Ralph Cameron addressed the House


60Unlike his nephew Barry Morris Goldwater, longtime U.S. senator and 1964 presidential nominee, Morris Goldwater was a lifelong Democrat.


62Ibid.


64"Trip across Grand Canyon Is Program of President Taft," Christian Science Monitor, October 14, 1909.
of Representatives in January 1910 and delivered his own plea for statehood: "Arizona has been knocking at the door of statehood for many, many years, and its just claims to recognition and inclusion in the Sisterhood of States have been met with scant consideration, notwithstanding the numerous promises and pledges of the two dominant parties.

Arizona's new delegate would not move Congress any faster than Mark Smith's entreaties did. In the end, it would take a higher authority. Unlike the cautious attitude of William O. McKinley or the windsock approach of Teddy Roosevelt, President Taft would prove a reliable, even persistent supporter of statehood for Arizona. That support, as he had made clear in his Arizona visit, was not unconditional; Arizona would have to come up with an acceptable constitution. From his first Annual Message to Congress on December 7, 1909, to the June 20, 1910, signing of the Enabling Act, President Taft saw fulfillment of the platform promise he had run on as a committed goal.

By early June 1910, the stars were finally aligning in Arizona's favor. Democrats in Congress were insisting that Arizona statehood be taken up before the summer recess. When pundits presumed that statehood legislation for both Arizona and New Mexico would be shelved, President Taft met with congressional leaders and insisted that the measure be taken up even if it meant prolonging the session. With the session winding down, he was even willing to forgo attending his son's graduation from Yale to ensure action on statehood. Sending first for Senator Beveridge, the tenacious longtime opponent of Arizona statehood, and then Senator Charles Dick [R-Ohio], a member of the Territories Committee that Beveridge chaired, and with Governor Richard Sloan at his side, the president made clear he wanted statehood acted upon in the current session.

On June 16, the U.S. Senate, voting along party lines, passed legislation permitting New Mexico and Arizona to enter the Union as separate states. There remained the business of

67 "Taft to Go West in October," Washington Post, June 14, 1910.
69 "Taft to Go West in October," Washington Post.
70 "President Taft May Not Be Able to See Son Graduate," Los Angeles Times, June 15, 1910.
conforming the Senate measure with an earlier version passed by the House, but there was little doubt but that accommodation would happen. As Senator William E. Borah (R-Idaho) said, "There are two reasons why we should reach an agreement. One is that we won't go home until we get it and the other is that it is getting too hot to stay here this long."70

The principal difference between the House and the Senate versions was a Senate requirement that the constitutions of the two prospective states be approved by Congress and the president before statehood would become effective. This was the version that the president favored; shortly after the Senate passed its version, Taft delivered a letter to House speaker Joseph Cannon (R-Ill.), urging the House simply to accept the Senate version and avoid the need for a conference committee. Some Republicans apparently were willing to send the measure to conference in the hope that statehood legislation would never come out.71 Persuaded by the president that Congress should act, and act now, House Democrats gave up their objections to the Senate version, and the full House voted to accept the Senate version.72 On June 18, 1910, almost a quarter-century after Mark Smith's first efforts, a decade after Richard Sloan's platform plank, and two years after Ralph Cameron's upset delegate win, the long fight was over—or so it seemed.

On June 20, 1910, Ralph Cameron went to the White House to participate in the bill-signing ceremony that would finally put Arizona inexorably on track to statehood. As he was ushered into the room where the signing would take place, Cameron assumed he and W.A. Andrews, the delegate from New Mexico, would receive ceremonial pens to mark the occasion. With a flourish, President Taft, using both a gold pen and an eagle feather, affixed his signature to the Enabling Act. To Cameron's surprise, the president's newly appointed personal secretary, Charles D. Norton, stepped forward and, handing the delegate from Arizona the blotter that had just been used to dry the ink of the president's signature, announced to the group: "This is the Cameron who saved my life." It seems that, fifteen years earlier, Norton had become ill and disoriented while hiking alone in the Grand Canyon. He was wandering aimlessly, sometimes crawling, when a

70"State Bill Passed; Senate Agrees to Admit New Mexico and Arizona," Washington Post, June 17, 1910.
local miner found him and took him to the Cameron home on the South Rim, where he was nursed back to health.73

The act itself bore more than Taft’s signature. By pushing for Arizona statehood but favoring the Senate version of the Enabling Act, the president was true to both his promise and his warning. Arizona would have to draft and adopt a constitution, and then, in a step not before required of any prospective new state, the constitution would have to be approved by both Congress and the president. In this way, the president reinforced his earlier admonitions to the people of Arizona and ensured that the Oklahoma experience would not be repeated in the Southwest.

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**The Work Ahead**

There was much to be done before Arizonans would fully realize their statehood dreams. Delegates to a constitutional convention would have to be elected and then meet and produce a constitution. Despite warnings from Mark Smith, Ralph Cameron, and Governor Richard Sloan, the delegates produced a document rife with detailed Progressive provisions designed to ensure voter oversight of state government.74 Voters were given the power to bring citizen-proposed legislation to the ballot (initiative); to prevent legislation passed by the legislature from going into effect without a public vote of approval (referendum); and to remove elected public officials, including judges, outside of regular elections (recall). This was obviously much closer to the Oklahoma model than the straightforward document President Taft had recommended in his Arizona visit. Most objectionable was the provision allowing the recall of judges.

True to his promise, Taft vetoed the proposed constitution. Elimination of the judicial recall provision was placed on the same ballot as approval of the constitution. The voters complied, removing judicial recall and approving the constitution. The president then approved, and Arizonans had their statehood. Once it was a sovereign state, at the next general

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74For Sloan, permitting direct democracy through procedures like the initiative, the referendum, and the recall was “the agitators opportunity.” Mark E. Prior, “Arizona and the Politics of Statehood, 1892–1912” (Ph.D. diss., Arizona State University, 1997), 251 [on file at Arizona State Archives].
President William Howard Taft signs the Arizona statehood bill in Washington, D.C. Territorial delegate Ralph Cameron is in the background, second from the right. (Courtesy of History and Archives Division, Arizona State Library, 97-6172)

election Arizona promptly put recall of judges back into the state constitution.75

Senator Beveridge's fears were realized when the Arizona Legislature, in March 1912, selected Mark Smith and Henry Fountain Ashurst as its first U.S. senators. On April 2, they were introduced in the Senate and drew straws for the short and long terms. Mark Smith drew the short straw and thus had to stand for reelection in 1914, when, by popular vote, he was elected to a full six-year term, defeating Republican J. Lorenzo Hubbell, a well-known Indian trader.76 In 1920, Smith squared off against the only person to whom he had ever lost, Ralph Cameron. The niceties of their earlier delegate campaign were quickly set

75 For all the attention it received, the judicial recall provision has been used only once. In 1924, Pinal Superior Court judge Stephen H. Abbey was recalled from office. James R. Murphy, “Arizona’s Constitutional Recall Provision,” Arizona Bar Journal (September 1966), 12–15. Judge Abbey appealed his removal to the Arizona Supreme Court and lost. Abbey v. Green, 28 Ariz. 53, 235 P. 150 (1925).

76 Martha Blue, Indian Trader: The Life and Times of J.L. Hubbell (Walnut, CA, 2000).
Arizona Statehood Day is celebrated in Phoenix, 1912. (Courtesy of History and Archives Division, Arizona State Library, 98-9892)

aside. Smith claimed Cameron’s campaign promises were filled with “nothing but gall,” and Cameron accused Smith of having lost touch with Arizona. In the end, Ralph Cameron repeated his victory of fourteen years earlier. He would serve a single term, losing to Carl Hayden in 1926. Cameron attempted to return to the Senate in 1928 (losing the primary) and 1932 (losing to Senator Hayden in the general). Neither Smith nor Cameron fully returned to Arizona after their final election defeats. Smith passed away in his native Kentucky, Cameron during a business trip to Washington, D.C.

Richard Sloan’s final act as territorial governor would be to swear in the delegates to the Arizona Constitutional Convention. A longtime and highly regarded member of the territorial supreme court who frequently rode circuit to conduct trials across Arizona, he was nominated by President Taft in 1912 to be a U.S. district judge, only to see his confirmation derailed by the opposition of Arizona’s Democratic senators, including Mark Smith.

"Fazio, “Marcus Aurelius Smith,” 60-61."
From the reluctance of a Republican-controlled Senate to add a new state with a history of sending Democratic delegates to Washington, through the reluctance of a Democratic president to support statehood because of a fellow Democrat's support of another in the nomination process, to the warmer reception to statehood when Arizona voters sent a Republican delegate, to the refusal to confirm a person of the opposite party to a federal judgeship, politics pervaded Arizona's path to statehood from beginning to end.
**Race to Washington: Why Arizona Is the Valentine's Day State**

David Devine

*Saturday, February 3, 1912*

As his late-night train pulled slowly away from the Phoenix station, assistant territorial secretary Robert A. Kirk was finally able to relax in his seat. He thought over some of the remarkable events of the past two years that had led to this historic moment. He found it hard to believe, but he was in fact on his way to the nation's capital to deliver the required paperwork to President William Howard Taft that would finally bring about statehood for Arizona.

After more than two decades of failure, including a 1906 congressional attempt allowing New Mexico and Arizona to enter the union as one state, the successful process had begun when, in June 1910, Congress had adopted an enabling act.\(^1\) That law established the steps needed for Arizona and New Mexico to achieve statehood separately.

The following month, abiding by the adopted legislation, Arizona territorial governor Richard E. Sloan declared that fifty-two men would be elected in September to draft a constitution for the proposed state. The election selected forty-one

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\(^1\) *Arizona Enabling Act*, 36 Stat. 557–79 (June 20, 1910).

Since 1995, David Devine has written about Tucson and Arizona history. Research for this article was originally done for four statehood centennial stories published in the *Tucson Weekly*, as well as a paper presented at the Arizona Centennial Conference held in April 2012.
Democrats and only eleven Republicans. This outcome, speculated the Tucson Citizen, was not good news for those seeking statehood for Arizona. "The [election] result makes certain the incorporation of the principles of direct legislation, the initiative, referendum and recall in the new state constitution," the newspaper summarized. "Republican leaders are quoted as expressing the belief it will defeat statehood as such a constitution will fail to meet the approval of President Taft...."

Ignoring gloomy predictions like that, the convention delegates met in Phoenix from October 10 to December 9 to hammer out the constitution. George W.P. Hunt, Democrat from Globe, was elected president of the gathering.

Although many portions of the draft constitution were generally acceptable to all the delegates, as the Citizen had suggested, some of its proposed provisions were extremely controversial, such as those that centered on the role of the electorate in determining public policy. These provisions—the initiative, the recall, and the referendum—were considered "insurgent doctrines" by several commentators.

Perhaps the most contentious of these doctrines was including the recall of judges in the constitution. Hunt's position on doing this was typically straightforward. He said, simply, "that the recall was of positive value and he could not see why judges were different from any other office holders and therefore they too should be subjected to the principle."

But Republicans at the convention were ardently opposed to including the judicial recall measure in the constitution. Their dispute with the Democratic delegates led to what the Arizona Daily Star in Tucson labeled in early November as "the most bitter fight of the convention so far. . . ." As a result of this disagreement, the convention defeated a motion to exempt judges from recall by a vote of 30 to 18. It then endorsed a measure, by a tally of 37 to 11, subjecting all elected officials to recall.

In the view of The Arizona Republican newspaper in Phoenix, this decision meant certain denial of statehood for Arizona. "Another nail," the paper stated on November 11, 1910, after adopt-

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3"Republican Leaders See Defeat of Statehood," Tucson Citizen, September 13, 1910.

4John S. Goff, George W.P. Hunt and His Arizona (Pasadena, CA, 1973), 41.

tion of the judicial recall provision, "the longest and the strongest of all, was driven into the coffin of statehood yesterday."

That pessimistic prediction seemed reasonable given President Taft's strong views on the subject. He said that the recall measure "would deprive the judiciary of that independence without which the liberty and other rights of the individual cannot be maintained against the Government and the majority."

At the end of the Arizona convention in early December 1910, forty delegates approved the entire final document. Of the twelve dissenters, all but one refused to sign the approved constitution.

As his train lumbered eastward through the cool desert night, Kirk reflected that as 1910 had come to a close, the chances for Arizona statehood had looked bleak indeed. Judicial recall was part of the draft constitution, and President Taft was strongly opposed to it. But things eventually turned around, and now he was on his way to Washington to insure that Arizona became a state.

It was extremely important, Kirk knew, that he reach the nation's capital as soon as possible. Early in 1912 Phoenix business and political leaders had seemingly finalized all necessary plans to guarantee Arizona would become a state on Lincoln's birthday, February 12. Given their efforts, what could possibly go wrong?

February 12 was an important date for Sloan and many others in Arizona, with the territorial governor writing Taft, "As you may know, there is a fitness in having our admission day on Lincoln's birthday inasmuch as Arizona was created a Territory by Act of Congress during Lincoln's administration. I think, therefore, it appropriate that our Territory, having begun its life through the act of President Lincoln, should terminate on his birthday."

For its part, the Republican was a strong supporter of the newest state's admission day being Lincoln's birthday, but acknowledged that it might not happen. On February 3, 1912, the paper commented, "It is expected that Feb. 12 will be the date of admission and inauguration [of state officials], though the announcement cannot be definitely made until the election returns reach Washington, and advices are received as to the date of the president's proclamation."

"In Most Offensive Form Recall Has Been Adopted," The Arizona Republican (Phoenix), November 11, 1910.


Sloan to Taft, 29 January 1912, Wm. H. Taft Papers, series 6, reel 384, case file 415.

"Preparations for Admission," The Arizona Republican, February 3, 1912.
Despite the uncertainty about the exact date of admission, Phoenix officials were developing definite plans for the celebration to be on Lincoln's birthday. The Republican also wrote on February 3, "The remainder of the program will have to do mainly with the celebration of admission day. The streets will be decorated to give the city a festive appearance. Early in the afternoon there will be a monster parade in celebration of statehood. For this event all the fraternal societies, civic organizations, labor unions, schools, town or city or county delegations, or any other organized body so disposed, will be invited to participate."\(^{10}\)

As he headed further east and dawn began to break, Kirk hoped to present the election results to Taft on Wednesday morning, February 7, and that was fine with the White House. Taft's secretary, Charles D. Hilles, telegraphed Sloan, "Will be glad to arrange for Mr. Kirk to present returns Wednesday eleven thirty as you request."\(^{11}\)

It was important that this meeting be held on schedule because the president had an extremely busy itinerary on February 12. But even though he already had numerous reelection campaign commitments in New York and New Jersey on Lincoln's birthday, Taft informed Sloan, "I am leaving the city early on the morning of the 12\(^{th}\) instant, but I shall be glad to see if it is possible to so arrange matters as to sign the proclamation before leaving."\(^{12}\)

To accommodate the president's tight schedule while making certain that February 12 would be Arizona's admission day, Kirk selected a new Southern Pacific train service for the important trip eastward. "Mr. Kirk expected to connect at El Paso with the Southern Pacific's new fast train via New Orleans," the Republican emphasized to its readers, "the fastest train now running between the east and west."\(^{13}\)

**Sunday, February 4**

Unfortunately, Kirk's train was running late by the time it reached Houston on February 4. Calling the Arizona messenger a Paul Revere-type rider and his trip a "mad chase eastward," the Houston Chronicle outlined the valiant steps Southern Pacific was taking to ensure that he reached Wash-

\(^{10}\)Ibid.

\(^{11}\)Hilles to Sloan, 4 February 1912, Wm. H. Taft Papers, series 6, reel 384, case file 415.

\(^{12}\)Taft to Sloan, 2 February 1912, ibid.

ington on time. "For hours," the newspaper reported of Kirk’s journey, "the telegraph wires had been busy telling . . . of the necessity of making connections at New Orleans. . . . At Houston, the fastest passenger engine on the system, No. 270, and John A. Anderson, the Casey Jones of the Texas lines, were in readiness." 14

The Houston newspaper saw some possible political gamesmanship being played by the White House over the date of Arizona becoming a state. "Admitting Arizona as a state further undermines President Taft’s strength," the Chronicle observed. "It gives the Democrats an undentable majority in [C]ongress. It adds another state to the Democratic solid [S]outh. And unless Messenger Kirk gets to Washington before President Taft leaves Wednesday, the entry of Arizona as a state may be much delayed." 15

As he paced nervously up and down the platform of the Houston train station waiting anxiously to move along, Kirk returned to the story of how he had come to be on an important cross-country pilgrimage to meet the president of the United States. After its approval by the convention, the draft Arizona constitution was sent for ratification to the territory’s male voters, since suffrage had not yet been granted to women. Arguing against the measure, a jurist in Tucson wrote, "I do not believe the provisions for the ‘Recall’ which the constitution contains . . . require any misconduct to be either alleged or proved before an officer can be recalled." 16 The Arizona Daily Star called the proposed document "a socialistic constitution." The paper also believed that adoption of the constitution would make "statehood at this time impossible." 17

Despite those negative opinions, Arizona voters, by an almost 3–1 margin, endorsed the constitution on February 9, 1911. The document then went to Washington for review and acceptance. The judicial recall provision, however, caused immediate and potentially insurmountable problems.

Those problems, Kirk recalled as he moved eastward at what seemed like a very slow pace, had appeared huge in early 1911. But now, one year later, they had all been resolved, and his biggest worry was getting to Washington as quickly as possible.

15 Ibid.
17 "Adoption of the Constitution," Arizona Daily Star, February 8, 1911.
Monday, February 5

The political paranoia suggested by the *Houston Chronicle* about Arizona’s admission to the Union was only heightened when Kirk’s train to New Orleans was further behind schedule. “The Southern Pacific de Luxe was two hours late in reaching here,” a frustrated Kirk wired *The Arizona Republican* on February 5, “and I am compelled to take a slow train out of New Orleans because they would not hold the limited. I am scheduled to reach Washington on this train at 10:20 Wednesday morning, but it is now one hour late in leaving.”

Despite the delay, the Phoenix newspaper was still betting on Lincoln’s birthday being admission day. “[I]t is believed there will in any event be time for the president to issue his proclamation by Monday, Feb. 12,” the newspaper predicted.

A letter from Lloyd B. Christy, mayor of Phoenix, to the White House backed up that belief. At the same time, the White House was writing to Christy, “The President is to leave Washington early on the morning of February 12th, but he will be very glad to try to arrange for signing the Arizona statehood proclamation before his departure.”

Incoming governor and former president of the constitutional convention George W.P. Hunt also seemed to believe February 12 would be admission day. According to the *Republican*, “it was learned . . . that Governor-elect Hunt expects to be in Phoenix on Sunday, Feb. 11 to take the oath of office on Monday, Feb. 12 at noon.”

Exhausted and full of anxiety at all the travel delays, Kirk sat slumped in his seat. As his train moved slowly through Mississippi, the Arizona assistant territorial secretary continued his reminisces of the saga that resulted in his heading to Washington.

After the U.S. House of Representatives approved separate statehood measures for both New Mexico and Arizona in a single bill, the Senate took up the proposal. At least one of its members, William Borah of Idaho, seemed to be somewhat confused about the public view of the judicial recall issue in Arizona’s constitution. He inquired of the *Arizona Daily Star*, “Do you think the people of Arizona generally would rather remain out of the Union than to have the recall of judges elimi-

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19Ibid.
20Hillis to Christy, 5 February 1912, Wm. H. Taft Papers, series 6, reel 384, case file 415.
21“Kirk Delayed by Slow Train.”
nated from the constitution?" To that question the Tucson newspaper immediately replied with an emphatic "No."22

Based on similar positions expressed by many Arizona leaders, the U.S. Senate considered two different measures. One required that the judicial recall be removed from the constitution before statehood would be granted. The Washington Post editorially endorsed this course of action. The other Senate proposal, though, merely required that a specific election on the recall issue be held without mandating its results.

The first measure, to require the removal of the judicial recall, was defeated in the Senate by a vote of 43 to 26. "Even some Senators who declared their opposition to the recall of judges," the Arizona Daily Star pointed out, "voted against the amendment on the ground that if the people of Arizona wanted the recall, it is not for Congress to say whether they should have it."23

Thus the second provision, which potentially allowed the recall of judges to remain in the Arizona constitution, was adopted in the Senate by a vote of 53 to 18. But Taft had made no secret of his opposition to the judicial recall measure. There was speculation, however, that either enough congressional votes could be secured to override a possible veto, or the president would allow the bill to become law without his signature. Both of those rumors, however, quickly proved unfounded.

For their part, despite the possibility of a presidential veto, many people in Arizona celebrated the Senate's action with bonfires and firecrackers. On the other hand, residents of New Mexico were characterized as full of "gloom and foreboding of ill" since their state's fate was directly linked to that of Arizona's.

After being described as "surprised" by the Senate's actions, Taft vetoed the statehood bill on August 15, 1911. In his veto message, he wrote of the judicial recall, "[I]n its applications to county and State judges [it] seems to me so pernicious in its effect, so destructive of independence in the judiciary, so likely to subject the rights of the individual to the possible tyranny of a popular majority, and therefore, to be so injurious to the cause of free government that I must disapprove a constitution containing it."24

The New York Times applauded Taft's action. Calling the veto measure "one of the best American State papers that we can


23"Only Hope Rests on Refusal to Veto or Take Any Action on Statehood," Arizona Daily Star, August 9, 1911.

24"Veto on Statehood," The Washington Post, August 16, 1911.
recall," the newspaper concluded that Taft’s reasoning was “very comprehensive, soberly stated, clear, simple, and practical.”

Aboard his lumbering train, Kirk remembered that events certainly had not looked promising at that point for Arizona’s statehood. But the situation had turned around quickly, and now he at least was moving toward his ultimate destination of Washington, D.C., and his appointment with history.

Tuesday, February 6

To commemorate both admission and inauguration day, Mayor Christy had mailed out invitations to a celebration to be held in Phoenix, “on a date approximating February twelfth....” On February 6, according to that city’s afternoon newspaper, the Arizona Gazette, he also sent out requests to other Arizona elected officials to “telegraph President Taft, requesting him to issue his proclamation making February 12 admission day.”

Unfortunately, after the problems in New Orleans, Kirk also missed his connection in Montgomery, Alabama. He informed the White House, “Will reach Washington Wednesday night (February 7) ten thirty and unless further instructed will deliver election returns from Arizona Thursday morning.” As his train chugged through the rolling countryside of the nation’s eastern states, Kirk had plenty of opportunity to reflect further on his, and Arizona’s, incredible journey to this point in time.

Finally, after some short-lived political posturing in which threats were made in Congress that no amended statehood legislation would be adopted for Arizona and New Mexico, on August 19, 1911, a joint resolution of Congress approved a provision to meet President Taft’s requirements. Taft then accepted the Arizona constitution on the condition that the judicial recall would be removed by the territory’s voters. This was to be insured “after the results of the election herein provided for shall have been certified to the President, and also after evidence shall have been submitted to him of the compliance with the terms and conditions of this resolution.”

26“Inauguration Day Will Be Observed as Holiday,” Arizona Gazette (Phoenix), February 7, 1912.
27Kirk to Taft, 6 February 1912, Wm. H. Taft Papers, series 6, reel 384, case file 415.
28Joint Resolution to Admit the Territories of New Mexico and Arizona as States into the Union upon an Equal Footing with the Original States, 37 Stat. 39 (August 21, 1911).
29Ibid.
Responding to this requirement, territorial governor Sloan called for a primary election to be held on October 24 to nominate state officials and a general election to select them on December 12. It would be on the second of these ballots that the constitutional amendment question would appear.

The Arizona Daily Star in Tucson was leaving nothing to chance in advocating for a repeal of the judicial recall. It told its readers, "[I]f you don't want statehood; if you want to be bound, hand and foot; if you want to be a puppet, with the owner of the Punch and Judy show in Washington pulling the string that makes dependent mankind dance, vote against the amendment. But if you want to be one of God's creatures, with all the rights of manhood and independence; if you want to be a free American citizen, vote for the constitutional amendment." Reinforcing that opinion, the Star showed a sample of the judicial recall ballot question. With a large "X," the newspaper indicated that voters should check "For Constitutional Amendment."

The other Tucson newspaper, the Tucson Citizen, also supported passage of the constitutional amendment. But unlike some other Arizona newspapers, the Citizen's hyperbole about the benefits of statehood was somewhat restrained. Achieving statehood, the Citizen predicted, would mean "no greener grass nor heavier rainfall, but more people and more money to make the best use of the present resources which nature has given Arizona."

The Citizen put an additional twist on the constitutional amendment issue. On the same December ballot that would decide its fate, numerous state positions were going to be contested. These races included those for governor, two U.S. Senate seats, one place in the House of Representatives, and an entire state legislature. The Citizen thought it appropriate, more than two months before the judicial recall amendment would be voted on, that each of the Arizona legislative candidates take a pledge stating "that during my first term of office I will vote for the prompt resubmission of the recall of the judiciary section of the constitution to a vote of the people, that they may vote upon its restoration untrammeled by any other consideration." In other words, the newspaper was advocating removing the judicial recall to secure Taft's approval of statehood, but reinserting the provision back into the constitution

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32 "The People of Arizona Want to Know," Tucson Citizen, September 23, 1911.
once Arizona became a state and was immune from the president’s interference.

Arizona’s congressional representative, Ralph Cameron, one of those primarily responsible for bringing the territory to the brink of statehood, took a somewhat similar tack. Speaking in November 1911 to an audience in Tucson as part of his campaign for the U.S. Senate, Cameron said, “The people, some of them, have said: ‘Mr. Cameron, why didn’t you tell the President to go to Hades, or some other place’ [after his veto] . . . when I could not get all that was in that constitution.” Cameron continued, “I took what I could get, knowing that the people, at the first legislature, could have the recall or any other amendment that they desired.”

How many of the candidates for the Arizona legislature took the Citizen pledge is not known. What is known is that, astonishingly, the amendment eliminating the judicial recall from the constitution was adopted by more than a 7–1 margin on December 12, 1911. At the same time, despite Republicans including the resubmission of the judicial recall as part of their party’s election platform, Democrats made a clean sweep of the major races, with Hunt elected governor, Marcus Smith and Henry Ashurst chosen as U.S. senators, and Carl Hayden elected as the state’s lone congressional representative.

Even though he was disappointed by these sweeping election results, territorial governor Sloan informed Taft that he was not totally discouraged by the outcome: “Immigration for the past few years has been largely from Republican States, and it is fair to assume, therefore, that a majority of these newcomers are Republicans.”

In addition to Arizona’s eventually becoming a Republican state, Sloan had another thought in mind, an idea that was first proposed by the Tucson Citizen. The governor quickly endorsed the idea of Arizona’s admission day being a holiday in every state of the union. The only problem with implementing that bold proposal, Kirk realized aboard his train, was that no one knew exactly when Arizona would achieve statehood. He was on his way to Washington to deliver the constitutional amendment election results, thus setting the stage for Arizona to become the forty-eighth state of the Union. Statehood would happen sometime in February 1912, Kirk knew; he hoped it would be February 12.


34Sloan to Taft, 26 December 1911, Wm. H. Taft Papers, series 6, reel 384, case file 415.
On February 7, governor-elect Hunt informed the inaugural and statehood organizing committee that he wanted a simple swearing-in ceremony. He also decided to walk the one mile from his Phoenix hotel to the capital for the event.

Late that night, after his event-filled train trip, Kirk finally arrived in the nation’s capital. The Arizona Republican in Phoenix then incorrectly speculated he’d see the president on Thursday, February 8, or Friday the 9th. Before then, though, Kirk was tossing and turning in his Washington hotel room, replaying the events of the past few hectic days in his mind. As he did, he continued his reminisces about how this point in his epic journey had been reached.

For various reasons, the official canvas of the returns from the December 12, 1911, Arizona election did not begin until the new year. Initially it was expected to take two to three weeks to complete. Delays in the counting by four men in Phoenix, however, soon pushed the anticipated completion date back to February 1.

Explaining the delay in counting the approximately 17,000 votes, Sloan told Taft, “It might appear that the Canvassing Board has been unnecessarily slow in canvassing the returns, but the fact is that we have a trained clerical force of four men constantly at work since the first day of January, and the canvass has progressed as rapidly as was consistent with the thorough and careful counting, tabulation and determination of the returns.” The Arizona Republican suggested another excuse for the length of the canvass count: “To those who are yet fearful that time has been lost, it is pointed out that there are fourteen counties in Arizona. The count has averaged two days to each county.”

After the final count, the returns were originally going to be sent by Arizona territorial secretary George U. Young via registered mail to the nation’s capital. But the postal service was not trusted with the precious cargo, so the returns were to be sent from Phoenix.

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35"Nation Waits to Greet New Sister State," The Arizona Republican, February 8, 1912.

36Sloan to Taft, 26 December 1911, Wm. H. Taft Papers, series 6, reel 384, case file 415.

37"Sloan to Taft, 29 January 1912, ibid.

38"Canvassing Board Has Completed the Count," The Arizona Republican, February 3, 1912.


with a courier on the Santa Fe Limited via St. Louis. By this route, if Kirk departed on Friday, February 2, the canvass was expected to be in Washington by Tuesday, February 6, for delivery to the president that same day.

In the end, though, Southern Pacific Railroad's train through New Orleans was chosen for the special mission because it was considered the fastest way east. "Schedules have been carefully studied by the official family at the capitol building," declared the *Tucson Citizen* of territorial administrators, "and it has been found that if Kirk leaves here (Phoenix) this evening (Sunday, February 3) he can travel over the Southern Pacific to Washington, D.C. and be there at 6:30 o'clock Wednesday (February 7) morning, in plenty of time to get his breakfast and rehearse his meeting with the president." This was obviously important if Arizona was to become a state on February 12. From his perspective, territorial governor Sloan believed the results could be in Washington, D.C., in time to allow Arizona's admission day to be on Lincoln's birthday.

In a letter to the president, Mayor Christy seconded that hope: "The citizens of Phoenix for sentimental reasons would request that your proclamation admitting Arizona to the sisterhood of states be issued on February 12, the great president's birthday." In addition to Christy, other political leaders from across Arizona concurred. They included Morris Goldwater, mayor of Prescott, who wrote the president, "As Arizona was made a Territory during President Lincoln's administration, it seems to many that the anniversary of his birth would be a fitting date on which the new State might annually celebrate its birth."

Others advocating for a February 12 statehood day included Moses Neuman, mayor of Bisbee, and John C. Potts, chairman of the Mohave County Board of Supervisors. Potts informed Taft, "At the request of many citizens of this county, I have the honor to suggest that you issue your Proclamation admitting Arizona to Statehood on February 12, 1912, the birthday of President Lincoln, during whose administration Arizona was admitted as a separate Territory."

42 "Kirk Leaves Tonight for Washington with Certified Election Results in Grip-sack," *Tucson Citizen*, February 4, 1912.
43 Sloan to Taft, 29 January 1912, Wm. H. Taft Papers, series 6, reel 384, case file 415.
44 Christy to Taft, 30 January 30, 1912, ibid.
45 Goldwater to Taft, 31 January 1912, ibid.
46 Potts to Taft, 1 February 1912, ibid.
But U.S. senator-elect Marcus Smith, hailing from Tombstone and Tucson, had a completely different viewpoint. Smith told Taft, "Mr. President, we do not want this. Our great reverence for the greatest of our illustrious dead is in no sense or degree abated by our natural desire to have our own birthday as a state unobscured by any National holiday." Taft, however, hoped to comply with the wishes expressed by most Arizonans that the territory would become a state on Lincoln’s birthday.

Thus, when, late in the evening of February 3, Kirk had left Phoenix headed to Washington, D.C. with the “voluminous” official election results in his grip, the stage was set for Arizona to become a state on Lincoln’s birthday. New Mexico had entered the union on January 6, and Arizona would be next—the forty-eighth state. But by the time Kirk finally reached the nation’s capital close to midnight on February 7, the plans for statehood on the 12th appeared to be fading quickly.

Thursday, February 8

Although Hunt may have been hoping for a simple inauguration ceremony as governor, Phoenix organizers were planning something a little more elaborate to mark Arizona’s statehood. “With G.A.R. (Grand Army of the Republic) and Confederate veterans, school children, union and lodge men in line,” the Arizona Gazette declared on the afternoon of February 8, “the largest parade ever held in Arizona will take place in Phoenix, Monday (February 12) in celebration of admission day.”

But predicting that the parade would be on Lincoln’s birthday at that point in time was pure guesswork on the newspaper’s part. As of Thursday, February 8, the date of the admission celebration was completely up in the air, with all sorts of signals being sent. Even though the president could not see Kirk until Saturday the 10th to receive the election results, S.W. Higley of The Arizona Republican insisted that admission day still be celebrated on the 12th. He wired Taft, “All arrangements have been made for inauguration of state officials and celebration of admission, Monday, Lincoln’s birthday. It will be highly appreciated by all citizens of Arizona if you can see your way clear to issue proclamation declaring Arizona a state on that date.”

But uncertainty was starting to creep into the discussion about the date of admission day. According to The Daily Silver Belt

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47 Smith to Taft, 1 February 1912, ibid.
48 “Plans for Large Procession Monday,” Arizona Gazette. February 8, 1912.
49 Higley to Taft, 8 February 1912, Wm. H. Taft Papers, series 6, reel 384, case file 415.
U.S. senator-elect Marcus Smith, above, did not want Arizona's admission day to coincide with Lincoln's birthday, preferring a date that would be "unobscured" by a national holiday. (Courtesy of Library of Congress, Prints and Photographs Division, LC-B2-1287-10 [P&P])
newspaper in Hunt's hometown of Globe, on February 8 territorial governor Sloan sent the governor-elect a telegram stating, "Advice from Washington make[s] it improbable that statehood proclamation will be signed before February 14th, owing to the absence of the president from Washington on the 12th. Will notify you promptly as soon as I know definitely as to the matter." Even The Arizona Republican was pointing out to its Phoenix readers, "A rumor that President Taft would not be in Washington to sign the proclamation declaring Arizona a state on Monday (the 12th) reached Phoenix last night. It came from Prescott. The president, it is noised about in the Mile High City, will be called to New York and will therefore be unable to issue the document." That possibility, the newspaper proclaimed, was simply not acceptable: "If the president fails to name Monday as admission day, much work and thought will go for nothing."

Friday, February 9

Phoenix mayor Christy reiterated that feeling of growing frustration to the White House on Friday, February 9. "Great preparations are being made to celebrate the [statehood] event and it is the unanimous wish of the people of Arizona to have this event take place on February twelfth, Lincoln's birthday," he wrote presidential secretary Hilles. "If the President can possibly see his way clear to sign this proclamation on that day, he will earn the gratitude of the people of Arizona."

Concurrently, The Arizona Republican was criticizing governor-elect Hunt's decision to walk to his swearing-in ceremony. "[I]t is quite a sizable distance out to the Capitol and the new governor is fat," the newspaper pointed out undiplomatically. "[I]t is difficult to see how the cause of republican institutions could have suffered if Mr. Hunt had accepted the courtesy of one of several hundred automobile owners in Phoenix who would have been glad to tender the use of a car for the occasion."

Saturday, February 10

By Saturday, February 10, it became apparent that Hunt would have a few more days to ponder his decision to walk.

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51 "Proclamation to Be Late?" The Arizona Republican. February 9, 1912.
52 Ibid.
53 Christy and O'Neill to Hilles, February 9, 1912, Wm. H. Taft papers, series 6, reel 384, case file 415.
54 "Hunt As a Peripatetic," The Arizona Republican. February 9, 1912.
Even though the Arizona Daily Star in Tucson still held out hope that February 12 was a possible admission day, it ran an ambiguous headline stating, "The Best of the 48 . . . Born ?? 1912." But by February 10, most people involved with the issue knew that Arizona's statehood day would definitely be February 14.

After almost one week in transit, a slightly exasperated but also somewhat jubilant Kirk finally was able to complete his task on Saturday, February 10. The Arizona Gazette reported, "The returns were delivered to the president at 1:15 this afternoon by R.A. Kirk. . . ." The newspaper also stated, "President Taft was most cordial in his reception and said he regretted that he was unable to sign the bill on Lincoln's birthday, as he would not be in Washington. He suggested that he affix his signature on Tuesday, but that being the unlucky 13th, an objection was heard, and the president decided to sign on Valentine's day."

The White House confirmed this decision in a telegram to Mayor Christy that stated, "Returns not received until this afternoon, too late to make possible what you wish." At about the same time, the White House sent the election returns to attorney general George W. Wickersham. After he ratified them, secretary of state Philander C. Knox would prepare the official statehood proclamation for Taft's signature on the morning of February 14.

Once this time was definitely known, territorial governor Sloan telegraphed Hunt in Globe, "Am advised that Statehood proclamation will be signed by President Wednesday, February 14," at ten o'clock.

Sunday, February 11

In Tucson, the Citizen saw a distinct advantage in the two-day delay. "If Arizona's statehood proclamation is signed by the president on St. Valentine's day," the newspaper pointed out, "it will give Arizona a holiday that will be observed each year by all the states of the union." The Citizen also noted that

57 Hilles to Christy or O'Neill, 10 February 1912, Wm. H. Taft Papers, series 6, reel 384, case file 415.
59 Untitled, Tucson Citizen, February 11, 1912.
February 14, 1912, was the fiftieth anniversary of the date on which Arizona became a territory of the Confederate States of America under a proclamation of Jefferson Davis. The Arizona Republican was philosophical in acknowledging that its hopes for a February 12 admission date had been dashed. "Like patience on a monument," the newspaper proclaimed on February 11, "the people of Arizona will wait from Monday, the day on which they thought the state would be admitted into the Union, until Wednesday, the day on which it actually will be admitted."\(^{60}\)

Despite its name, the newspaper was not supportive at all of Republican Taft's explanation for the two-day delay. "The president goes to New York tomorrow," the Republican wrote scornfully, "and for that reason declined to take up the matter at the date desired by the people of Arizona. The principal cause of disappointment to the people of this state is not over the delay of a couple of days, but because they could not celebrate admission and the anniversary of Lincoln's birth on the same day."\(^{61}\)

Monday, February 12

Even though Arizonans would not be busy with statehood and inauguration festivities on Lincoln's birthday in 1912, Taft certainly was fully occupied on a day traditionally important for Republican politicians. The fifty-four-year-old, vastly overweight president departed Washington in his private car, the Colonial, at 8 a.m. over the Pennsylvania Railroad on his way to Newark, New Jersey. There he dined with former governor Franklin Murphy and then laid a wreath at a statue of Lincoln at Newark City Hall. He later attended a campaign fundraiser at the Essex County Country Club before going into New York City.

After resting for an hour, Taft attended the Republican Club's Lincoln Day dinner at the Waldorf-Astoria Hotel. According to The New York Times, he delivered a "ringing campaign speech" in which he "cast scorn on the doctrine of the recall of the judiciary. . ."\(^{62}\) It was the president's opposition to that idea, of course, that had led to the need for Arizona's December 1911 constitutional amendment election and to eventual consideration of February 12 as admission day.

\(^{60}\)"Arizona Will Become State on Wednesday," The Arizona Republican, February 11, 1912.

\(^{61}\)Ibid.

After the Waldorf-Astoria dinner, Taft went to another hotel where he spoke to the initial convention of the National Retail Dry Goods Association. He concluded his long day by talking to the Graduates Club of New York before heading back to Washington at 11:30 p.m.

Tuesday, February 13

Wanting to take advantage of statehood day as an opportunity to promote Arizona, the Phoenix group that was organizing the celebration had a modest proposal for the citizens of the capital city of the soon-to-be state. "The committee makes the suggestion," The Arizona Republican reported on February 13, "that everybody in Phoenix who sends a valentine out of the country enclose with it some reference to the festivities of Arizona's most notable Valentine's day, and send a newspaper to the same addresses the following day telling all about it."63

On the same day, the Arizona Journal-Miner newspaper in Prescott criticized those who complained about admission day being pushed back to February 14. "As a matter of fact," the paper editorialized, "there never was any valid reason for believing that Arizona would be admitted on February 12."64

Wednesday, February 14

At just after 10 a.m. on February 14, 1912, President William Howard Taft finally signed the proclamation making Arizona the forty-eighth state of the Union. Several people from the newest state witnessed the signing, including Ralph Cameron, who had spearheaded the successful drive as Arizona's congressional representative. Also in attendance was Robert A. Kirk, the man who delivered the election results to Washington after his frantic rush eastward from Phoenix.

According to The Washington Post, as he signed the statehood document, Taft said simply, "There you are."65 Besides placing a forty-eighth star on the nation's flag, the ceremony was historic for another reason. Motion picture operators recorded the event, making it reportedly the first presidential proclamation signing ever filmed.

After the ceremony was concluded, the White House sent a telegram from the president to territorial governor Sloan in

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63 "Admission Day Arrangements," The Arizona Republican, February 13, 1912.
64 "They Should Be Happy," Arizona Journal-Miner, February 13, 1912.
As Arizona's congressional representative, Ralph Cameron, above, spearheaded the successful drive to make the territory a state. (Courtesy of Library of Congress, Prints and Photographs Division, LC-B2-5423-1 [P&P])
Phoenix. "I have this morning signed the proclamation declaring Arizona to be a State of the Union," it read. "I congratulate the people of this, our newest commonwealth upon the realization of their long-cherished ambition."66

A few hours later, before an estimated fifteen thousand people, George W.P. Hunt was sworn in as the state of Arizona's first governor. His walk to the capital, despite his weight, had gone on without incident except for some unwanted perspiration. There had been an issue, though, with the stand he occupied for the event. Early in the day the staunch union supporter learned that the original platform had been built by non-union labor. But twenty union members quickly constructed another stand, and that was the one Hunt occupied for his inauguration.67

As for the expected grand celebration of statehood in Phoenix, a lot of noise was made, but, at least in the view of The Arizona Republican, the event was celebrated "[m]ore with complacency than with enthusiasm. . . . The spirit was there, true enough, but it took the form of contentment rather than a glad frenzy."68

In Globe, The Daily Silver Belt newspaper marked the occasion of statehood in part by publishing the poem "Arizona" written by Charles I. Duncan. It began,

The forty-eighth star in the firmament splendid
That arches our home land from sunset to dawn,
With the azure and crimson another pearl blended,
All hail, Arizona, Columbia's new born!69

A ringing of bells and whistles shortly after the time President Taft signed the proclamation marked statehood in Tucson. Later in the day, an event including speeches was held at the University of Arizona. One speaker predicted hopefully, "[Arizona] will be one of the wealthiest and most prosperous commonwealths in the union. . . ."70

The future for the newest state was certainly bright in the opinion of many. As the Tucson Citizen commented, "Now that statehood is a reality, Arizona, whose progress has been

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66 Taft to Sloan, 14 February 1912, Wm. H. Taft Papers, series 8, reel 510, case file 204.
rapid, should go forward by leaps and bounds.” For its part, the Tombstone Prospector emphasized another advantage of statehood. “Beginning today,” the newspaper editorialized on February 14, “for the first time in its history, the people of Arizona are governed by men of their own selection.”

EPILOGUE

In November 1912, Arizona voters had their chance at the ballot box to comment on Taft’s performance as president. They did not like what he had done, including his veto of the original state constitution. As a result, they overwhelmingly supported other candidates for president, placing Taft a distant fourth in

the balloting. He ran behind Democrat Woodrow Wilson, Progressive Party candidate Theodore Roosevelt, and even Socialist Eugene Debs.

That same day, Arizona voters also reinserted the judicial recall into the state's constitution by a commanding margin of almost 5–1. Proving Taft's fears about the judicial recall to be unfounded, the measure was used only once in Arizona's first century. In that lone case, a Pinal County Superior Court judge was characterized as "violent," with an "ungovernable temper."

In addition to reinserting the judicial recall into the constitution, some other major legal changes occurred in Arizona during 1912. Strengthening a law initially adopted by the 1909 territorial legislature that stated that school districts "may segregate pupils of the African from pupils of the White races," the initial state legislature required that these pupils "shall" be segregated. That requirement for racial segregation of schools would last for almost four decades in Arizona.

Because the same 1912 Arizona legislature that mandated school segregation also failed to enact a women's suffrage law, the voters of Arizona, after garnering 3,500 petition signatures, used the constitutional initiative process to place the issue on the November ballot. Endorsed by all political parties and many major newspapers, the measure was handily approved by a 2–1 margin, thus granting women the right to vote in state and local elections.

Eighteen years after this first Arizona state election, former territorial governor Sloan was supervising editor of a history of Arizona. Regarding statehood day in 1912, the book declared simply,

President Taft had promised those most interested in the proceedings that he would sign the Proclamation on February 12, Lincoln's birthday, but just a day or two before the 12th, business called him to New York, and he was unable to be in Washington on that day. Consequently, the plans which had been made in the state's capital for the ceremony of inducting


75 Acts, Resolutions and Memorials of the Twenty-Fifth Legislative Assembly of the Territory of Arizona (Phoenix, AZ, 1909), chapter 67, section 1; Acts. Resolutions and Memorials of the Regular Session First Legislature of the State of Arizona (Phoenix, AZ, 1912), section 41, paragraph 2.
the Governor and other officials into office had to be postponed for two days.\textsuperscript{76}

As research often reveals about historic events either mundane or critical, that was not a very accurate portrayal of what actually took place during the first two weeks of February 1912. Instead, Robert A. Kirk's frantic rush to the White House just came up a little bit late.

THE HOWELL CODE, ARIZONA'S ORDENANZAS DE MINERÍA

JOHN C. LACY

Thomas A. Rickard (1865–1911) once famously wrote that "trade follows the flag, but the flag follows the pick." Rickard was referring to the prospector's pick, and nowhere is Rickard's axiom demonstrated more clearly than the early days of the California gold rush. Imagine what this must have been like: gold had been discovered at a mill race on the American River near Sacramento on January 24, 1848, and nine days later the area became part of the United States. The only "law" was in the form of fewer than one hundred soldiers stationed at Monterey. Suddenly there were 100,000 miners in California, and most of the troops had deserted to the gold fields. In an effort to fill this legal void, the miners made up their own laws following time-honored practices that even today can be found in the customs of Third-World artisanal miners. These practices included establishing a geographically defined "mining district"; designating a committee to write laws for staking, recording, and maintaining mining claims; and electing a recorder and a president. Disputes would be settled by the president acting as judge, with a jury consisting of all miners in the district not directly involved in the dispute.²

¹T.A. Rickard, Man and Metals (New York, 1932), 1049.

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As miners drifted back into Arizona after the initial flurry faded in California, the gold-rush legal template was used for the staking of mining claims along the Gila River. When Union soldiers marched in to protect Arizona's mineral resources during the Civil War, similar rules were adopted in the vicinity of Prescott. However, mineral exploration in the Santa Cruz Valley did not follow the same rules. Civilization, of sorts, had arrived earlier in the form of Spanish exploration for silver that had begun with the first *entradas* in the seventeenth and eighteenth centuries, and the regulations of the Cerro Colorado Mining District near Tubac were very different.\(^3\)

When the "law" reached Arizona Territory in 1864 and the first legislature gathered in Prescott, William T. Howell, the territorial judge appointed for the First Judicial District, was tasked with preparing a code of laws on Friday, October 1, 1864.\(^4\) The draft that was submitted—on Monday—was eventually published in a volume of 680 pages. Obviously, Judge Howell had given the matter some prior thought. For the most part, his proposal was based on the *Field Codes*, a set of legal codes written by David Dudley Field, the brother of United States Supreme Court Justice Stephen J. Field. These codes followed a pattern adopted by most of the western territories, but Howell's proposals for mining were clearly unexpected and certainly were not welcomed by the miners of the Walker mining districts around the territorial capital at Prescott, who had been following the self-government model of the California mining districts.

In fact, Judge Howell had left Prescott for Tucson eight months earlier, on February 3, 1864. He had drafted the code during the spring and summer, with the assistance of Coles Bashford, the former governor of Wisconsin, who was then an attorney practicing in Tucson. While in Tucson, Judge Howell had been exposed to the ideas of Charles Poston and Herman Ehrenberg of the Sonora Exploring and Mining Company, who were looking to promote and protect their holdings in the Santa Cruz Valley at the Solero and Cerro Colorado mines. Poston and Ehrenberg had adapted the mining laws of Spain to their activities, and these laws reflected the mature legacy of

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When the first legislature met in Prescott, William T. Howell, above, the territorial judge appointed for the First Judicial District, was tasked with preparing a code of mining laws. (Courtesy of History and Archives Division, Arizona State Library, 97-6889)
the Spanish mining experience. Ehrenburg was convinced that the Ordenanzas of 1783 was worth adopting and had prepared a proposal for its adoption as the federal mining law.

The Howell Code was of general applicability, dictating every step of initiation, perfection, maintenance, and transfer of mining claims. It upset the freedom the miners had enjoyed within their self-declared mining districts, where it was clear that they could change the rules with very little effort and could settle disputes among themselves. The comprehensive code was also in marked contrast to actions taken in other western territories at the time that had used the California template.

The mining code was composed of five titles. Title One contained the general provisions relating to the registration and conveyance of mining rights. Title Two defined the extent of mining rights and provided procedures for initiating, perfecting, and maintaining the mining claims. Title Three addressed abandonment and relocation of mines and mining rights. Title Four included nine sections containing the procedure for litigation of mining cases. Title Five created a claim for the benefit of the territory.

The thrust of Title One showed a desire to keep the records current and to avoid any question of ownership; this was emphasized by a further requirement that all claims be registered in the real names of the parties, and that any sales had to be recorded within three months to avoid a forfeiture. By far the most important part of the code was Title Two, which contained the procedures for initiating, perfecting, and main-

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5 Among the books at the library in the company headquarters at Tubac were the 1783 Spanish Ordenanzas de Minería of New Spain and Francisco Xavier Gamboa’s Commentarios en las Ordenanzas de Minas published in 1765. These laws had begun with what amounted to a self-governing system that Viceroy Antonio Mendoza had developed in 1550 and had enlarged into a comprehensive mining code first promulgated in 1584 but then updated with the Hapsburg reforms in 1783.

6 Ehrenburg had sent a letter on December 1, 1859, to William P. Blake, the editor of the Mining Magazine and Journal of Geology, who was to become the first director of the Arizona Department of Mines and dean of the School of Mines at the University of Arizona.

7 Howell Code, ch. L.
Judge Howell drafted the mining code with the assistance of Coles Bashford, above, an attorney practicing in Tucson. (Courtesy of History and Archives Division, Arizona State Library, 97-6517)
taining the mining claims. The mining claim itself was called a pertenencia, clearly a connection to its source in the 1783 Ordenanzas. A pertenencia was defined as being two hundred yards square, including the vein or mineral deposits and "following the dip of the vein so far as it can or may be worked with all earth and mineral therein." The mining districts, however, were given leeway to prescribe smaller dimensions within the individual districts. "Auxiliary lands"—that is, those lands that did not contain minerals but that were needed for proper mining of the deposit—could also be taken up as part of the location process and could contain up to 160 acres.

A common problem in the early mining districts occurred when two or more persons attempted to claim the same ground. In California, as early as 1860, the courts had recognized a bare right of possession against later competitors. This right of pedis possessio has never been clearly defined and has been fertile ground for litigation ever since. The mining code, calling on the wisdom of Spanish legal experience, specified that when two or more parties were exploring the same vein at different places and without each other's knowledge, the party

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9 The boundaries of mining claims had to be marked with substantial monuments and were required to be witnessed either by the recorder of the mining district (who was the clerk of the probate judge) or any other witness who could prove the proper monumenting to the recorder's satisfaction. The notice of claim had to be posted at the opening of the vein and entered into the recorder's book within three months from the initial act of location. Boundaries could be changed so long as the modification could be made without prejudice to other parties. The change did have to have the sanction of the probate judge, and new monuments had to be fixed at once upon removal of the originals.

9 Howell Code, ch. L, sec. 15.

10 The law applied only to lode deposits. Placer mining, although recognized, was given short shrift by the following statement:

The extraction of gold from alluvial and diluvial deposits, generally termed placer mining, shall not be considered mining proper, and shall not entitle persons occupied in it to the provisions of this chapter, nor shall any previous section of this chapter be so construed as to refer to the extraction of gold from the above-mentioned deposits.

Thus, placer miners held rights by possession only and presumably by rights defined within the mining district regulations.


able to prove the first occupancy had the right of possession.\textsuperscript{14} All late comers had to locate in the order of the time of their arrival on the vein or mineral deposit. When the owners of a senior claim knew that another group was exploring the same claim but failed to give some sort of notice of the prior claim, then the portion of the "mine" situated between the main excavations of the two parties was divided equally between them, without regard to the number of members in each company.

Another historic conflict area has been between the mineral claimant and the occupant of the surface. Because the mining code recognized the right of miners to claim discoveries on private lands, the possible conflict between the surface and mineral estate was foreseen, and the code defined the respective rights of the miner and the surface owner. The code thus provided that the miner, before sinking any shaft on private land, was required to pay compensation to the surface owner.\textsuperscript{15} In the absence of an agreement, the amount of damages was fixed by the probate judge. Where damages were subject to dispute, either party could require the judge to fix the amount of a bond to permit work to proceed.\textsuperscript{16}

Mining claims were perfected by requiring the claimant, during the first year after location, to sink at least one shaft to a depth of thirty feet or to run a tunnel of fifty feet in length into the main body of the vein or the adjoining rock. On completion of this work, the recorder had to be notified. The recorder was required to examine the work, issue a certificate, and take three specimens from different parts of the work. The specimens were kept in the office of the probate court to be preserved for the use "of the mineralogical professorship of the

\textsuperscript{14}The situs of the first claim was fixed by using the primary excavation as the center of the claim and measuring off the remainder of the claim along the general direction of the vein or deposit. The other parties then could proceed after the first parties had fixed their boundaries. Then, if vacant ground remained between the parties, the claimant making the first discovery had the option of changing the boundaries to take in the vacant ground to its maximum advantage.

\textsuperscript{15}In addition to the rights of the surface owner—and since tunnels could be made for the purpose of drainage, ventilation, or better handling of ores—it was lawful for any party to construct such tunnel or drift through all private and public property, and the mining code also fixed the privileges of owners of other mineral rights. Thus, the code provided, if the tunneling traversed or intersected mineral deposits or ran along lodes claimed and held by other parties, the owners of the other mineral deposit had the option either to pay one-half of the expense of excavation for the distance that the tunnel ran through their mineral deposit and thereby obtain all of the ores extracted from within such length of the tunnel, or to pay nothing and receive half of the ores within the tunnel.

\textsuperscript{16}The party responsible for damages arising from subterranean works was the party for whose benefit the tunneling was done.
University of Arizona."

On completion of the certification, the code established a procedure whereby the claimant could obtain a confirmation title.

Another provision encouraged joint development for what was deemed "best suited to ascertain the best advantage of the general character, quality, and capacity of that particular vein or mineral deposit." This provision was clearly an attempt to avoid the need for outside financing. Judge Howell clearly felt that existing financial practices lent themselves to abuse. He had observed that the solution to the problem of lack of mineral production was "to get a local resident to locate the mine and begin work," and, above all else, "keep out of Wall Street, as the fountain head can be reached much cheaper through the right channel."

The abandonment and relocation of mines and mining rights was covered in Title Three of the mining code and provided another direct link to the Spanish laws through the use of the term *denouncement* for the process of relocation of abandoned claims. These provisions initially specified that any claimant who did not comply with the provisions of the mining code would forfeit all right to such recorded or unrecorded claims and auxiliary tracts and could not refile on such claims within a period of three years after the forfeiture.

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18 The procedure permitted the claimant to petition the probate judge for a confirmation title. The judge was required to issue a summons requiring all interested persons to appear in court within sixty days from the notice to show cause why the title of the claimant should not be confirmed. This notice was published twice in the territorial newspaper and was posted in the probate clerk's office. Thereafter, upon a finding that the claimant had complied with the provisions of the law, the probate judge could enter a decree granting a "perfect title" to the claim until the first day of January, 1868 (apparently recognizing the need for the miners to comply with the requirements of the law and recognizing a "holiday" from the performance of work commitments during this period), "and forever after unless abandoned by them." If a dispute over title arose in this process, an answer could be filed by the return date of the summons, in which case the question of possessory rights was settled pursuant to the normal rules of civil procedure.

19 William Howell to William A. Richmond, 9 March 1864, in Goff, "William T. Howell and the *Howell Code*," 232; Thomas E. Farish, *History of Arizona*, vol. 3 (Phoenix, 1918), 150-51, note 27: "A silver mine once opened and tested is a safe and permanent investment. Mines are discovered, tested, found rich and stock immediately created and sold in such a diluted condition that the investment is unprofitable."

20 *Howell Code*, ch. L, sec. 15. A judicial definition of denouncement in the decisions of the courts of the United States can be found in *Steward v. King*, 166 Pac. 55 at 56 [Ore. 1917] [interpreting the laws of Panama].
The mining code did recognize the existing self-governing mining districts near Prescott and along the Colorado River, but their future operation required conforming to the new law, and permanent rights could be established only in accordance with procedures set forth in the mining code. All claimants under prior law had six months within which to file their claims with the probate clerk, and the existing recorders were required to deposit the district's records with the probate clerk within three months after the effective date of the Howell Code. The same three-month limitation was also required for the recordation of all conveyances of mining claims, all of which records were to be maintained by the probate clerk.21

Title Four of the mining code included nine sections containing the procedure for litigation of mining cases. These proceedings were governed according to the rules of equity based on the merits of each party's position and apparently recognizing the fact that legal title was still open to question.22

Because of the miners' long-standing distrust of the "civilian" judicial system, a statutory provision was made recognizing the need for expertise and arbitration of mining disputes. The probate judge was authorized, "when local knowledge is necessary," either at his own option or at the request of either party, to appoint a commission of three persons "skilled in mining" to examine the question at issue and make a report in writing and under oath of all the facts and circumstances bearing on the litigation.23


22 The probate court was the trial court, and all appeals were to be taken to the district court within ten days after judgment, provided that the appellant first posted a bond sufficient to cover all costs and damages that might be suffered by the adverse party. Any appeal of the trial court proceedings was taken to the district court and was considered solely on the record and testimony from the probate court, provided, however, that new testimony could be introduced if it could be shown that "new, important, or material testimony has been discovered since the trial before the probate court, or could not be procured in season to be used at said trial, and which may change the judgment in the cause." In such a case the new testimony was to be taken by the judge, the clerk, or a commissioner, and became part of the record. The district courts also exercised supervisory control and reviewed the actions of the probate court through mandamus, prohibition, and injunction. Any questions of errors of law could also be considered by the district court and further appeal allowed to the territorial supreme court.

23 This report could either be rejected or approved in whole or in part by the probate judge and would become part of the record. These commissioners received five dollars per day for their services, which costs were part of the cost of litigation. Boundary disputes (i.e., lines, divisions, and demarcations) between parties claiming mineral veins, deposits, or auxiliary lands were determined by the probate court in a summary manner, or, on the request of either party, by an appointed commission of miners.
Title Five of the code provided one of its more progressive suggestions and established a means of funding educational institutions in the territory. Here, as a part of the process of defining a new claim, the discoverer was required to define the boundaries of one pertenencia adjoining the new claim, which was to be the property of the territory of Arizona. By making such a provision, Howell showed an awareness of a federal congressional practice of setting aside land for the benefit of common schools at the time that territories were created, which lands were granted to the new state on its admission to the Union.

THE ENACTMENT OF THE HOWELL CODE

The mining code was initially referred to a house committee on October 4, 1864, and, not surprisingly, the proposal brought immediate opposition from the miners around the Prescott area. The journals of the House of Representatives indicate that, on October 19, 1864, "Giles presented remonstrances from miners of Hassayampa, Walker, Turkey Creek, Quartz Mountain, and other mining districts, protesting against the passage of a general mining law, which were received, read and referred to the Committee on Mines." 26

The view of many of the individual miners was that no direction at all was needed from government. They believed that the legislature simply should have recognized the right of miners to self-government through the establishment of mining districts which, in turn, would be free to regulate property rights and settle disputes through their own regulations.

24 The territorial claim had to be presented to the recorder at the time of the initial location; failure to do so would result in forfeiture of the claim and any discovery. Once the territorial claim was initiated, the locator had no further obligation to perform work on the territory's claim, and it was not considered to be abandoned so long as it was the property of the territory. The territory could, however, sell the claim, in which case the time within which the purchaser would be required to work the claim commenced on the date of sale. The territory, likewise, had the right to sell these claims at auction to the highest bidder on public notice of the same. The amount of the purchase price went into a fund to protect the people of the territory against hostile Indians; after "all hostile Indian Tribes in this Territory are liquidated," then all remaining funds would be applied to a sinking fund for school purposes.

25 Morrell Act of July 2, 1862, P.L. 37-108, had been passed two years earlier.

26 Arizona Legislative Journals, 1st territorial session (1864), 130–31.
The miners' objections fell on deaf ears; the house approved the law as a committee report without objection on October 27, 1864, as substitute House Bill No. 5. During deliberations on the bill on October 31, 1864, by House Concurrent Resolution No. 6, the eventual mining code was ordered translated into Spanish, along with the civil and criminal codes, giving a clear indication that the Mexican population of southern Arizona would not be subjected to the same discrimination that had been prevalent previously in the operation of the mines. Apparently, the legislators were willing to accede to Judge Howell's judgment over the Prescott miners: on November 3, 1864, the Act for the Regulation of Mines, as amended by the council, passed the council on a six-to-one vote (Mark Aldrich of Tucson casting the only vote in opposition) and without any opposition in the house. This influence must have been significant, considering that thirteen of the twenty-seven members of the legislative assembly were either miners or mining engineers.

It is unclear what, if any, lobbying was done for the mining code. It is possible that the assembly was influenced by Coles Bashford's views and by a belief that the silver mines of southern Arizona were more likely to begin production if the new law more nearly paralleled the district regulations of the Cerro Colorado Mining District and the Ordenanzas de Minería than the regulations of the mining districts around Prescott. Judge Howell also reflected a bias in favor of southern Arizona in his comment: "I have traveled five hundred miles in the Territory, and been fifty days on the road. While Indian hostilities continue, the silver mines of the southern portion are much surer and safer than any other, as we have sufficient protection to work them. Every day further work develops their richness and extent." The session ended seven days later with the mining code enacted as chapter 50, consisting of fifty-two sections and covering fourteen pages of the original text.

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27Ibid., 178–79.
28Ibid., 192. See Harwood Hinton, "Frontier Speculation: A Study of the Walker Mining Districts," Pacific Historical Review 29 (1960): 245. In addition to the exclusion of Asians prevalent in the California Mining District, attempts were made by the mining districts near Prescott to preclude Mexicans from staking claims. Such restrictions were later dropped when it was concluded that defining the term Mexican was impossible.
29Arizona Legislative Journals, 1st Territorial Session (1864), 205–206; Arizona Laws, 1st Territorial Legislature (1864), xi.
REACTION TO THE MINING CODE

Reaction to the new mining code first reflected the territorial administration's line in the editorial pages of the Arizona Miner. This was understandable since the territorial secretary of state, Richard McCormick, was the editor. The issue of November 23, 1864, editorialized, "(W)hile we are not prepared to call it a perfect law, we can but believe it to be a good beginning. Its provisions are generally very liberal, and its shortcomings are such as can readily be overcome by future Legislation."

Anticipating the reaction of the miners who were being deprived of their legislative freedom, the editorial continued,

We hear dissatisfaction expressed in some quarters that the Legislature took any action in reference to the mines. . . . To us the mining districts, and the records kept therein, may seem all that is necessary, but the capitalist wants more. He demands that the system and authority of the highest law of the Territory, or State, shall protect his investment. . . .

It sounds strange to hear men who expect to realize fortunes from their mines objecting to perfecting titles to the same at a cost less (and to be less for the next three years) than their weekly outlay for tobacco and toddies. Let us be careful how we strain at gnats and swallow camels.31

Although the Miner was restrained with its praise, the Mining and Scientific Press published in San Francisco was enthusiastic. It referred to the "very excellent Mining Code" and in summary described the law as being "carefully drawn, comprehensive and liberal," and felt that the uniform law was "far preferable to the multifarious and generally ill-digested local laws which have hitherto prevailed in California and Nevada."32

31 Arizona Miner, November 23, 1864.
32 In noting that the law envisioned square claims, the article noted "that this location may have many objections, but it certainly will possess the important merit of doing much to keep down the luxurious crop of litigation which the mode of location usually adopted in this state [California] and Nevada has engendered." It applauded the requirement to locate the claim adjoining the discovery claim for the benefit of the territory and for the eventual sale of the claim for the benefit of the common school fund. It was of the opinion that the law gave ample time for the performance of the work requirement and provided a cheap and simple mode to obtain a perpetual title. It also saw the division or segregation provisions as very important. Mining and Scientific Press, December 24, 1864.
Territorial secretary of state Richard McCormick, above, was the editor of the *Arizona Miner*, which supported the new law. (Courtesy of Arizona Historical Society-Tucson, Main Photograph Collection, 44977)
But the reaction of the miners around Prescott was also predictable. At a meeting of the miners of the Walker Quartz and Pioneer Mining Districts on Lynx Creek at McLaughlin store on September 16, 1865, it was "Moved And Seconded that We as A boddy Are Emphatically Opposed to the Present Territorial Laws Carried Unanimously."33

Given the Walker party’s previous actions in continuing efforts to secure the best positions for themselves within the Walker District to the exclusion of others, the latecomers to the Walker District could probably empathize with this view. This reaction of the miners was at least sufficiently vocal to be heard as far away as San Francisco, where the Evening Bulletin commented that "the mining law passed last session does not suit a majority of the miners" but was framed for the capitalist in lieu of the individual prospector.34

These criticisms of the mining code were again ignored, and the second legislature made only slight changes.35

THE OPERATION OF THE MINING CODE

Despite the miners’ criticism of the law, once the code was in force most mining district governments took the necessary

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34San Francisco Evening Bulletin [December 7, 1865].

35These changes included, first, an effort to appease the placer miners on the Colorado and Gila Rivers near La Paz, to recognize the rather tenuous state of placer claims under mining code by formally establishing placer rights, but this applied only to Yuma County; second, a shift of the primary supervisory authority over the mining districts from the probate court to the district court. Another criticism was the absence of assessment or work requirements under the mining code. Herman Ehrenberg wrote a letter from La Paz, dated January 17, 1866, to Richard McCormick, commenting, after the close of the second legislature,

I regret that [no] law was passed by the late Legislature amending the law of the Territory, making at least, some little actual work on mineral veins compulsory on the owners, in order that prospectors may be able to distinguish public property from that located by private individuals.

Ehrenberg’s criticism may have been based on his pride of authorship of the model for the mining code which, in its work requirement, provided,

After the first year’s registry mentioned in Article 13, it shall be obligatory upon claimants to such mineral tracts, to hold actual possession of them, and work the vein; which obligation shall be considered as complied with by having at least four men actually at work in excavation, for each and every mineral tract claimed and recorded, for at least 200 days in each year.
action to match the district laws to the mining code.\(^{36}\) The Walker District, the hotbed of criticism of the mining code, wasted no time: on November 14, 1864, only four days after the close of the legislative session, the district adopted the territorial code. Other mining districts followed suit: on January 11, 1865, the Weaver District adopted “the Mining laws of this Territory subject to the action of Congress as the laws of this district” and repealed all prior laws; the Agua Frio District adopted the mining code that same day; on January 28, 1865, the Turkey Creek District repealed all of its laws that were in conflict with the territorial mining law; and the Big Bug District adopted the code on February 7, 1865.

Based on evidence found in recorded documents and publications, the mining code appears to have functioned well. In the June 27, 1866, edition of the *Miner*, a notice of sale of territorial mining claims appeared which offered for cash sale and public auction mining claims in the Agua Frio District, the Hassayampa District, the Walker District, and the Big Bug District. Under the terms of the proposed sale, on payment of cash, all right, title, and interest of the territory to six-hundred-square-foot claims would be conveyed by a “good and sufficient deed” on payment of the purchase price and the expenses of transfer.\(^{37}\)

The secretary of state’s office also contains proceedings on the adjudication of mines to obtain permanent title after completion of the requisite location work. The application would state the situs of the claim and recite the nature of work performed, with the final entry being the probate court ordering the appearance of all persons “adversely interested and desirous to contest the title of complaints to said claim or any part thereof.”\(^{38}\)

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\(^{36}\) Mohave County was an exception; the miners were not impressed with the exemption given from the obligations to perform assessment work. At a meeting of miners held in the Little Meadows of the Wauba Yuma District on November 11, 1865, the legislature was taken to task by Daniel Smith. In a split vote, the following resolution was passed:

> On account of the mining law of the Territory allowing the mines thereof to be held without work on account of the Indian Difficulties we consider it detrimental to the interest of Mojave County. Therefore be it Resolved that the miners of Wauba Yuma District request their Representative when assembled in the Territorial Legislature to use their influence in excepting Mojave County from said act.

\(^{37}\) *Arizona Miner*, June 27, 1866.

\(^{38}\) See, for example, *William H. Hardy and Wooster M. Hardy comprising the Southern Cross Gold and Silver Mining Company v. Whom It May Concern*, in equity in probate court, Judicature of Mines, Mohave County, Arizona Territory. Arizona State Archives, papers of the Arizona secretary of state.
Although criticism continued, the law was short-lived; everyone understood that Congress had the ultimate authority to make laws related to the disposition of mineral rights on the public domain.\textsuperscript{39} Certainly the miners recognized this because of the repeated reference to potential "action of Congress."\textsuperscript{40} Finally, however, the territorial effort was preempted on July 26, 1866, when the U.S. Congress passed the first of the laws that became the General Mining Law of the United States. This law, drafted by gold rush miners, followed the California template. Thus Arizona's progressive effort was almost entirely superseded.

\textsuperscript{39}It seems clear that resistance to the perceived complexity of the code continued. In his 1868 report to Congress, J. Ross Browne, the commissioner of mineral statistics, commented that, whereas the mining code first met with general favor both within and outside Arizona, "practice proved it to be cumbersome and annoying, . . ." J. Ross Browne and James W. Taylor, \textit{Reports on the Mineral Resources of the United States} [Washington, DC, 1868], 479.

\textsuperscript{40}See, for example, the laws of the Weaver Mining District, January 11, 1865.
In 1913, two women made history when they testified before the all-white, all-male jury of the Superior Court of Yavapai County in the State of Arizona v. Juan Fernandez murder trial. Mary Woolsey, an elderly Yavapai widow, and Dolores Rodriguez, a Mexican single mother of three, established the legal precedent for allowing non-English-speaking, non-citizen women to testify in state courts in Arizona when many other western states still did not grant such privileges to indigenous residents. Woolsey and Rodriguez showed that Arizona's indigenous population were competent, if somewhat problematic, members of Arizona's body politic, and their historic involvement in the Arizona v. Fernandez trial is an important chapter in American Indian citizenship history.¹

Some aspects of this story are difficult to interpret, which may explain why scholars have not chosen to feature Woolsey and Rodriguez in their own studies of racial and legal history in the Southwest. For instance, although Woolsey and Rodriguez’s testimony in the Arizona v. Fernandez trial established the right to testify in court for all Arizona non-citizens, both

¹Porter v. Hall, 34 Ariz. 308 (1928).

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women were actually forced to testify under subpoena against their will, making a depiction of the women as civil rights actors problematic. Mary Woolsey and Dolores Rodriguez also lived largely undocumented lives, making it difficult to cast them as significant historical actors. Finally, judicial commentary regarding the landmark decision to turn away from legal precedent denying non-English speaking and non-citizen witnesses the right to testify in court is strangely silent, making it difficult to interpret Arizona justices' motives for upholding Mary Woolsey and Dolores Rodriguez as competent legal figures within the Arizona body politic. Despite these evidentiary hurdles, a compelling story emerges from the Arizona v. Fernandez transcripts and the case law submitted in the subsequent conviction appeal, Fernandez v. Arizona (1914). What follows is an essay that features a pivotal, if often overlooked, event in Arizona's legal history through the lenses of critical legal theory.\(^2\)

### MAPPING LOYALTIES

When Prescott police officials began their investigation in the murder trial of Juan Fernandez, they first had to establish jurisdictional authority over the Granite Creek community in which he lived.\(^3\) As a primarily indigenous community established on the periphery of a military fort, the Granite Creek camp where Mary Woolsey and Dolores Rodriguez lived—and where the murder occurred—rested under federal jurisdiction. However, under the terms of the 1848 Treaty of Guadalupe Hidalgo, Juan Fernandez and his victim were legally Arizona citizens under state and county jurisdiction. Then again, most of the witnesses were indigenous and undocumented refugees living outside of the Prescott municipal district and beyond the purview of state laws. The history of Granite Creek and Prescott bears out these jurisdictional questions and illustrates the strategies that Mary Woolsey, Dolores Rodriguez, and their Granite Creek neighbors used to maintain their autonomous status as non-citizens.


\(^3\)"Murder Case to Be Handled by State," *Prescott Journal-Miner*, September 5, 1913. Prosecutors' efforts to secure the case under state jurisdiction are discussed below.
Granite Creek cuts through the middle of Yavapé territory in central Arizona, and flows through modern-day Prescott. The Yavapé comprised one of the four bands of Yavapai claiming territory throughout large portions of central Arizona that bordered Pai, Navajo, and Apache territories. As a whole, the Yavapai lived largely undisturbed by white settlers until the 1863 discovery of gold near Granite Creek. Although Anglo animosity toward Arizona tribal members gained its greatest rhetorical strength against neighboring Apaches, the Yavapé band felt the effects of gold-fever as well: "From the beginning, the citizens of Prescott posed a serious threat to the Yavapé subsistence economy that extended beyond Granite Creek. They also posed an intense physical threat to Yavapé survival, organizing Indian-hunting expeditions as part of their genocidal activities." The Yavapé refused to yield to Anglo claims on their homelands, but after a series of violent encounters with civilian militias and federal troops, many surrendered in 1873 and settled on the Camp Verde reserve along with other Yavapai bands under military surveillance. In 1875 Indian agent John Clum authorized a forced relocation of the Camp Verde Yavapai to the Western Apache Reservation at San Carlos. On both reserves, Yavapé were grouped with Apache tribal members as enemies of the state. Mary Woolsey does not appear in the Camp Verde or San Carlos census records during this period, but her elderly status in 1913 means that she would have remembered these acts of violence against indigenous Arizonans and their forced removal to guarded reservations. Her absence from agency records may also indicate that she had successfully evaded federal capture throughout her lifetime.

As reservation conditions at San Carlos worsened, many Yavapé families decided to jump the reservation border and return to their homelands near Granite Creek. By 1900, the federal government stopped tracking these refugees and officially released them from confinement at San Carlos. Clearly demonstrating the tension between western settlement as progress or conquest, the indigenous families that returned to Granite Creek found the town of Prescott growing into a well-established Anglo community, home to a railroad depot, telegraph lines, and a moderate mining economy. Yavapé families settled near Granite Creek and just north of Prescott, because by 1900 the creek still remained within the boundary of the Fort Whipple military post, a federal jurisdictional sanctuary against

local white intrusions that allowed Granite Creek residents some degree of autonomy.5

Prior to the discovery of gold in 1863, few Mexicans had settled within Yavapé territory near Granite Creek. Prescott-area Anglo miners immediately protested their presence, however, and passed resolutions barring ethnic Mexicans from staking mine claims. Nineteenth- and early twentieth-century census data for Yavapai County includes Mexicans as whites, making it difficult to determine their numbers, but historian Paul T. Hietter estimates that Mexicans comprised between 4 and 15 percent of the Yavapai County population.6 Chicana studies scholar Martha Menchaca notes that although the 1848 Treaty of Guadalupe Hidalgo made citizens of Mexicans in Arizona and legally constructed women such as Dolores Rodriguez as “white,” members of the Arizona legislature enacted legislation to restrict the participation of Mexican men and women in the Arizona body politic.7

Miscegenation laws also made interracial relationships criminal in Arizona until 1955, and although these laws did not officially affect “white” Mexicans, Yavapai County Anglo residents had begun to disapprove of interracial liaisons by the end of the nineteenth century. The Mexican residents of Granite Creek seemed to embody Menchacha’s description of “Chicano Indianism,” which affected non-English-speaking, mestizo Mexicans in Arizona, legally and socially shunned by Anglos as indigenous non-citizens. Historian Susan L. Johnson’s study of Mexican and Anglo women’s domestic arrangements in central Arizona mining towns reveals that intercultural relationships


Readers familiar with the ambiguous nature of American Indian legal status at the turn of the twentieth century will no doubt recognize the significance of Yavapé choices in seeking federal, rather than state, jurisdiction when no reservation lands were available in their homelands.


were not particularly common, but that Mexican women such as Dolores Rodriguez, living within the constraints of a Chicano Indian category, often secured economic stability through domestic and non-marital relationships with Mexican men such as defendant Juan Fernandez. Dolores Rodriguez, in joining Juan Fernandez among the Granite Creek residents, seems to have been typical of Mexican women in Yavapai County who formed their own community ties beyond the prejudicial scrutiny of Anglo society.

With the discovery of gold near Granite Creek in 1863, the federal government established Fort Whipple to protect federal and private mining interests against tribal land claims in the region. Local miners and ranchers formed the Prescott community under the military shadow of Fort Whipple in the same year. In its early years, Prescott enjoyed the prestige of being the territorial capital, as well as the Yavapai County seat.

While the United States military supported Prescott development by rounding up Yavapai and Apache families, miners and entrepreneurs (who often assisted with military roundups of Indian "renegades") worked to develop Prescott infrastructure. Because some Yavapé men served as scouts for the Fort Whipple and Camp Verde troops, Mary Woolsey and her indigenous family members later found refuge in those sites of federal authority. Granite Creek residents became familiar with interracial relationships that could be both violent and fruitful.

By 1900, Prescott boosters had managed to secure a railroad line through their town, a telegraph office, an electric company, and phone service. Prescott was well connected to the state and national community. A series of fires at the turn of the century had not depressed Prescott's growth, but instead had prompted a progressive drive for modern and managed downtown development that manifested itself in the rows of uniform red brick buildings marking the commercial center of the community. The courthouse emerged as the tallest building in Prescott; its cupola could be seen from the hills surrounding


9It is unknown to the author whether Dolores Rodriguez and Juan Fernandez were Mexican nationals, citizens of Mexico living in Arizona, ethnic Mexican citizens of the United States, or naturalized Mexican citizens of the United States. Legal records refer to them simply as "Mexicans."

10Phoenix and Prescott competed for territorial capital until Phoenix won the title permanently in 1889.
Prescott, and even from the Granite Creek community a mile-and-a-half away.\footnote{Nancy Burgess, \textit{Photographic Tour of Prescott, Arizona 1916} (Jefferson, NC, 2005).}

Despite the cultural and political distance between Prescott and Granite Creek citizenship identities, the geographic and social proximity between these communities ensured frequent interactions, most of which were economic. Although some members of the Granite Creek refugee community worked for Prescott employers, others engaged in small-scale industry and agriculture to construct a diverse and interdependent economy. Juan Fernandez worked as a cobbler when he could, and scavenged for scrap metal when work was scarce. Other male Granite Creek residents worked at the Prescott railroad depot as laborers. Some Granite Creek women such as Maria Gonzalez worked in Prescott’s service industry, while others dealt in indigenous arts and crafts, distributing tribal baskets to Prescott residents.\footnote{Juan Fernandez, testimony offered before coroner’s inquest, September 2, 1913 (records of Yavapai County, 1913), SG3 Coroner, microfilm 50.25.5, case no. 769, 56–57; Jacob Blumberg, testimony offered before coroner’s inquest, September 2, 1913, 2; J.M. Cooksy, testimony offered before coroner’s inquest, September 2, 1913, 41–43; and Dinah Hood, testimony offered before coroner’s inquest, September 2, 1913, 38.} Granite Creek residents’ testimony revealed that their living quarters were simple, often described as tents and wickiups, a stark contrast to the solid brick structures that composed Prescott’s downtown during this period. Many residents traveled frequently to visit friends and family on nearby reservations and to seek out seasonal employment opportunities. The ability of Mary Woolsey, an elderly widow, and Dolores Rodriguez, a single mother, to draw support from the Granite Creek community serves as a testament to the interdependence practiced within the community and its capacity to support all of its members, young and old, married, single, and widowed.

\underline{THE MURDER OF JESUS ESPARCIA}

Yavapai elder Mary Woolsey rose with her dogs in the predawn light of September 2, 1913. She worked quietly to collect kindling, her daily contribution to the tightly knit tent community composed of Yavapé and Mexicans who regularly crossed the border between the U.S. and Mexico. As she stooped to gather wood, wet from the overnight rains, she also ducked the authority of federal military and Indian agents,
Yavapai County jurists, and law enforcement. Woolsey continued along the surging Granite Creek, carefully choosing her steps on the slick bank, and came across her neighbor, Juan Fernandez, burying the body of a strange Mexican man. Woolsey retreated back to the camp, still in sight of the shallow grave, and told no one what she had seen.

Dolores Rodriguez lived a few tents away from Mary Woolsey and boarded with her friend Juan Fernandez while her husband served a prison sentence for forgery. Rodriguez provided domestic services such as laundry and food preparation in exchange for her board. Fernandez returned to his canvas tent, in clothes covered with blood, shortly after being seen by Woolsey on the morning of September 2. He promptly opened a bottle of wine and swilled from it until he passed out, clinging to the half-empty bottle in his small cot. When Rodriguez emerged from her tent and warmed herself at the fire built by Mary Woolsey, the two women must have known their tenuous autonomy had been threatened by Fernandez’s apparent violent behavior.

A.J. Oliver, the only white man living within earshot of Granite Creek, had heard noises on the night of September 1, but he had ignored the disruption as an insignificant dispute among the Granite Creek squatters. On the morning of Sep-
tember 2, an Indian couple traveling through Prescott to trade baskets stopped at Oliver's home on their way out of town and informed him of Jesus Esparcia's murder. Once Oliver was notified, he reported the crime to Prescott authorities, who then investigated the report. Now Granite Creek residents were forced to explain the abundance of evidence, including a blood trail and multiple footprints that cut through their camp and ended at Esparcia's shallow grave a quarter of a mile away. The entire Granite Creek community seems to have been made up of less than fifteen individuals, including young children, yet few of them admitted even knowing Fernandez's name when first asked the question. As a largely refugee, non-English-speaking community, Granite Creek residents demonstrated that their loyalties were to each other despite state efforts to impose jurisdictional authority over them.

A handful of Granite Creek residents testified willingly at first, their statements translated for the coroner’s jury (which was hastily called together in a matter of hours on the day the crime was discovered) by Dinah Hood, a thirty-two-year-old Yavapai woman with family at Granite Creek and at nearby Camp Verde. Dinah Hood's cousin Kelly Wilson testified that he saw Fernandez and Esparcia arguing the day before the murder and that Esparcia and another, unidentified Mexican male attacked Fernandez. Maria Gonzales, a waitress in a Prescott restaurant and an intimate acquaintance of Jesus Esparcia, testified that Fernandez had made unwanted advances toward her and that Esparcia had “championed” her honor the day before his death. Prescott resident J.C. Stephens described this quarrel between Fernandez and Esparcia as taking place “in the Mexican saloon” where Gonzales worked.

Witnesses gave their first round of testimony before the coroner’s jury just hours after Oliver had been notified of the crime. A little after noon, jurymen and Prescott officials returned to Granite Creek to explore the crime scene for themselves. For many, this would prove a rare opportunity to scrutinize recently pacified Indians’ homes and domestic relations. Social and language barriers had limited the contact between

13Dinah Hood, ibid.

14Ibid., 35–36.


Anglo photographers take photos of Yavapai Indian dwellings, Prescott, Arizona, c. 1900. This scene is similar to those described in the coroner’s account of the Granite Creek encampment. [Courtesy of Sharlot Hall Museum, Prescott, Arizona, iny2101p]

Anglo Prescottonians and Granite Creek residents to economic transactions, but, as jurors, these white men gained full access to their employees’ domestic and private domains. Investigators found men’s and women’s tracks between the tents and Esparcia’s shallow grave and footprints matching Fernandez’s shoes, and they noted piles of wine bottles outside of Rodriguez’s and Fernandez’s tent.

In their invasion of Granite Creek residents’ privacy, Prescott citizens entered a zone overshadowed by the federal military presence of nearby Fort Whipple and largely unknown to Prescott municipal officials. Here the Yavapai and Spanish languages predominated, and justice of the peace Charles McLane, Sheriff Keeler, and their jurors encountered the stares of Mexican and Yavapai men, women, and children who had never fully surrendered to white patriarchy but had instead established their own geopolitical boundaries around the Granite Creek camp. Not surprisingly, Justice McLane and his jurors found sufficient evidence to indict Juan Fernandez for the Granite Creek murder and sent the case to superior court judge Frank O. Smith. Yavapai County officials consulted attorney general Joseph Morrison in Phoenix when they realized that the murder “was committed upon government ground” and that the primary witnesses were indig-
enous wards of the federal government, but Morrison waived jurisdictional authority, and the trial proceeded into Judge Smith's courtroom. 17

The Yavapai County coroner had relied on indigenous and Mexican witnesses in previous investigations, but the jurists' decision to introduce those witnesses into trial marked a significant deviation from state law and jurisprudence. In the trial held in December 1913, three months after Esparcia's murder, county attorney P.W. O'Sullivan and assistant county attorney Joseph H. Morgan called seventeen Anglo witnesses, one Mexican witness (Dolores Rodriguez), and three Yavapai witnesses (Mary Woolsey, Harry Hood, and Kelly Wilson) to testify against Juan Fernandez. Defense attorneys J. Ralph Tascher and Neal Clark added three Anglos and their Mexican defendant to that list of witnesses. Three of the Anglos testifying for the prosecution included A.J. Oliver and his family, all of whom had heard sounds indicating a violent disturbance from their residence on the grounds of Fort Whipple.

Defense attorney Tascher conducted a voir dire examination of Rodriguez, Woolsey, Hood, and Wilson, the only non-English-speaking witnesses for the prosecution, through a Spanish interpreter and a Yavapai interpreter. Tascher and Clark failed to conduct voir dire examinations (most commonly applied to assess juror biases, but also used to determine the legal and mental competency of minor and otherwise vulnerable witnesses) of any English-speaking witnesses. That at least two Anglo witnesses were under the age of eighteen, and voir dire proceedings applied to minor witnesses as well as Indian wards of the federal government suggests the racially motivated nature of Tascher's examinations. More interesting, neither the prosecution nor the defense conducted a voir dire examination of Fernandez, who seemingly enjoyed the fullest potential of his legal whiteness only as a defendant for murder even as he testified in Spanish through a translator. Such tactical decisions by the defense, highly touted in the press coverage of the trial, suggests that Tascher and Clark

aimed to defend Fernandez's claim to white patriarchy as a means to trump Indian and female witnesses.\textsuperscript{18}

Anglo witnesses in the trial, all of middle-class or elite status in the Prescott community, delivered rather non-controversial testimony throughout their interrogations, showed a relative degree of familiarity with legal proceedings, and conformed to the expectations of them held by Judge Smith, the prosecution, and defense teams. Likewise, defense and prosecuting attorneys questioned the Anglo witnesses respectfully, prodding for details but not insulting their morality or intelligence. Rodriguez, Woolsey, Hood, and Wilson, on the other hand, showed signs of resistance, confusion, and frustration during testimony that revealed fundamental differences in worldview between themselves and the Anglos present in the courtroom. Furthermore, the defense, showing utmost respect for their defendant, attacked Dolores Rodriguez's credibility on the grounds of her alleged promiscuity. Tascher and Clark also challenged Kelly Wilson and Mary Woolsey's mental competence because of their inability or unwillingness to testify in English and to submit fully to an oath of loyalty to the state and God. Wilson and Hood exhibited embarrassment and shame, while Woolsey's frustration and hostility were so evident that reporters included it in their coverage of the trial.\textsuperscript{19}

Rodriguez testified to very little, admitting only that Fernandez indeed spent the evening of September 1 away from home and returned with bloodied clothes. She corroborated Fernandez's story, however, that the blood was her own expelled during menstruation. Attorneys failed to press the matter, and reporters declined to print such lurid details despite both parties' otherwise aggressive interrogation and sensational reporting. Rodriguez sustained herself by living with Fernandez and doing laundry for unnamed Prescott residents, but reporters suggested that she augmented her income through sexual

\textsuperscript{18}Newspaper coverage of the trial suggests that bilingual prisoners served as Spanish-language translators, although trial records name Joseph Calles as the court's translator. "Fernandez Is Guilty; Life Imprisonment; Jury Brings in Verdict at the Midnight Hour, Following the Taking of Two Ballots," Prescott Journal-Miner, December 17, 1913. The Yavapai-speaking translator was referred to as "Indian Dick," a frustratingly ambiguous name, but Mike Burns describes a "Mohave Dick" who served as a translator in Yavapai County, and this may have been the same man. Burns also sometimes served as Yavapai County interpreter, but his name is not included in the trial transcripts. Mike Burns, All of My People Were Killed: The Memoir of Mike Burns (Hoomothya), a Captive Indian (Prescott, AZ, 2010), 97.

\textsuperscript{19}"Saw Him Cover up Grave, Squaw Swears: Prosecution Springs Surprise in Fernandez Murder Trial by Putting New Witness on Stand," Prescott Journal-Miner, December 11, 1913.
commerce. Rodriguez's children each had different fathers; the youngest, named after his father Jose Reinosa, was released from the Arizona State Prison in Florence just two days before Jesus Esparcia's murder. Although lawyers chose not to call Reinosa as a witness in the trial and Justice McLane and Judge Smith chose not to pursue him as a defendant, some witnesses implicated Reinosa as the possible third man seen by Kelly Wilson and Harry Hood fighting with Fernandez and Esparcia before the murder.20

The Prescott Journal-Miner suggested some sort of lover's quarrel involving Dolores Rodriguez, who lived with Fernandez but had a child with the senior Jose Reinosa, and Maria Gonzalez, linked to Esparcia, but pursued by Fernandez. Because Maria Gonzalez fled the state after the coroner's inquest and never appeared in the Arizona v. Fernandez trial, lawyers could not implicate her in their questioning of Rodriguez and Fernandez, but the defense chose to suggest that Rodriguez's alleged promiscuity might have caused Esparcia's violent death, or at least had made her an unreliable witness. The press reported on her testimony:

On cross-examination, Mr. Tascher made the witness admit that she was telling untruths. . . . He also brought out facts to show that the woman had lived with Jose Reinosa, the father of three boys and that they had not been married. . . . She admitted also that after the end of her residence with Fernandez she went to live with a man named Ventura and that she had never been married. While the evidence she offered is highly incriminating, the character of the witness offset the strength of the testimony.21

Maria Gonzalez likely fled to protect herself from a similarly hostile interrogation, but Rodriguez failed to defend her claims to privacy, a white woman's right, and held her tongue against Fernandez as much to protect her and her children's reputation as to protect his.

Mary Woolsey, elderly and widowed, gave Tascher and Clark little opportunity to question her sexual morality, so they challenged her mental competence instead. Woolsey first gave her name as Chachawawa; it was her Yavapai interpreter who fur-

20In the coroner's inquest and during the trial, Rodriguez described the blood as the result of her "monthlies."

nished an English name for the court. Woolsey plainly stated
that she was prepared to tell the truth regarding her knowledge
of the murder, but defense attorney Tascher proved unwill-
ing to accept her oath because Woolsey would not explicitly
confirm that she knew she could be jailed for perjury. Wool-
sey's testimony revealed a fundamental commitment to the
truth, but also a radically different worldview from that held by
members of the court. To the frustration of the court, Wool-
sey articulated a sense of time based on a seasonal, lunar calen-
dar, rather than the Gregorian calendar, and defined her living
quarters in relation to the crime scene only through locative
description, not in reference to known spatial referents.

Woolsey refused to say that she saw Fernandez burying
Esparcia's body and admitted only that she saw the defendant
moving brush and debris from one place to another; an omis-
sion that would have served defense attorneys better had they
chosen not to batter her on the witness stand. Although she
answered the questions put to her, Woolsey's resentment of her
rough treatment came through even in the trial transcripts, but
an observant reporter summarized her testimony best: "[Mary
Woolsey's] testimony was offered through an interpreter and
the witness became at times frustrated, especially when asked
whether she knew what the truth meant."

Even prosecuting
attorney Morgan became frustrated with Tascher's insistence
that Woolsey define truth, as this exchange from the voir dire
examination shows:

Mr. Tascher: Do you know what the truth is?
Mary Woolsey through Indian Dick: She say yes, sir.
Mr. Tascher: What is it?
Mr. Morgan: Now, if the court pleases, that question
cannot be answered. People have been trying to determine
an answer to that question for thousands of years.

Female witnesses were not the only ones badgered by de-
fense attorneys. Kelly Wilson, a twenty-five-year-old Yavapai
man from Camp Verde, endured a hostile interrogation as well.
Although Wilson testified through an interpreter during the
coroner's inquest and during his first round of trial testimony,
the defense objected to an interpreter during Wilson's subse-
quent voir dire examination, insisting that he knew enough

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23Mary Woolsey testimony, submitted to Arizona Court of Appeals, Division
One; Criminal Files, Briefs and Records, microfilm, case no. 360 [Phoenix, AZ,
1914], 190–92.
English to testify. The transcripts captured Wilson's linguistic helplessness as Tascher fired questions the young man did not fully comprehend and demanded answers he could not articulate. After prosecuting attorney Morgan suggested the court involve interpreter Mojave Dick in the voir dire proceeding, Tascher interjected, "We object to an interpreter. The witness was put on the stand to speak English. If the witness is competent to tell his story in English he is competent to state whether or not he is competent to testify as a witness." It seems the defense felt justified in expecting English fluency from Wilson because of his Anglicized name and his experience as a laborer in the Prescott vicinity, but when they found his language skills lacking, the defense challenged his competency through a voir dire examination that barraged Wilson with legal terminology regarding perjury and sworn oaths and drove him into silence.

Eventually, county attorney Morgan convinced Judge Smith to provide an interpreter, and the interrogation proceeded. As in the case of Woolsey's testimony, which did not actually describe Fernandez engaged in a murderous act, Wilson's testimony could have helped the defense. Wilson testified that he saw Fernandez fighting with Esparcia and another Mexican and that the forty-two-year-old Fernandez actually might have been the victim of the younger men's harassment. As noted earlier, reporters gathered that the third man might have been Jose Reinosa, the father of one of Rodriguez's sons, but, as noted, Justice McLane and Judge Smith chose not to hear evidence against Reinosa, and neither legal team subpoenaed him for testimony.

The all-white, all-male, all-English-speaking jury found Fernandez guilty of Esparcia's murder, and Judge Smith sentenced him to life in prison. Tascher and Clark appealed the conviction on the grounds that the court erred in accepting Woolsey and Rodriguez's testimony—the defense attorneys did not mention the male, non-English-speaking witnesses called by the prosecution. Tascher produced a body of case law demonstrating that in similar instances of testimony provided by Indian witnesses, courts ruled such witnesses incompetent because of their incapacity to understand the obligations of an oath. That Tascher and Clark considered both Rodriguez and Woolsey incompetent witnesses is evidence that they and other Yavapai County jurists classified the Mexican woman as a non-citizen, non compos mentis witness. According to the defense, such exclusionary rulings were in the best interest of witnesses incapable of determining truth from falsehood and

24Kelly Wilson testimony, submitted to Arizona Court of Appeals, Division One, ibid., 369–83.
fantasy from reality because the rulings protected them from charges of perjury.

Court transcripts make it clear that Fernandez's attorney had conducted his voir dire examinations of Woolsey and Rodriguez strategically in order to present his case for appeal, since his voir dire interviews quoted, nearly verbatim, previous cases that excluded witness testimony. Although it would not bolster Fernandez’s appeal, Woolsey's and Rodriguez's responses to voir dire questions had also followed the same patterns as those of witnesses excluded for incompetence. Local press coverage of the jury's verdict and Judge Smith's delivery of a life sentence against Fernandez included Tascher's declaration that he and Clark intended to appeal to the state's supreme court. Within a year, they prepared their arguments and claimed that "the court erred" when it accepted the testimony of "Mary Wolsey [sic], an Apache-Mohave Indian squaw . . . for the reason that upon voir dire [she] did not show that she understood the obligation of an oath . . . and was therefore incompetent to testify as a witness."

Tascher and Clark protested Dolores Rodriguez's testimony on the same grounds of incompetency. Justice Henry D. Ross of the Arizona Supreme Court wrote the opinion; he and justices Alfred Franklin and Donald L. Cunningham unanimously affirmed Judge Smith's ruling. Without explaining their decision to dismiss the case law presented before them, the three original members of Arizona's supreme court accepted Woolsey's and Rodriguez's loyalty oaths and sworn testimony, recognizing both women as legally competent actors in Arizona's body politic. Ross acknowledged in his opinion that Rodriguez had been "a very unwilling witness," but he went on to describe both women as able to meet the minimum standards of Arizona witnesses, "who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others. . . ." The justices made no acknowledgment of the historic precedent of their racially progressive ruling in affirming the testimony of indigenous and non-citizen women against white defendants in Arizona. Later

In the case of Arizona v. Fernandez, the defense conducted voir dire examinations of all witnesses from Granite Creek, but not of any of the Prescott witnesses, despite the fact that some of the Prescott witnesses, including A.J. Oliver's daughter, were minors. These voir dire proceedings became the basis for Tascher's appeal after the jury found Fernandez guilty of murder.

Apache-Mojave is a misnomer for Yavapai from the period. Assignment of Errors, submitted to Arizona Court of Appeals, Division One; Criminal Files, Briefs and Records, microfilm, case no. 360 (Phoenix, AZ, 1914), 8.

Fernandez v. State 1914 16 Ariz. 269; 144 P. 640; 1914 Ariz. Lexis 130.
justices of the Arizona Supreme Court would deny American Indian legal competency when they withheld indigenous suffrage in 1928, and then would cite this 1914 ruling as evidence of Native competency when they enfranchised Arizona Indians in 1948. It is important to note that Justice Ross served on the 1914 court that upheld indigenous testimony but filed a dissent in the 1928 decision to disenfranchise Arizona Indians. He died in 1945, three years before the state supreme court would return to his view of Native residents as competent legal actors. Such juridical ambivalence, in addition to Mary Woolsey’s and Dolores Rodriguez’s “unwillingness” to testify, makes it difficult to interpret these justices’ decision as an affirmation of indigenous and marginalized women’s civil rights. Looking to some of the foundational writings on postcolonial and critical race theory offers some insights into the complex nature of Natives’ and non-citizens’ legal status during Arizona’s early statehood.

The "Nervous Condition" and "Combat Breathing"

In his book The Wretched of the Earth, Frantz Fanon provides a number of psychoanalytical and historical insights that may explain Juan Fernandez’s seemingly random murder of Jesus Esparcia, as well as Dolores Rodriguez’s and Mary Woolsey’s apparent acceptance of the superior court’s authority. In particular, Fanon’s description of the psychosis brought on by violent colonialism might explain Fernandez’s brutal behavior. Fanon’s charge that colonized peoples overcome their fear of the colonizer and breach colonial institutions [such as the law] also helps to explain Rodriguez and Woolsey’s presence in the courtroom.

Before accepting that Fernandez, Woolsey, and Rodriguez acted under colonial conditions, readers should recall a few crucial aspects of Yavapai County history. Contemporary Yavapai County is the territorial homeland of the Yavapé. In 1863, white prospectors discovered gold near Granite Creek and established the town of Prescott. Shortly thereafter, Yavapé and Apache families were rounded up at gunpoint and placed on federal reserves. At the close of the nineteenth century, many Yavapé families fled the reservations and returned to Granite Creek, only to find that Prescott had become a progressive settler town of red brick storefronts and homes.

This sequence of events exemplifies a number of critical points from Fanon’s description of colonial societies. Prescott was founded to extract resources from the region, and the Yavapai were exploited to this end. As in Fanon’s observa-
tions of the African encounter with French colonists in Algeria, white Prescott settlers' and Arizona Natives' "first encounter was marked by violence and their existence together—that is to say the exploitation of the native by the settler—was carried on by dint of a great array of bayonets and cannons." Territorial journals, newspapers, and official records from the 1870s and 1880s abound with descriptions of violent encounters, both private and state-sponsored, between white settlers and indigenous Arizonans.

Prescott settlers terrorized Mary Woolsey, Dolores Rodriguez, and Juan Fernandez by murdering non-white residents, occupying Native lands, and forcibly segregating Indians on reservations and Mexicans in ghettos in newly established towns. Federal and state officials in Arizona also forcibly removed Yavapai children and placed them in boarding schools throughout the Southwest. Mary Woolsey's niece had been removed to the Santa Fe Indian Industrial School in the 1880s and returned in 1900, although the school superintendent had tried to have her expelled for being a disruptive student in the 1890s. The local press recognized signs of colonial distress in Dolores Rodriguez during the Fernandez murder trial. Rodriguez had been detained in the state mental hospital during the three months between the murder and the trial, and she no doubt feared the loss of her children because of her association with a suspected—and then convicted—murderer. When she broke down in the middle of her interrogation, the Prescott Journal-Miner reported that "the woman prisoner has been removed to the county hospital. Terror has seized her. In addition, she was ill when the authorities took her in charge, her condition at the present time bordering on the precarious."29

Fanon's accounts of the geophysical aspects of colonialism, as well as his psychological descriptions of violence, apply to Prescott: "The colonial world is a world divided into compartments."30 The geographical boundaries between Fort Whipple, the Granite Creek squatter camp, and downtown Prescott reflected the racial compartmentalization that typifies colonial settings. The fires that swept through Prescott and prompted rebuilding only hardened the architectural markers of racial segregation and made the distinctions between white American, Indian, and Mexican more apparent. Fanon continues, "The settlers' town is a strongly built town, all made

28Frantz Fanon, The Wretched of the Earth (New York, 1978), 36.
30Fanon, The Wretched of the Earth, 37.
Yavapai Indians sit on the sidewalk at the corner of Gurley and Cortez Streets, directly across the street from the Yavapai County Courthouse, Prescott, Arizona, c. 1920. (Courtesy of Sharlot Hall Museum, Prescott, Arizona, iny2127p)

...of stone and steel... The settlers' town is a town of white people, of foreigners. The town belonging to the colonized people, or at least the native town... the reservation, is a place of ill fame, peopled by men of evil repute... The native town is a crouching village, a town on its knees, a town wallowing in the mire.”

Although he wrote these descriptions of French Algeria fifty years after the Arizona v. Fernandez trial, it is as if Fanon had strolled the streets of Prescott and the banks of Granite Creek and had observed the unsettling contrast between the red brick storefronts of Prescott and Granite Creek's canvas tents built among trash heaps.

When Fernandez stabbed Jesus Esparcia ten times and buried him a few hundred yards from the homes of Woolsey, Rodriguez, and his other Granite Creek neighbors, his actions invited state authorities into their community, rupturing the careful independence the Indians had built. The subsequent murder investigation examined not only the context of Esparcia's death, but the social and cultural legitimacy of the Granite Creek residents as members of the Prescott and greater Arizona communities. Under state scrutiny, attorneys interrogated Mary Woolsey as a "decrepit old Apache-Mohave squaw" and named Dolores Rodriguez a hostile witness who was "wholly...

31 Ibid., 39.
incompetent” and “prejudicial.” Through the trial of State of Arizona v. Fernandez, Woolsey, Rodriguez, and a handful of other Granite Creek residents were subsumed within the jurisdictional eye of the state—a condition they had escaped most their lives by dodging Indian agents, federal soldiers, and census takers. Esparcia’s death allowed the state to demand that Woolsey and Rodriguez swear a loyalty oath to colonizers and disrupted the ties they had formed within their tight-knit community. Because of Fernandez’s infraction, Woolsey and Rodriguez found themselves on trial when the state finally co-opted their resistant voices.

Jean Paul Sartre described the status of the Native as “a nervous condition introduced and maintained by the settler among colonized people with their consent.” Although the legal transcripts produced in Arizona v. Fernandez and Fernandez v. Arizona reveal little regarding the psychological condition of Fernandez or other Granite Creek residents, Fernandez’s, Rodriguez’s, and Woolsey’s testimony reveals tensions between Granite Creek residents and Yavapai County officials that certainly could be described as nervousness. Sartre argues that this nervous condition is the product of violence enacted by settlers that “does not only have for its aim the keeping of . . . men at arm’s length; it seeks to dehumanize them. Everything will be done to wipe out their traditions, to substitute our language for theirs and to destroy their culture without giving them ours. . . . [S]hame and fear will split up his character and make his inmost self fall to pieces.”

Arizona historians have shown conclusively that the wars and negative policies employed against Mexican and indigenous Arizonans prior to 1913 embodied settlers’ efforts to dehumanize the Native population, wipe out their traditions, and

32Assignment of Errors, submitted to Arizona Court of Appeals, Division One; Criminal Files, Briefs and Records, microfilm, case no. 360 [Phoenix, AZ, 1914], 8, 17.
33Jean Paul Sartre, “Preface,” in Frantz Fanon, The Wretched of the Earth, 20. The Gramscian reference to consent is highlighted.
34In her article “Chicano Indianism” [see note 8], Martha Menchaca describes a group of Mexican-Americans identified by white Americans as indigenous inferiors. I include Juan Fernandez and Dolores Rodriguez in the Native colonized population because they lived among the Yavapé in the Granite Creek Indian camp and because they were denigrated aggressively by Yavapai County officials in ways that indicate that neither Fernandez nor Rodriguez was considered a white member of the Prescott community.
destroy their culture. The Fernandez murder trial effectively communicated to Granite Creek residents that they could no longer hope to remain "at arm's length," outside the jurisdictional and cultural authority of Anglo Prescott residents, but that they would have to submit to a marginal status in the new legal culture of the state. Although efforts to destroy Yavapai and Mexican culture took place beyond the realm of the Yavapai County courthouse, the substitution of English for Spanish and Yavapai was paramount in the Fernandez trial, and in the voir dire examinations particularly. The "shame and fear" exhibited in the non-white witnesses' testimony suggest that they did in fact struggle to keep from falling to pieces. Dolores Rodriguez, Mary Woolsey, and Kelly Wilson were all repeatedly told to "speak up" by the court, and the prosecution frequently coaxed them simply to answer the question, while the defense lodged objections after almost every one of their responses. Dolores Rodriguez's testimony was so tentative that the court called a recess so that she could be counseled before returning to the witness stand. Mary Woolsey stepped out of the witness stand to use gestures rather than words to answer the questions put to her, and Kelly Wilson simply stopped answering questions in English and only spoke Yavapai, even though Tascher objected to the young man's reliance on an interpreter.

Fanon describes those living under these violent conditions as existing in "a state of permanent tension . . . a hostile world, which spurns the native, but at the same time it is a world of which he is envious." Yavapai residents along Granite Creek may not have been envious of the "hostile world" that made up Prescott and its immediate surrounds, but they no doubt remembered that the region had been their traditional homeland. Mexican men like Esparcia and Fernandez may have been envious of the economic and social opportunities afforded Anglo Prescott residents who spurned them, however. Fernandez described himself as a cobbler who was often out of work, so he resorted to wage labor when he could stand it and selling scrap


37 Each of these incidents is described in the trial transcripts submitted to Arizona Court of Appeals, Division One; Criminal Files, Briefs and Records, microfilm, case no. 360 (Phoenix, AZ, 1914); "Saw Him Cover up Grave, Squaw Swears," Prescott Journal-Miner; and "Fernandez Owned the Deadly Knife," Prescott Journal-Miner.

38 Fanon, Wretched of the Earth, 52.
metal when he could find it. Fernandez and Esparcia may have worked together as laborers in the Prescott Depot railroad yard, but white Prescott employers knew so little about their Mexican laborers that no witnesses could definitively make this connection. Fernandez raised extra money by boarding Dolores Rodriguez and her three young children, but he claimed not to know her well.

For her part, Rodriguez claimed only to be "stopping by" with Fernandez and knew him by another name that he denied having. The discrepancies between Fernandez's and Rodriguez's testimony indicate an uneasiness before juridical scrutiny and an unwillingness to reveal the details of intimate living arrangements that did not conform to settlers' standards of decency. Fernandez admitted to drinking on the day of the murder, and a pile of thirty or more empty bottles of wine was found outside his tent. It is possible that Fernandez's economic distress and personal instabilities led him to act out violently against Jesus Esparcia rather than Anglo neighbors, just as Fanon describes: "The colonized man will first manifest . . . aggressiveness which has been deposited in his bones against his own people."39

Despite the onslaught of witnesses who testified against him, and the Granite Creek witnesses who implied that Fernandez acted in self-defense, Fernandez claimed complete ignorance of all aspects of the crime. Perhaps he felt what Fanon would later observe—that in

a world ruled by the settler, the native is always presumed guilty. But the native's guilt is never a guilt which he accepts . . . in his innermost spirit, the native admits no accusation . . . . The symbols of social order—the police, the bugle calls in the barracks, military parades and the waving flags—are at one and the same time inhibitory and stimulating for they do not convey the message "Don't dare to budge"; rather, they cry out "Get ready to attack."40

Perhaps Jesus Esparcia fell victim to Juan Fernandez's nervous impulse to attack as he crept between white and Native settlements and listened to the sounds of Prescott parades and celebrations of white supremacy that penetrated the walls of his canvas tent along Granite Creek.

Woolsey's and Rodriguez's contributions to Fernandez's trial signified the imposition of juridical authority into the personal

39Ibid., 52. That Esparcia was stabbed ten times with a small knife indicates the rage felt by his murderer.

40Fanon, Wretched of the Earth, 53.
lives of Granite Creek residents. Yavapai County officials demonstrated their capacity to fracture indigenous and Mexican alliances, and to extract testimonies that served the interests of settlers. However, because Woolsey and Rodriguez managed to avoid swearing loyalty oaths to the state (thus the grounds of the appeal) and admitted only to what the state already knew, these women, in Fanon’s words, “[held] out against the occupier,” and maintained “co-existence as a form of conflict and latent warfare . . . keeping up the atmosphere of an armed truce.” Their collective reticence served as a “weapon of the weak,” to use James Scott’s terminology. These forms of careful and strategic resistance comprise Fanon’s view of the initial stages of decolonization, which require the “victory of the colonized over their old fear and over the atmosphere of despair distilled day after day by a colonialism that has incrusted itself with the prospect of enduring forever.”

Dolores Rodriguez endured months of imprisonment designed to compel her loyalty and degrade her attachment to the Granite Creek community, but she still testified only that Fernandez had not come home on the night of September 1. She did not say that his clothes were covered in Esparcia’s blood or that she knew he had been drinking; she even corroborated Fernandez’s claim that the blood came from her “monthlies” and not from Esparcia. Mary Woolsey endured an insulting interrogation but refused to doubt her ability and right to narrate her own experience.

Fanon employs a concept called “combat breathing” to describe the nonviolent and subtle strategies of those confronting colonial forces. Readers can imagine that, throughout Woolsey’s and Rodriguez’s staccato testimony, their “breathing [was] an observed, an occupied breathing; a combat breathing,” similar to the internalized resistance that Fanon found among those who resisted colonialism in the second half of the twentieth century. Unable to retreat from a court that subpoenaed their testimony and unwilling to use violent forms of resistance, breathing with such purpose through their guarded testimony may have invigorated these women’s commitment to the Granite Creek community even under the juridical scrutiny and police authority of the Yavapai

41Frantz Fanon, A Dying Colonialism [New York, 1959], 47. Italics added by author for emphasis.


43Fanon, A Dying Colonialism, 52-53. Italics added by author for emphasis.

44Ibid., 65.
County superior courtroom. When these women walked back to Granite Creek, they may have been breathless, but they had not lost their language, their power, or their truth. The course of these events may even have helped to fuel the Granite Creek residents' drive to secure federal tribal recognition, which was finally achieved in 1935.

MOTIVES OF THE COURT: GRAMSCIAN HEGEMONY AND BELL'S DILEMMA

Throughout the Arizona v. Fernandez trial, the defense repeatedly objected to Granite Creek witnesses, both male and female, as incompetent. The court, represented by the black-robed authority of Judge Frank O. Smith, repeatedly overruled these objections. At no point did Judge Smith explain his decision to divert from legal precedent and accept testimony from noncitizen witnesses like Mary Woolsey and Dolores Rodriguez, who offered ambiguous loyalty oaths and hostile testimony at best. When Fernandez's defense attorney, J. Ralph Tascher, submitted his client's appeal, he stated their position this way: "So far as we have been able to discover, from a review of the cases, there has never been a time when a witness was allowed to testify who did not understand the nature and obligation of an oath. . . ." Tascher based his argument primarily on the murder trial appeal of Priest v. Nebraska [6 N.W. 468], in which the Nebraska Supreme Court excluded Native witnesses who failed to convince the court sufficiently of their ability to understand the obligations of an oath. The defense concluded their assignment of errors by summarizing a series of other cases in which witnesses who failed to pass voir dire examinations were excluded from trials.45

The argument presented in the Fernandez v. Arizona assignment of errors highlights the significance of Arizona Supreme Court justices' departure from established jurisprudence in accepting the testimonies of Woolsey and Rodriguez. It becomes perplexing, then, that Arizona's justices felt no need to explain their progressive position toward noncitizen, non-English-speaking witnesses in 1914. If we recall that just fifteen years later a different ensemble of Arizona justices would argue that Arizona Indians could not vote because their relationship to the federal government made them comparable to wards of

45J.R. Tascher, "Assignment of Errors," submitted to Arizona Court of Appeals, Division One; Criminal Files, Briefs and Records, microfilm, case no. 360 (Phoenix, AZ, 1914), 7, 9, 11.
mental hospitals, the position of 1914 justices becomes even more remarkable. It is possible that Arizona’s first bench of supreme court justices used the 1914 ruling as a means to incorporate indigenous residents within the newly formed state political body; the state had been a territory until 1912, and off-reservation Indians proved an ambiguous set of subjects existing between federal and state jurisdiction. When justices Alfred Lockwood and Archibald McAllister turned away from chief justice Henry Ross’ view that Native Arizonans held voting rights in 1928, they demonstrated the tenuous nature of indigenous legal status in Arizona in the early twentieth century.

The 1914 Fernandez v. Arizona appeal, then, presented an opportunity for Arizona justices to expand newly formulated state powers and redefine the legal relationship between the state and its Indian residents. Arizona had gained statehood only two years earlier; state authority outlined in the Arizona Constitution had not yet been proven through state jurisprudence. The Fernandez v. Arizona case allowed Arizona jurists to reify jurisdictional authority over noncitizen, non-English speaking residents by extracting loyalty oaths and collecting their testimonies in court, trumping federal authority over indigenous residents—still a sizeable portion of Arizona’s population. That the state attorney general had yielded jurisdiction over a crime that took place on a federal military reserve—“government ground,” as local reporters described it—signifies that, through this case, the state gained control over the Granite Creek squatters who had sought to lodge themselves under federal jurisdiction. If we consider the Arizona Supreme Court as a model of the superstructural institutions that Marxist theorist Antonio Gramsci claims are designed to reify the authority of the elite over the majority population, then we might understand how Mary Woolsey’s and Dolores Rodriguez’s contribution to Arizona legal and racial history depends simultaneously on their victimization as compulsory witnesses of the state and on their activism in resisting state authority.

This interpretation of the Fernandez v. Arizona case assumes that the function of the state is to serve elite interests—a fundamental critical legal studies tenet. This stance is borrowed from Latin American historian Elizabeth Dore, who points out that “although states present themselves as governing in their general interest . . . societies have no ‘general inter-

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est' that overrides all class, gender, and racial divisions [and] such an interpretation ignores the major power inherent in the operation of the state, power that derives from the expropriating classes." Absorbing the voices and bodies of noncitizen, non-English-speaking women served the interests of the Arizona judiciary and Prescott elite because this process expanded Arizona's sovereignty over tribal members and Mexicans who might otherwise withhold their knowledge and loyalty from the state. In this formulation, Arizona Supreme Court justices resemble Antonio Gramsci's intellectuals, who "are the dominant group's deputies exercising the subaltern functions of social hegemony and political government." Although these subaltern functions are many, Arizona Supreme Court justices in particular manned the "apparatus of state coercive power which legally enforces discipline on those groups who do not consent either actively or passively. This apparatus is . . . constituted for the whole of society in anticipation of moments of crisis of command and directions when spontaneous consent has failed." When Juan Fernandez murdered Jesus Esparcia within a few hundred yards of Mary Woolsey's and Dolores Rodriguez's homes, both women refused to report the incident and thus passively refused to consent to state authority. In order for judicial "deputies" to exert state coercive power over Woolsey and Rodriguez, they had to accept their loyalty oaths and extract their testimony under subpoena. Accepting the testimony of noncitizen, non-English-speaking women, in effect, expanded state hegemony over an otherwise peripheral population of former enemies of the state.

That this exertion of state coercive power over Woolsey and Rodriguez served the legal rights of other noncitizen, non-English-speaking women seeking to testify against neighbors and employers who had abused or cheated them would seem like a story of unintended consequences were it not for the insights of critical race theorist Derrick Bell. Although his work is directed primarily toward legal decisions affecting black civil rights, Bell perfectly explains the backhanded granting of minority rights by self-serving courts. He describes this phenomenon as "the principle of 'interest convergence,' [which] provides [that] the interest of [minorities] in achieving racial equality will be accommodated only when it converges

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48 Elizabeth Dore and Maxine Molyneux, eds., Hidden Histories of Gender and the State in Latin America (Durham, NC, 2000), 148.
50 Ibid. Italics in original.
with the interests of whites." By 1914, Arizona justices were willing to grant Mary Woolsey and Dolores Rodríguez a voice in state courts because granting them this right converged with the justices' interests of expanding state authority over noncitizens. Prior to 1914, Native residents could lodge no testimony against white defendants because the territorial government had not recognized indigenous people as rights-bearing individuals. The flimsy nature of this recognition of noncitizen testimony became clear in 1928 when the composition of the supreme court had changed and justices acted to disenfranchise—or silence—indigenous Arizonans once again despite Justice Ross' dissent.

Bell further explains that state interests do not have to be explicit when judicial decisions invest minorities with previously withheld rights:

Racial remedies may . . . be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites. Racial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.

Prescott residents could be satisfied with the notion that their own superior court judge Frank Smith had upheld the rights of Natives and Mexicans to speak their truths in their own language in twentieth-century courtrooms, a sign that Prescott settlers' past hostilities toward local Mexican, Yavapai, and Apache residents had subsided. Yavapai County Anglos could convince themselves that they had successfully integrated the potentially disruptive noncitizens of Granite Creek and had rid themselves of a murderer in one fell swoop. This self-satisfaction was gained at no loss to the established dominance of white Prescott residents and in fact expanded state and county authority to call Granite Creek residents as witnesses against one another.

Bell's insights about how judicial decisions reflect convergent interests also explains why 1914 views of Arizona Natives as competent members of the body politic had become unpopular by 1928, when the state supreme court ruled that Arizona

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52Ibid. [emphasis added].
tribal members were ineligible to vote. "[The] convergence between minority and white interests may fade after a court decision; at this point, jurisprudence may reverse previous investments of minority rights."53 By 1928, state interests in claiming authority over Native and Mexican voices and bodies deferred to state interests in excluding Indian and Chicano citizens from voting.

After 1914, Mary Woolsey and Dolores Rodriguez fade from the local record.54 The Granite Creek community persisted in its claims to the land and continued to breach the colonial compartments that excluded them from Prescott settler society. In 1922 Granite Creek residents established the Yavapai Presbyterian Mission Church, which incorporated aspects of tribal religious practices with Presbyterian rituals. Granite Creek residents joined the Prescott Salvation Army and Chamber of Commerce, raising Prescott support for the establishment of a federal reservation. In 1935, Prescott and Granite Creek residents successfully lobbied the federal government via Arizona senator Carl Hayden and Bureau of Indian Affairs commissioner John Collier (both progressive supporters of tribal land rights) for a seventy-five-acre reservation that included much of the recently abandoned Fort Whipple military post, including the Granite Creek squatter camp.55

Understanding Fernandez, Woolsey, and Rodriguez as colonial subjects who reacted against settler oppression, and considering the possibility that Arizona judges acted as state deputies ruling in affirmation of elite hegemony can shed new light on complex chapters in Arizona's legal and racial history. An obvious next step would be to investigate the particular views of Chief Justice Ross, a prominent figure in Arizona's supreme court history. This essay is an attempt to broaden our understanding of American Indian citizenship construction and to feature the voices and actions of indigenous and marginalized people who negotiated their entry into Arizona's body politic. Mary Woolsey and Dolores Rodriguez are significant figures in that history, no doubt, and the insights of critical race and legal theorists grant us the opportunity to explore the ambivalent and complex contributions of such marginalized actors to western legal history. The sites of Jesus Esparcia's murder and other

53Ibid., 526.
54Mary Woolsey and other Yavapai members of the Granite Creek community are featured prominently in my current manuscript project on indigenous women's encounters with imperial courts in Arizona and Washington between 1853 and 1935.
violent colonial episodes are now part of the Yavapai Prescott Indian Reservation, and the descendants of the Granite Creek squatters continue to make their homes within sight of the superior courthouse of Yavapai County, although they have established their own jurisdictional boundaries. The witnesses who testified in the Arizona v. Fernandez murder trial occupy an important place in the long history of negotiating Yavapé autonomy within the Arizona body politic.
Romo v. Laird: Mexican American Segregation and the Politics of Belonging in Arizona

Laura K. Muñoz

On September 23, 1925, Adolpho “Bebé” Romo and his wife Joaquina Jones sued the Tempe, Arizona, School District No. 3 (TD3) for segregating their four children at the Eighth Street School, the so-called “Mexican Training School.” On October 5, Judge Joseph S. Jenckes of the Maricopa County Superior Court ruled in their favor. Eight days later, on October 13, their children Antonio (age 15), Henry (age 14), Alice (age 9), and Charles (age 7) took their seats in the Tenth Street School, joining their classmates “on the same terms and conditions... as children of the white race.” By the end of the school year,

1Adolpho Romo v. William E. Laird et al., no. 21617 (Sup. Ct. Ariz. October 5, 1925); Laura K. Muñoz, “Separate but Equal? A Case Study of Romo v. Laird and Mexican American Education [lesson plan], OAH Magazine of History 15 (Winter 2001): 28–34. Romo used the formal first names “Adolph” and “Adolpho,” as well his nickname “Bebé” or “Babe.” Tempe School District No. 3 in Tempe, Arizona, is known today as the “Tempe Elementary School District No. 3” or “TD3.” I use the district’s original name in the text, but I cite the latter. A separate district called the Tempe Union High School District No. 213, founded in 1908, manages the high schools.

2Romo, Alternative Writ of Mandamus (September 24, 1925) at 2.

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34 percent of the students—105 of 308 children—at the Tenth Street School claimed Mexican American heritage. The story of Romo v. Laird represents what historians call a "particularism." The telling of a singular historical event "can teach us to find great value in . . . the specific experiences and unique standpoints of aggrieved groups, while at the same time seeking a universalism rich with particulars, a universalism that invites dialogue from all." Historian Vicki L. Ruiz interprets particularisms as singular events analyzed within contextual perspectives; she evokes William Blake's poetic phrase, "To see a world in a grain of sand." Arizona historians such as Katie Benton-Cohen, Linda Gordon, Peggy Pascoe, and Thomas Sheridan have crafted a history of this border state through the art of its particular race relations and emergent politics of whiteness. Romo complements

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3“School year 1925–26—Enrollment to date at Tenth St” (loose document), Minutes, Board of Trustees, Tempe Elementary School District No. 3, Tempe, Arizona [hereinafter cited as TD3 Minutes]. This slip of paper shows the total enrollment for the academic year.

4Social scientists and humanists have explored historical universalism and particularism since the turn of the twentieth century. This phrase from George Lipsitz is succinct in its application to American social history. See George Lipsitz, review of Mercy, Mercy Me: African-American Culture and the American Sixties by James C. Hall, The Journal of American History 89:4 (March 2003): 1606.


Adolpho Romo, seated left, and Adolpho's wife, Joaquina, right, sued the Tempe, Arizona, School District No. 3 in 1925 for segregating their four children at the Eighth Street School. The standing man is Adolpho's brother Miguel. (Courtesy of Irene Gomez Hormell)

their work, offering a new example of how central Arizonans grappled with the concept of belonging in America and how they used the law to deliver the rights and privileges promised to white American citizens. In Romo, the concern over who belonged emerged in a battle over a public school and whose interests it should serve.

I argue that Romo offers us a compelling particularism to re-examine how westerners in Tempe, Arizona, a small agricultural community east of Phoenix on the banks of the Salt River, used local notions of belonging and the "common knowledge" of race to challenge and establish social order within their town in 1925. The conversation astonishes on a national scale because even though Romo is an unpublished case filed in the Maricopa County Superior Court, it is the earliest known Mexican American school desegregation battle. Offering a new

7By common knowledge I refer to the legal rationale, meaning "the assignment of petitioners to one race or another by reference to common beliefs about race." See Ian Haney López, White by Law: The Legal Construction of Race, rev. and updated tenth anniversary ed. (New York, 2006), 4. I also rely on Mae M. Ngai’s definition of race as a “socially constructed category of difference” that is “always historically specific.” See Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America (Princeton, NJ, 2004), 7.
chronology and cultural geography for thinking about Mexican American legal challenges to educational inequity and the construction of race, Romo emerges five years prior to the Texas appellate case of Independent School District v. Salvatierra in 1930, which contested the expansion of a Mexican school in Del Rio, Texas, and predates by twenty-six years the 1951 Arizona federal case of Gonzales v. Sheely, which disputed the race-based separation of Mexican children in Tolleson, a rural community in western Maricopa County. Gonzales was the second federal case to affirm the unconstitutionality of racialized school segregation as a violation of equal protection prior to Brown v. Board of Education. The Gonzales decision relied upon precedent established in the 1947 California case of Mendez v. Westminster, in which Mexican and Latino parents successfully challenged the arbitrary racial separation of their children in the Orange County public schools. Significantly, from Romo we learn that Mexican American parents in Tempe sought similar remedies and began testing comparable legal arguments two decades earlier.

Romo also confirms an Arizona history of Mexican American educational segregation justified as de facto segregation for pedagogical or language rationales, such as teaching the immigrant-heritage child how to speak English, as well as racialized segregation that met the "separate but equal" standard of equal protection. The earliest published federal case on educational segregation in Arizona is Gonzales et al. v. Sheely et al., 96 F. Supp. 1004 (D. Ariz. 1951). In this class action suit, Mexican American parents represented by lawyers, including Tempeño (Spanish for Tempean) Ralph Estrada, from the Alianza Hispano-Americana, sued the Tolleson Elementary School District for segregating their children; Tolleson, Arizona, is in western Maricopa County, about a forty-five-minute drive from Tempe. The court found the segregation discriminatory and illegal on the basis of the holding in Mendez v. Westminster, 64 F. Supp. 544 (S.D. Cal. 1946). The earliest published federal case on Mexican American educational segregation is Independent School District v. Salvatierra, 33 S.W. 2d 790 (Tex. Civ. App., San Antonio 1930). See Richard Valencia's discussion of the thirty-five Mexican American school desegregation cases, including Romo, in Chicano Students and the Courts: The Mexican American Legal Struggle for Educational Equity (New York, 2008), 7-78. For an assessment of lawyer Ralph Estrada and desegregation legal strategy, see Jeanne M. Powers and Lirio Patton, "Between Mendez and Brown: Gonzales v. Sheely and the Legal Campaign against Segregation," Law and Social Inquiry 33:1 (Winter 2008): 127–71; and Laura K. Muñoz, "Ralph Estrada and the War against Racial Prejudice in Arizona," in Leaders of the Mexican American Generation: Biographical Essays, ed. R. Anthony Quiroz (forthcoming).


Plessy v. Ferguson and “color of law” validations of later desegregation cases. The Maricopa County Superior Court permitted the racialization of Mexican-origin students and their segregation in public schools in the early twentieth century, so long as districts upheld the Plessy standard. Equally important, Romo substantiates our knowledge of Arizona activism that coincided with the Mexican American generation lawsuits filed from 1930 to 1960, corroborating a history of agency that reveals individual and community commitments to self-determination and self-identification. In Romo, Mexican Americans pursued a public political and legal battle to prove they belonged in Arizona and belonged there “on the same terms and conditions” as white Americans.

In casting the history of Romo, I examine the lawsuit from three perspectives drawn from court records, school board minutes, and oral history. Each angle—the Mexican parents, the school administrators, and the court—turns on different interpretations of “belonging” in Tempe, Arizona. The college and school district trustees document how the administrators implemented the segregation policy in response to Tempe’s political elite and higher education intelligentsia whose progressive school reorganization led to the lawsuit. The Romo family embodied the Mexican American community at large, including its heritage of mutual assistance, blended families, and borderlands settlement. Judge Joseph S. Jenckes, who symbolized the American legal system and Arizona law, ultimately determined how race, citizenship, and belonging would be handled in this western town. The legal case began officially on September 23, 1925, when Adolpho Romo’s attorneys submitted a Complaint for Writ of Mandamus, demanding that Judge Jenckes issue a ruling to stop the Tempe school district from segregating Mexican American children. Although the judge ruled within twelve days of the complaint, the events surrounding the case lasted three months, from September 14 to November 9, 1925. Consuming one-third of the school year, Romo signaled an important legal challenge to the community’s understanding and practice of race and citizenship.

In spring 1925, the president of the Tempe Normal School (TNS), Dr. Arthur John Matthews, achieved a monumental coup. He convinced the Arizona State Legislature to convert the TNS into a four-year teacher's college, changing it from a junior college into a baccalaureate institution. Students who had graduated from TNS after its 1887 founding earned two-year diplomas and teacher certificates that allowed them to work in Arizona and neighboring states, including California. Matthews' new college now had the authority to issue a four-year bachelor's degree in education. In celebration of TNS's new status as Tempe State Teacher's College, Matthews hosted a town party, closing the college and its three elementary training schools for an official holiday.

As part of the college expansion, however, Matthews needed to acquire additional training school classrooms to prepare the growing undergraduate student body, which now numbered near seven hundred and served students from across Arizona and the western states. Historically, the TNS had engaged in cooperative agreements with two local school districts to operate county-funded schools with "student
teachers." Matthews hired certified veteran teachers or professors who specialized in teacher training to work as "critic teachers," overseeing the college students at both the Rohrig School, a rural district less than a mile east of the college, and TD3's "Rural School" several miles south. In addition, the TNS also operated its own independent "training school" on campus. The TNS retained controlling legal jurisdiction over all three training schools in cooperation with each school district. As early as October 1924, Matthews began negotiations with TD3 to take over its largest elementary, a three-story building with more than five hundred students called the Eighth Street School, nearly adjacent to the college at the corner of Eighth Street (University Avenue) and Mill Avenue. The TNS board agreed that if they could not secure an arrangement with the TD3 trustees, then the TNS would pursue "proper legislation" to garner training schools "through the adjacent school districts." To avoid state interference, the TD3 trustees shared the TNS proposal at a town meeting and allowed voters to help determine the issue in a special referendum during the fall school board election. Tempe voters passed the measure "369 for and 198 against," allowing the "use of the Eighth Street School Building for normal training purposes." The following spring, President Matthews and the TD3 trustees finalized a Memorandum of Agreement. The TD3 relinquished the Eighth Street School and its full operation, including the students, to the college. The trustees even added the proviso that the Eighth Street School "shall be restricted and limited to the accommodation of Spanish-American or Mexican American children."
In 1925 the TD3 relinquished the Eighth Street School, above, to Tempe State Teacher's College, with the proviso that the school be restricted to Spanish American and Mexican American children. (Courtesy of University Archives, Department of Archives and Manuscripts, Arizona State University Libraries, UP-ASUB-E44-#1)

According to TD3 trustee Isabel Waterhouse, this arrangement followed the “established segregation plan, of the past several years.” TD3 had segregated the Eighth Street School in 1915, when it built a new Tenth Street School for the “American” children. TD3 superintendent G.W. Persons reported that the district worked to ensure “conditions . . . as nearly equal as it is possible to make them” in the two schools. Teacher Ruby Olive Haigler Wood, who understood Tempe’s race politics from her own ethnically mixed extended

21TD3 Minutes, September 24, 1925; Waterhouse family, biographical files, Tempe Historical Museum [hereafter cited as THM], Tempe, Arizona.
23G.W. Persons to Gene S. Cunningham, assistant county attorney, Phoenix, Arizona [copy], 9 February 1925, TD3 Minutes. Minutes indicate that the board charged Persons with writing the letter, but the copy enclosed in the bound minute book cites “Clerk.”
family, ascribed the early segregation to Tempe's Americanization efforts.\(^{24}\)

A special feature of the Tempe Public School is the method of handling Mexican children. There are many of them in the town, and they form a difficult problem for the educator. In the Tempe Schools these pupils are put by themselves, under one or more teachers, according to the size of the class. The teachers give them special attention, study their character and peculiarities, and endeavor to make school attractive for them. This plan has been found to work better than where races are taught together.\(^{25}\)

When Haigler Wood graduated from the TNS in 1914, progressive educators such as Dr. Matthews, who was a two-time president of the Arizona State Teachers Association and a vice president of the National Education Association, valued school segregation as a solution to the "Mexican Problem."\(^{26}\) Native-born and immigrant Mexican children comprised the majority of the state's school population in twelve of its larg-


est towns, including Tempe. Americanizing these children concerned many educators across the state. In 1918 these teachers participated in a U.S. Bureau of Education survey to assess the dilemma of how to improve Arizona's public schools and the teaching of its Mexican-majority school population. They resolved to implement Americanization curriculums that emphasized traditional academic "classroom work" such as reading, writing, and speaking English, as well as vocational "hand work" in the domestic and agricultural sciences to prepare Mexican children to enter the workforce.

The Tempe Normal School and its training schools specialized in preparing future teachers to educate Spanish-speaking children. As early as 1906, the TNS hired Spanish professor Gracia L. Fernández at the suggestion of Apache County school superintendent Alfred Ruiz, who promoted the idea of qualified bilingual teachers to the state superintendent of education. Fernández explained in the 1907–1908 TNS course bulletin that the goal of the foreign language requirement was "to equip our graduates for better work as teachers in our Territorial schools." A former Arizona public school teacher and a gradu-


28Discussions affecting Spanish-speaking children appeared in the monthly issues of *Arizona Teacher and Home Journal*. See, for example, the editorial "Does It Pay to Educate a Mexican?" by superintendent R.E. Somers of the Douglas City schools in volume 11, number 4 [1923]: 6–8.

29Educational Conditions in Arizona, 122.


31Biennial Report of the Superintendent of Public Instruction for the Territory of Arizona, 1906–1908 [Phoenix, 1908], 13; "G.L. Fernández," photograph, Picadillo Yearbook [1911], 10; Territorial Normal School of Arizona Bulletin [Tempe, 1911–12], 52. TNS offered two language electives: Latin and Spanish. Fernández wrote the descriptions of the Foreign Language Department and these courses in the annual TNS bulletins during her tenure.

32Bulletin of the Tempe Normal School of Arizona at Tempe, Arizona [1907–1908], n.p.
ate of the University of Maine, the American-born Fernández taught her native Spanish at TNS until 1912. Her successors continued to grow the language course into a foreign language department through the 1920s. TNS encouraged student teachers to learn basic Spanish so they could teach English to Spanish-speaking children. As the TNS training schools enrolled growing numbers of Spanish-speaking youth, the college shifted its curricula to meet the demands of this Americanization work taught in segregated classrooms across the state and now at the segregated Eighth Street School.\(^\text{33}\)

TNS professor and Eighth Street School principal Helen Roberts argued that segregated, protracted curricula benefited the non-English-speaking child. Most children of Mexican descent, regardless of their language abilities, spent three years at minimum in the first grade as part of English immersion programs such as the 1C-1B-1A curricula taught in Phoenix and Tucson.\(^\text{34}\) Writing to the *Arizona Teacher and Home Journal* in 1918, Roberts explained this pedagogical philosophy:

> [T]he only reason I can see for segregation is that it is a slower process, until the non-English speaking children have their vocabulary established. I firmly believe that we should not allow the non-English speaking child to enter the third grade until he is on equal footing with the English speaking child. I have followed up not a few cases where he was put on while still lacking in understanding of English, and I find he gets into deep water and can't wade thru [sic], becomes disgusted and drops out of school.\(^\text{35}\)

Roberts helps us understand why Mexican American children attending elementary schools often were retained and over age for their grade levels such as the Romos’ teenaged sons, Antonio and Henry, who were still attending the Eighth Street

\(^{30}\)Ibid. [June 1915], n.p. Training school photographs published in the bulletin emphasized farming and gardening for Mexican American boys and domestic skills for Mexican American girls.


Helen Roberts, center, stands with Mexican American children from Eighth Street School at a fountain at Tempe State Teacher's College. (Courtesy of University Archives, Department of Archives and Manuscripts, Arizona State University Libraries, UP-UPC-ASUD-T72-E3-#2)

School in 1925.\(^3\) Progressive American educators insisted that segregation served the Mexican child's best educational interests, despite the patterns of underachievement, school failure, and educational inequity that segregation generated.\(^3\)

From reading Roberts, Haigler, and Matthews, we learn that children of Mexican heritage were not yet seen as true Americans. Their lack of English skills and their "character and peculiarities" rendered them outsiders. School segregation reinforced the outsider status of all Mexicans within Tempe. When TNS president Matthews first proposed adopting the Eighth Street School as a new training school, the boards of trustees at both the college and the school district worked methodically to sustain the segregation. The TD3 tapped Superintendent Persons to clarify the legality of continuing Mexican American segregation, even though the school district would no longer control the elementary school. A career

\(^3\)Romero, Complaint for Writ of Mandamus (September 23, 1925) at 1.

\(^3\)San Miguel and Donato, "Latino Education in Twentieth-Century America," 30-32; Educational Conditions in Arizona, 120.
educator, Persons knew quite well that in 1925 no Arizona law authorized Mexican American school segregation. Nonetheless he wrote the county deputy attorney Gene Samuel Cunningham, explained the proposed agreement, and asked very pointedly, “Can the trustees compel these Mexican children to attend the Eighth Street School after it is a training school should they not desire to do so?”

In Cunningham’s interpretation, segregation at the new “Mexican Training School” would be illegal. Cunningham, who had practiced Arizona law since 1912 and in the employ of county attorney’s office since 1916, determined the legal issue was not a matter of race per se, but of technicalities in the statutory law. The school district garnered its authority from public school laws, specifically the 1913 Arizona Revised Statutes. If the trustees relinquished control of the Eighth Street School to the college, then the school would no longer be a part of the public school system and therefore no longer subject to the protections and privileges of the civil code. This forfeiture would prevent the TD3 trustees from legally enforcing Mexican attendance at the Eighth Street School. The revised statutes required trustees to maintain schools “as far as practicable with equal rights and privileges; provided that the board of trustees of any district may make segregation of groups of pupils as they may deem advisable.” But with the new Memorandum of Agreement, the pupils would cease to be under their control. More importantly, Cunningham concluded that “such manipulations” could be enforced only by state legislation to revise the education laws and as a result was “not within the purview of the Board of Education governing the Normal School, nor the Board of Trustees governing the district school.” Further, state law did not address the question of segregation within higher education. The TNS, like other

88G.W. Persons, superintendent, Tempe Public Schools, Tempe, Arizona, to Gene S. Cunningham, deputy county attorney, Phoenix, Arizona, 9 February 1925 (loose document), TD3 Minutes.
89Gene S. Cunningham, deputy county attorney, Phoenix, Arizona to G.W. Persons, superintendent, Tempe Public Schools, Tempe, Arizona, 26 February 1925 (loose document), TD3 Minutes (hereafter cited as Cunningham to Persons).
92Cunningham to Persons, 26 February 1925.
southwestern normal schools and universities, integrated the few qualified Mexican American college students who managed to enter their ranks.\textsuperscript{44}

To Deputy Cunningham, the TD3's legal questions about continuing Mexican American segregation probably seemed ordinary. School boards often wrote to county and state attorneys about the parameters of school law, including their authority over race-based segregation. George W. Harber, an assistant attorney general and Cunningham's colleague, had answered a similar question ten years earlier for a Mrs. Luther Stover of Williams, Arizona, who asked "whether or not Mexican children can legally be segregated from the white children in the public schools."\textsuperscript{45} Harber offered Stover a short but precise interpretation of the rule on record—per subdivision II, paragraph 2733, of the Revised Statutes of Arizona, 1913: "[O]ur law empowers the trustees to segregate children of the African race, but does not empower them to segregate children of the Mexican race unless, of course, children of the Mexican race might also be of African descent, by being intermingled with African blood through birth."\textsuperscript{46}

Harber's assessment revealed that Mexican children could not be segregated under Jim Crow laws affecting African Americans. Since Mexicans were considered a different "race" from blacks, the laws did not apply to them. In the town of Williams, then, as in 1925 Tempe, this sort of Mexican race-based segregation would have been illegal.

Taken together, Cunningham's and Harber's legal interpretations pinpoint how the establishment of the new "Mexican Training School" skirted through the 1913 Arizona Revised Statutes. The state legislature authorized school districts to separate students "as deemed necessary."\textsuperscript{47} The state legislature also allowed normal schools to establish laboratory training schools in contract with local school districts. The statute did not address segregation within public institutions of higher education, nor in the maintenance of training schools.\textsuperscript{48} No law specifically prevented the new arrangement between the TNS and the TD3.

\textsuperscript{44}MacDonald, ed., \textit{Latino Education in U.S. History}, 72–73; Ogren, \textit{The American State Normal School}, 67–68.


\textsuperscript{46}Ibid.

\textsuperscript{47}\textit{Ariz. Rev. Stat.} 1913 §2750.

\textsuperscript{48}\textit{Ariz. Rev. Stat.} 1913 §§4515–18.
Recognizing this legal loophole and despite the attorney general's opinion, the TNS and TD3 trustees moved forward with their decision to transfer the Eighth Street School and its Mexican American students to the college. Part of their rationale extended from the broad control granted to normal schools to operate training schools as public schools in cooperation with local school districts. Under statute 4515, training schools became "a part of the public school system and . . . [were] governed by laws and regulations relating to the public schools." Further, statute 4518 authorized trustees to "prescribe from time to time, such rules and regulations as they may deem proper, governing the admission and attendance at such training schools." Thus, given this combined authority and the successful school referendum, both school boards voted unanimously to support the memorandum naming the Eighth Street School as a "normal training school" effective July 1 and to continue the de facto educational segregation. On April 10, 1925, both parties signed the agreement. The college acquired full responsibility for conducting the new "Mexican Training School," including its administration, budget, faculty and staff employment, and the "admission and entrance of pupils."

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**Mexican Tempe**

Adolpho Romo's battle for school integration in Tempe only came to light as a result of oral histories conducted by the Tempe Historical Museum's "Barrios Oral History Project" in the 1990s. Romo's grandniece, Irene Gómez Hormell, recalled that her Tío Bebé sued the college on behalf of all the Mexican children in Tempe. She described him as very community minded and willing to challenge the inequity; he appeared to be "¡el único que quiso pelear! [The only one who would

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49Ibid. §4515.
50Ibid. §4518.
51Romo, Exhibit A: Memorandum of Agreement (filed September 23, 1925).
52Ibid.
Yet Romo did not act as an individual, despite historical references to his action as a one-man, one-family pursuit of justice.\(^4\) Like the claimants in Mendez and Gonzales, Romo pursued the legal challenge with community endorsement. The TNS trustees described the case as “being filed in Court by the Mexican people whose representatives were Adolpho Romo and others.”\(^5\) Hormell added that Romo became the spokesman because he was light skinned and had a better chance of winning than a dark-skinned person. She said, “That’s the way it was!” Romo’s portrait, displayed in a Soto-Gomez family album at the museum where Hormell has actively worked to record and acknowledge Tempe’s Mexican history, reveals a man with black hair, deep, dark blue eyes, and a pale complexion.\(^6\)

The memory of Romo’s complexion points to the enduring racialization that Tempe’s Mexican community negotiated. Although his physical appearance may have factored in the community’s decision to advance him as the petitioner, the Romo family clearly possessed the classic genealogical heritage of Mexican Americans. According to family lore, Romo was a “Spanish immigrant” who came to Arizona as a ranchero, or cowboy, who had worked on several homesteads in Phoenix as a young man.\(^7\) His wife Joaquina Jones, called Quina, was the daughter of Alcaria Montañé from Altar, Sonora, Mexico, and Dr. Walter Wilson Jones, a Virginian considered the first white physician (a tubercular specialist) in Arizona Territory.\(^8\) In 1878, Jones settled his family along the Salt River west of Tempe. He hired Romo to work on his ranch. Quina was the youngest of four sisters who married into both Mexican


\(^{5}\)ABOR Minutes, October 9, 1925.

\(^{6}\)Soto-Gomez Family Album, Hispanic Family History Albums, THM.

\(^{7}\)Santos Vega, Mexicans in Tempe (Charleston, SC, 2009), 10-11, 13. In this picture book, Vega includes [courtesy of Irene Gómez Hormell] photographs of the extended Jones and Romo family members, including Alcaria Jones, her brother Francisco Monroy, her daughter Joaquina “Quina” Jones, daughter Kate Jones, and sons-in-law Jesus Aros Gómez and Adolpho “Babe” Romo with his brother Miguel. Romo’s birth is dated here as the “mid-1800s” in “Seville, Spain,” even though his death certificate and other state documents note his U.S. citizenship and place of birth as California. See Adolph Romo, Sr., Certificate of Death, state file no. 6434, Arizona State Department of Health, Division of Vital Statistics, dated October 15, 1956.

and white families, including the Currys, Franks, Turners, Villanuevas, and Romos, many of whom continue to live in the Salt River Valley today.\textsuperscript{59}

Despite this mixed ethnic heritage, the Romos identified themselves as "Spanish-Mexican."\textsuperscript{60} This point is important given the racialized historical context of Mexican Americans in Tempe. As in many Arizona towns, segregation came to Tempe late, at the turn of the twentieth century, when its labor-segmented economy developed across race and class lines.\textsuperscript{61} Most whites lived west and south of Tempe's "N" mountain, a double butte (recognized today as Sun Devil Stadium) that centered the town at the edge of the Salt River. Most Mexican descendants of the 1880s lived east of the butte and called themselves Tempeneños. They often distinguished themselves from African Americans and the history of slavery, as well as from the recién llegados (recently arrived) or México Lindo immigrants who planned to return to "beautiful Mexico."\textsuperscript{62} The Tempeneños referred to their barrio as "San Pablo," even though some whites called it "Chihuahua" or "Mexican Town."\textsuperscript{63}

The Romos did not live in San Pablo, but, like other Tempeneños, they joined the effort to challenge the steady growth of "Juan Crow" practices.\textsuperscript{64} In 1897, Mexican American middle-class and working-class men, including Adolpho Romo, who became a butcher, helped found the Tempe Lodge #5 of the Alianza Hispano Americana (hereafter Alianza). This mutual aid society, or mutualista, unified the Mexican American community by providing funeral insurance, social activities, and

\textsuperscript{59}Hornell interviews; Family #324 (Wilson Walker Jones and Alcaria Jones), in Mexico/Arizona Biographical Survey.

\textsuperscript{60}Romo, Finding of Facts and Order (October 5, 1925) at 1.

\textsuperscript{61}For examples of the emergent racial divisions in Arizona communities, see Benton-Cohen, "The White Man's Camp in Bisbee," in Borderline Americans, 80-119; Gordon, The Great Arizona Orphan Abduction, 99-100; Luckingham, Minorities in Phoenix, 25, 133.


\textsuperscript{63}Edward B. Goodwin, "Founding of Salt River Valley; Civic Tasks, Murders Go Hand in Hand," Arizona Republic, April 9, 1941; Solliday, "The Journey to Rio Salado," 100.

\textsuperscript{64}Juan Crow refers to Jim Crow practices as applied to undocumented and documented Latinos in the United States and is popularly attributed to journalist Roberto Lovato. See "Juan Crow in Georgia," The Nation [May 26, 2008]. See also Benton-Cohen, Borderline Americans, 171.
public defense through limited political activities, such as the formation of Tempe's volunteer fire department Hose Company No. 1 that served the Mexican neighborhoods.\textsuperscript{65}

In 1914, many of these same men helped organize a chapter of the \textit{Liga Protectora Latina} (also called the Latin Protective League or LPL). With 115 members, the LPL publicized in the \textit{Tempe Daily News} their activist platform "solely for the betterment of the condition of the Spanish-American citizens." The LPL possessed radical labor roots, having been established in Phoenix by Spanish-language newspaper owner Pedro G. de la Lama, and specifically in response to the 1915 Kinney-Claypool Bill. Proposed by the Arizona Legislature, the bill intended to ban "non-English-speaking men from employment in hazardous occupations, an obvious threat to Mexicans who spoke only Spanish."\textsuperscript{66} Although the legislature managed to defeat the bill, it too was a reaction to the Ninth Circuit's ruling that the original Kinney Bill, or the "Eighty Percent Law," was unconstitutional. This initiative passed by Arizona voters in 1914 intended to prevent businesses from hiring non-citizens. Employers with five or more employees would have been allowed to hire only 20 percent of its workforce from non-citizen ranks. Importantly, the bill conflated "non-citizen" with anyone of Mexican descent who did not speak English.

In the midst of this political turmoil, the Romos' oldest son Antonio turned five years old, and the Tempe school district initiated de facto school segregation.\textsuperscript{67} The TD3 trustees built a new school called the Tenth Street School but restricted its enrollment to "American" children. The district required Antonio and the rest of the Mexican American children in the district to continue at the Eighth Street School. The LPL, which held its state convention in Phoenix in 1915 and in Tempe in 1917, boasted 2,500 members and listed educational improvement among its objectives. In Tempe, members formed a special education committee to investigate this new segregation policy, while the statewide organization contemplated legislation for bilingual education.\textsuperscript{68} The Tempe newspaper reported that "the Mexican population is very worked up over what it claims is the 'segregation' of the Mexican children at-


\textsuperscript{66}Luckingham, \textit{Minorities in Phoenix}, 29.

\textsuperscript{67}\textit{Phoenix Gazette}, July 21, 1915.

\textsuperscript{68}Solliday, "The Journey to Rio Salado," 106–107. Solliday noted that the LPL faded by the 1920s.
tending the public school." But white Tempeans insisted that the "arrangement [was] better for both the Mexican children and the American children."

The Tempe News never followed up on the actions that the LPL or the Mexican American parents pursued in 1915, and the historical record remained dormant until the Romos filed their surprise lawsuit in 1925. The ten-year delay may have resulted from other pressing LPL priorities, including its 1915 protest of mass executions of Mexicans at the Florence state prison, and its national labor complaints against the Arizona Cotton Growers Association (headquartered in Tempe) for abuse and abandonment of Mexican farm workers during World War I and the 1920 cotton bust. These issues and organizational conflict led to the LPL's demise in the 1920s. Still, the Romos and the Tempeños must have contemplated the school desegregation lawsuit for ten years.

THE LEGAL CHALLENGE

Like any proud parent on the first day of a new school year, Aldopho Romo eagerly escorted his four children—Antonio, Henry, Alice, and Charles—to the Tenth Street School on the morning of September 14, 1925. But when he presented the children, superintendent G.W. Persons declined to admit them. Persons informed Romo that he had inadvertently come to the wrong school and directed him to the Eighth Street School, a few blocks north, dedicated to the teaching of "Spanish-American and Mexican-American children." Persons explained the new agreement between the school district and the college, but Romo refused to leave and demanded that his children be admitted to the Tempe public schools, not the college's training school. Still Persons turned him away "under orders and by virtue of the directions and commands of the Board of Trustees," and "directed [the Romo children to] report to the authorities of the Normal Training School of the Tempe State Teachers College."

69Tempe News, July 9, 1915.


71Romo, Exhibit A: Memorandum of Agreement (filed September 23, 1925) at 2.
College.” Romo took his children home, and between that moment and filing the writ, Adolpho and Quina contemplated their options.

Although the historical record is sketchy here, we can surmise that the Romos strategized carefully and probably with input from the Temppeñeno community, because they were not alone in their political action. Shortly after the referendum passed, Juana Estrada Peralta petitioned Arizona governor George W.P. Hunt to plead their case to the state legislature in session in Phoenix. In a four-letter exchange, she pressed him “not as a Mexican mother, but as an American citizen” to expose the segregation and to consider the fate of her four children who were “real sore when they were separated.” With political incisiveness, she asked, “Don’t you think we have a right to ask for a fair deal? . . . I wish I could speak to you or some other person who could help us and tell you our side of the story. It’s all right for the Normal to become a college, but why should it be over the anguished pride and trampled feelings of the Mexican residents of this town?” Governor Hunt explained that he had no real authority on the state board of education, nor any power to write state laws. Frustrated by his inaction, Peralta chastised him: “You could have at least given me advice on what to do. But in a way I don’t blame you. I think that if you could help us, you would not do it. Everything would crash around you if you did just because you helped the despised Mexicans.” Governor Hunt resented her “bitter tone” and insisted that he could only enforce laws, not make them.

This stalemate pushed the Temppeñenos, and especially the Romos, to conceptualize a plan of action that would take them on a course from inquiry to nonviolent direct action, and on to court. First and foremost, they understood that they would have to act within the law. For example, the Romos knew their children would be subject to the state’s compulsory attendance laws. The Romos could have refused to send the children to school, although the truant officer Cresensio “Chris” Sigala would have advised against absenteeism. Constable Sigala, like the Romos, came from a long-time Temppeñeno family and had joined the mutualista. He monitored attendance at five area schools, including Scottsdale, Eighth Street, Tenth Street,
and Kyrene, and he regularly cited Mexican American parents, bringing them into criminal court for failing to send their children to school. Quina and Adolpho Romo also could have considered sending the children to the private school at St. Mary's Catholic Church, or moving their children into a nearby district. But St. Mary's had a history of separating its white and Mexican parishioners, as well as its school children. The neighboring schools at Scottsdale and Rohrhig also practiced segregation or had been co-opted into the college's training school system. By default, the Romos enrolled their children at the Eighth Street School while they sought legal assistance.

The Romos hired two attorneys, Edward Bray Goodwin and Harold Jennings Janson. Goodwin possessed liberal notions of race in sync with older, pioneer attitudes of "Anglo-Mexican integration" and cooperation. The Goodwin brothers had arrived in Tempe in the 1880s, and, with the help of Mexican and Indian laborers, had dug six miles of canal called "the Goodwin and Kyrene ditch," which opened a new section of the southeast valley to irrigated farming and ranching. Edward Goodwin graduated from the TNS, then studied law in Denver and passed the Colorado bar exam in 1895. He opened a law practice in Tempe on Mill Avenue, next door to his brothers' downtown grocery. In 1908, he gained notoriety for successfully representing the Salt River Pima-Maricopa Indian community in a claim against Colonel J.B. Price, who squatted on land along the reservation's southwest border near Tempe (marked today by Price Road or State Loop 101). By 1925, Goodwin lived in South Phoenix, where he was elected county representative to Arizona's 6th (1923) and 7th (1925) legislatures. With a home "south of


75 Smith, Tempe—Arizona Crossroads, 64.

76 Benton-Cohen, Borderline Americans, 167–75.

77 Edward B. Goodwin, "Founding of Salt River Valley; Civic Tasks, Murders Go Hand in Hand," Arizona Republic, April 9, 1941; Thomas J. Goodwin [biographical note], Goodwin family, biographical file, THM.

78 Arizona lawyers had to earn bar credentials in other states prior to 1912, when the State Bar of Arizona began "official admission procedures." The Arizona Legislature did not require "mandatory membership" until 1933. See "Our History," The State Bar of Arizona, http://www.azbar.org/WhoWeAre/history.cfm.

79 Goodwin, "Founding of Salt River Valley."

80 "Goodwin," History of Arizona. Each legislative session ran two years. Edward's oldest brother James also served in the Arizona Territorial Legislature.
Washington and west of Central Avenue," the Democrat represented a diverse constituency in the town's "colored section." Goodwin and Janson filed Romo's Complaint for Writ of Mandamus on September 23, 1925. The complaint included Romo's signed affidavit and his allegations of racial segregation in the Tempe schools. The lawyers argued that the Romos' four children possessed the right to attend the schools without "race or descent" as a factor in their admission. As citizens and taxpayers of "Spanish-Mexican descent," the parents specifically contested the agreement on two points: the Eighth Street School's enrollment restriction to "Spanish-American or Mexican-American children" and their instruction by non-certified, apprentice teachers. According to the writ,

Mexican-American and Spanish-American children . . . between the ages of six and twenty-one . . . who are qualified and entitled to enter into, and be admitted to the public schools . . . on account of their race or descent without regard to their age, advancement or convenience, are segregated, excluded and compelled to attend the 'Eighth Street School', which . . . is taught exclusively by student teachers of the Normal Training School. . . .

Importantly, the Romos' two-pronged argument opposing unequal race-based education and its delivery by noncredentialed teachers forced the Maricopa County Superior Court to consider the question of "separate but equal" as it applied to Mexican Americans. Unlike other plaintiffs in Mexican American school desegregation history, the Romos are the first to challenge teacher qualifications and school district jurisdiction. The Romos claimed that as a result of the TNS agreement, their children received substandard instruction by student teachers. They further asserted that the TD3 now admitted "only white children alone." They requested the judge

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82Romo, Complaint for Writ of Mandamus (September 23, 1925) at 3-4.

83In 1910, Mexican American parents in San Angelo, Texas, challenged the "quality of instruction" in the segregated "Mexican school" and boycotted the district in lieu of litigation. See Valencia, Chicano Students and the Courts, 10.

84Ibid.
to issue an order "as justice may require" demanding that the school district admit their children to the Tenth Street School "to which they have a right of admission."\(^8^5\)

Following the rules of procedure, Judge Jenckes issued the order for an Alternative Writ of Mandamus and summons calling on the TD3 to respond to the complaint in court within two days or to admit the Romo children as they "now admit children of the white race."\(^8^6\) Maricopa County attorney Arthur T. LaPrade and deputy county attorney Gene Cunningham, acting as defense counsel for the TD3 trustees, met the short, two-day deadline. On Saturday, September 26, they filed a demurrer to quash the complaint, arguing that the plaintiff had no legal grounds, since the writ did not give any supporting evidence entitling the Romo children admittance to the Tenth Street School, nor did it offer any evidence that they had been denied admission. LaPrade and Cunningham further notified the court that the school district would not answer the writ unless the judge ordered it to do so.

That same day Judge Jenckes and deputy clerk N.C. Moore swiftly composed an amended alternative writ, changing the order to show that superintendent Persons "did refuse and still refuses to admit said [Romo] children to the public schools of said Tempe School District No. 3 on the same terms and conditions as children of the white race."\(^8^7\) Jenckes then ordered Cunningham and the school board to answer the amended writ within four days. On Tuesday, September 29, Cunningham returned an answer to the plaintiffs and the court, denying allegations that the trustees had refused admittance to the Romo children.\(^8^8\)

According to the TD3 board of trustees, all children who lived in the district possessed the same right to attend the public schools, and all children who had presented themselves to the superintendent had been admitted, including the Romos, who were now attending the Eighth Street School. The board confirmed that they had organized two elementary schools, commonly known as the Eighth Street School and the Tenth Street School, which together comprised the "Tempe public schools." More importantly, they insisted that they did not segregate Mexican children "except as is necessary, proper and expedient for the education of such children of such extraction

\(^8^5\)Ibid.

\(^8^6\)Romo, Alternative Writ of Mandamus [September 24, 1925] at 2.

\(^8^7\)Romo, Amended Alternative Writ of Mandamus [September 26, 1925] at 2.

\(^8^8\)Romo, Answer and Return of All Defendants to Alternative Writ of Mandamus [September 29, 1925].
and descent." Pedagogical pragmatism, the board had determined, required that the Mexican children could be "most expeditiously and advantageously educated by persons employed as teachers who are able to speak and understand the Spanish or Mexican language." The board and the superintendent intentionally "placed" these students in classes with Spanish-speaking teachers, and, for "convenience and advantage," those classes were located in the Eighth Street School.

The defendants followed the "separate but equal" logic. The trustees and superintendent asserted that students at both schools followed the "same relative course of education and the same assignments and the same methods of instruction together with the same surroundings, advantages and equipment." They claimed that the administration hired teachers of equal ability for both schools and ensured that all children "in like grades in all school houses receive like education in like surroundings." Therefore, the defendants reasonably denied that they had "ever failed and refused to admit" the Romo children to the Tempe public schools.

THE JUDGMENT

On October 5, 1925, Judge Jenckes issued his Findings of Fact and Judgment. The verdict resulted in two outcomes that allowed both sides to reaffirm their notions of belonging in Tempe. On one hand, Judge Jenckes agreed that the TNS and TD3 had exercised "sound discretion" in separating the Mexican children as provided by school law. But the TNS and TD3 also failed to meet the Plessy standard because they did not provide true "separate but equal" conditions at the Eighth Street School. In the Findings of Fact, Judge Jenckes emphasized that the key failure was that undergraduate student teachers taught the Mexican American children at the Eighth Street School, while state-certified teachers taught the white children at the Tenth Street School. Correcting this situation—by hiring an equally

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89Ibid., 3.
90Ibid. I have found no evidence that confirms whether the critic teachers spoke Spanish.
91Ibid., 4.
92Ibid.
93Ibid.
94Romo, Findings of Fact and Order [October 5, 1925].
Judge Joseph S. Jenckes, above, ruled that the TNS and TD3 had failed to provide true "separate but equal" conditions at the Eighth Street School. (Courtesy of city of Phoenix, Michelle Humphrey, city photographer)

certified teaching force for both schools—would be essential to a lawful solution that met the *Plessy* standard. Otherwise, "to compel [Mexican American children] to attend schools taught by so-called student teachers" was illegal.

Throughout the week and into the weekend of October 10 and 11, the TD3 and TNS boards of trustees held a series of meetings to devise a legal remedy to continue Mexican segre-
gation "on race lines." They proposed two solutions, which they called Plan A and Plan B, and appointed TNS president Matthews, TD3 superintendent Persons and TD3 board chairman William E. Laird to present the plans to county attorney Cunningham. In Plan A, the TNS would hire two additional certified "critic" teachers, for a total of six (one per grade) to oversee the student teachers at the Eighth Street School. The critic teachers would be the "official" teachers of record, while the student teachers observed and presented lessons. In Plan B, the TNS would continue its practices as usual "for the Mexican children whose parents do not object," and also would hire two additional certified teachers to work with the Mexican children whose parents do "object to the Training School System." Cunningham did not care for Plan B, since it intimated a "double system in the building." Nonetheless, he conferred with Judge Jenckes, who determined that both options would be legal only if critic teachers taught the classes and the Mexican children and the American children had "similar advantages." The next day, October 12, the TNS board implemented Plan A, but limited the student teachers to observation.

Judge Jenckes relied on the 1912 Arizona Supreme Court verdict in Dameron v. Bayless to support the Romo judgment and the subsequent modifications of the teaching plans at the Mexican Training School. In Dameron, parent Samuel E. Bayless had challenged the "separate but equal" test, arguing that his children, who walked across busy railroad tracks to attend the Madison Street School in Phoenix, which was designated for African American children, did not have safe and equal access to school in comparison to white students who did not have to cross the tracks to get to school. The court ruled against Bayless, stating that it is only "after children arrive at the school building that it be as good a building and as well equipped and furnished and presided over by as efficient a corps of teachers as schools provided by children of other races." This qualification for equally "efficient" teachers applied to Romo.

95ABOR Minutes, October 9, 1925.
96Ibid.
99Romo, Finding of Facts and Order (October 5, 1925) at 6. Judge Jenckes' emphasis.
Yet, on the basis of this one inequality, Judge Jenckes simul-
taneously granted Romo a "permanent preemptory writ of man-
damus." In the judgment, he commanded the trustees to admit "upon pain and peril" the Romo children to the Tenth Street School "on the same terms and conditions to the public schools . . . as children of other nationalities are now admitted." The Tempeneños took advantage of this opening and interpreted the judgment as halting all segregation, because in the Findings of Fact the judge described the segregation as having applied to the Romo children "as well as all other Spanish-American and Mexican-American children." The Tempeneños expected Superintendent Persons to admit the Romo children and, by de-
fault, all Mexican American children who presented themselves for school registration on October 12, 1925.

Now Tempeneño community action truly emerged as Mexican parents and children descended on the Tenth Street School to gain admission. But just as events had unfolded one month prior, Superintendent Persons again obstinately refused to admit the Romo children or any others. Regardless of the superior court ruling, Persons explained, the TD3 board of trustees had reconfirmed that no Mexican child would attend the Tenth Street School. This time, however, the Romos and the other Mexican parents refused to leave the campus. "The children was (sic) taken into one of the classrooms and seated comfortably—while the parents present were being conferred with in the office."

Unable to disperse the parents, Persons finally called the TD3 trustees. Chairman William Laird dashed out of his Mill Avenue soda fountain at the Laird & Dines Drugstore, which he co-
owned with his father and pharmacist brothers, and intercepted secretary Isabel Waterhouse. Together they joined Persons at the Tenth Street School and tried to intimidate the Mexican parents, who still refused to budge. At a loss, the trustees called county school superintendent A.L. Jones, missing board mem-
ber J.H. Daniel, and deputy county attorney Cunningham, who agreed to negotiate the standoff at 2 p.m. that day.

106Romo, Judgment (October 8, 1925).
107Romo, Findings of Fact and Order (October 5, 1925).
108TD3 Minutes, September 24, 1925.
109TD3 Minutes, October 12, 1925.
110Ibid.
111Laird family, biographical files, THM.
Cunningham was a mediator at heart. When Judge Jenckes had issued the verdict on October 5, Cunningham had tried to convince the TD3 trustees to be mindful of the lawsuit's implications. He warned them to let the “just and sound opinion” stand, and he closed the case. He did not anticipate any “legal advantage” in pursuing an Arizona Supreme Court appeal, which he felt would only result in “hardship.” In a letter to Superintendent Persons, Cunningham argued, “I am against further litigation in the matter, as I am fearful of the ultimate results . . . in creating a condition of race animosity in your community, which might, under certain circumstances, become prevalent over a much greater territory.” What kind of “race animosity” did Cunningham mean? Had he anticipated or been warned of a community protest? Is this why he agreed to mediate the standoff with the parents?

When Cunningham arrived at the school, the Tempeneños stood resolute. Waterhouse recorded in her minutes that Cunningham “tried in vain” for several hours to convince the Mexican parents to acquiesce to the revised segregation remedies approved by Judge Jenckes. Plan A offered a “peaceable” solution and equal accommodation, but the Tempeneños refused to accept any standard less than full integration, which the writ promised and which they viewed as a victory and as a civil right. Because the parents remained steadfast, Cunningham managed instead to sway the TD3 trustees, who conceded that evening and now agreed to admit all of the Mexican children. “They [the Mexican parents could] send their children Tuesday morning to Tenth St. School and if they belonged in grades One to Six — Mr. Persons would enroll them and provide them with slips starting their grade and to report there.” Secretary Waterhouse recorded that only a few children arrived for classes the next morning. But her records also indicated that by the end of the academic year, 34 percent—105 of 308 children—of the Tenth Street School’s enrollment claimed Mexican American heritage. Clearly, Cunningham had avoided a “race war,” and the Tempeneños asserted their right to belong “on the same terms and conditions” as white Americans.

106 Gene S. Cunningham, deputy county attorney, Phoenix, Arizona to G.W. Persons, Tempe Public Schools, Tempe, Arizona [loose document], 5 October 1925, TD3 Minutes.
107 TD3 Minutes, October 12, 1925.
108 School year 1925–26—Enrollment to date at Tenth St” [loose document], TD3 Minutes.
109 Romo, Alternative Writ of Mandamus (September 9, 1924) at 2.
While Judge Jenckes' split ruling fell in line with the era's case law, it also revealed the careful parameters of Arizona's race politics and the common knowledge of Mexican racialization. In fact, Judge Jenckes' findings were congruent with the "racial prerequisite cases" of the late nineteenth and early twentieth centuries. Critical race theorist and legal scholar Ian Haney López has determined that holdings in the racial prerequisite cases relied on legal precedent and, if none existed, two kinds of rationales: scientific evidence and common knowledge.110 These cases determined the racial classifications of groups of people in the United States, including Mexican Americans. In 1897, a Texas court declared, "Mexicans are White," based on legal precedent established in the 1848 Treaty of Guadalupe Hidalgo, which ended the U.S.-Mexico War.111 In all of these cases, "whiteness" was the measure of naturalized citizenship. Haney López tells us that until 1952 "being a 'white person' was a condition for acquiring citizenship."112

Judge Jenckes employed both legal precedent and common knowledge of race in the Romo ruling. Although he was new to the superior court, having been appointed to the bench in early 1925, he had practiced Arizona law since 1912.113 He clearly understood and applied, in his decision, the Jim Crow laws applicable to African Americans as well the educational rules outlined in the 1913 civil code of Arizona's Revised Statutes. For example, in the Findings of Fact, Judge Jenckes' reference to Dameron v. Bayless carried with it a very localized history of racial negotiation that emerged directly from Maricopa County race politics.114 In 1909, Arizona legislators overrode the veto of territorial governor Joseph H. Kibbey in order to pass a territorial law requiring separate schools for African American children. Kibbey, a former Arizona Supreme Court justice and Jenckes' father-in-law, chose to represent the Bayless family in 1910

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110Haney López, White by Law, 1–7, and Appendix A: The Racial Prerequisite Cases. These cases range from In re Ah Yup, an 1878 California case that held that "Chinese are not White," to Ex parte Mohriez, a 1944 Massachusetts case that held that "Arabians are White."

111See case holding for In re Rodríguez [81 Fed. 337 (W.D. Texas 1897)] in Haney López, White by Law, Appendix A, 164.

112Haney López, White by Law, 1.

113James M. Murphy, Laws, Courts, and Lawyers: Through the Years in Arizona (Tucson, 1970), 179, 183.

114Romo, Findings of Fact and Order (October 5, 1925).
when Phoenix School District No. 1 segregated its black students. Kibbey lost the case on appeal to the Arizona Supreme Court, but in the meantime state legislators, led by Tempe representative and education committee chair Dr. Benjamin B. Moeur [a physician and future governor], hoped to incorporate the Jim Crow law into the draft of the proposed state constitution. At Dr. Moeur's request, TNS president Arthur Matthews drafted the constitutional language for school segregation, as well as the civil codes for the public schools. But the legislature perceived too many complications in adding school segregation to the proposed state constitution, because it might require local communities to create new schools for other "non-whites," especially Asian Americans. Instead, the legislators retained the 1909 territorial law on African American school segregation and, later, after statehood, revised the education section of the 1913 civil code to allow school boards to segregate "any group of pupils they deem advisable."

In 1912, the same year the Union admitted Arizona as the forty-eighth state, the Arizona Supreme Court affirmed Plessy's "separate but equal" holding in Dameron v. Bayless. The Dameron holding had no particular bearing in Tempe at the time, since blacks were barred from residence, but it did provide a precedent for the educational segregation that Moeur and Matthews had hoped to craft. Dameron, combined with the flexibility of the 1913 civil code, allowed white Tempeans to justify the legal segregation of Mexican children in 1914 and again in 1925. Understanding the relationship between these race relations

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115John S. Goff, Joseph H. Kibbey [Cave Creek, AZ, 1991], 55–58.
116ABOR Minutes, June 15, 1926; Keith Crudup, “African Americans in Arizona: A Twentieth-Century History” (Ph.D. diss., Arizona State University, 1998), 234; Luckingham, Minorities in Phoenix, 133–44. In 1925 (the same year as Romo), the TNS contracted with Dr. Moeur to be the school physician. From 1933 to 1937, he served as governor of Arizona.
118Rule cited in Romo, Finding of Facts and Order (October 5, 1925) at 6.
119The Phoenix Real Estate Board carefully regulated residential segregation in the Valley of the Sun and restricted blacks to South Phoenix. When the TNS began admitting African American college students in the 1920s, these young men and women were not allowed to reside in the TNS dormitories, nor to teach in the TNS training schools. They commuted to Tempe, and the TNS negotiated "practice teaching" for them in the Phoenix "colored schools." See ABOR Minutes, Dec. 6, 1923; Crudup, “African Americans in Arizona,” 113–62; Bob Jacobsen, “ASU Held Hope, Anguish for African Americans,” ASU Vision 6:1 [Fall 2002]: n.p.; Luckingham, Minorities in Phoenix, 143; Whitaker, “Desegregating the Valley of the Sun,” 136–37.
patterns within Tempe and their correlation to state and federal Jim Crow precedents, Judge Jenckes recognized that Arizona law accommodated the dual legal (white) and social (non-white) constructions of a "Mexican American race."120

Equally significant, the consultations and legal documents exchanged between Judge Jenckes, deputy attorney Cunningham, and the plaintiff's attorneys Goodwin and Janson also reflected the shifting social constructions of the Romo children's racialization. Judge Jenckes never specifically addressed the racial class of the Mexican American children, nor did he reference legal precedents related to their racialization. However, he did accept common knowledge and relied on Goodwin's and Janson's descriptions from the original complaint. They described Romo as a "resident citizen and taxpayer . . . of Spanish-Mexican descent." They also quoted the college's memorandum describing the Eighth Street School segregation as limited to "Spanish-American and Mexican-American children."121 The memorandum, however, contained two odd clauses, one asking "for a more particular definition of the term 'Spanish-American and Mexican-American'" and another clarifying that "Spanish-American or Mexican-American 'student teachers'" would be exempt from the segregation. The TNS had a long history of Mexican American alumni and financial support dating to its founding.122 Between 1924 and 1936, more than seventy-five Mexican American college students attended TNS.123 So it appears that the TNS trustees understood how the common knowledge of Mexican racialization might complicate notions of ethnicity and class, as well as the personal and practi-

120Laura E. Gómez, Manifest Destinies: The Making of Mexican American Race (New York, 2007), 4. Gómez argues that the "legal construction of Mexicans as racially 'white' alongside the social construction of Mexicans as non-white and racially inferior" was the central paradox of Mexican American racial identity. (Gómez's emphasis) She discusses in particular how these contradictory conditions replicated themselves in American law, especially in New Mexico after the U.S.-Mexico War.

121Romo, Exhibit A: Memorandum of Agreement (filed September 23, 1925).


cal negotiations of deciding who belonged in these imaginary communities. But Judge Jenckes never expressly defined the terms Spanish American and Mexican American, nor did he address the issue of the protected Mexican American student teachers. Instead, in the order and request for an alternative writ, he “command[ed]” the TD3 to enroll the Romo children “as they now admit children of the white race.”

Did this mean that Judge Jenckes considered the Romos to be white? Or did he think they were non-whites who warranted equality under the law?

Deputy Cunningham expressed serious concern that Judge Jenckes considered Mexican Americans to be white. Cunningham observed in a letter to the TD3 trustees that the judge “pointedly uses the words ‘Caucasian Race’” when referring to the Mexican American students. These references, he explained, occurred in dicta, and their insinuation seriously decreased the defense’s plea for race-based exclusions, which could have been arguable in an Arizona Supreme Court appeal. “The phraseology,” Cunningham opined, “used both in the agreement between the District and the Normal School and that used by the plaintiff in his application for a writ and the alternative writ, I feel have been most unfortunate.”

We can interpret the dilemma Cunningham observed by drawing on legal analysis of the post-1930 Mexican American educational desegregation cases. After 1930, Mexican American lawyers shifted legal strategy away from arguments for “equal protection under the law” toward arguments for “due process” as guaranteed under the Fourteenth Amendment. This specifically changed the nature of the legal conflict from racial “difference” to “whiteness.” Mexicans Americans objected to educational segregation because it denied them “the privileges of their ‘whiteness’ under Jim Crow.” Perhaps this was the strategy that the Romo attorneys pursued as well?

Goodwin and Janson carefully attempted to shape the Romos’ racial identity to emphasize race-based segregation

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124 Romo, Order for Alternative Writ of Mandamus (September 23, 1925).
125 Cunningham to Persons, 6 October 1925.
126Ibid.
128Ibid., par. 5.
without exempting them from white privilege. In the initial complaint, the attorneys argued that the "Spanish-Mexican" children possessed "a right of admission without excluding them on account of their race or descent" to the school district "to which white children alone are admitted." In their draft of the order for the alternative writ, which the judge adopted verbatim, the attorneys also called upon the TD3 to enroll the Romo children "as they now admit children of the white race." These statements, however, suggest ambiguity. The Romos may or may not be white. To clarify white lineage, then, in the amended alternative writ, the plaintiff's attorneys shifted the Romos' description to "children of Spanish-American and Mexican-American extraction." In the answer, the defense attorneys adopted these notions of "extraction and descent" but now qualified the segregation as a matter of the "Spanish or Mexican language," not race. This pushed Judge Jenckes to adopt and insert an amended terminology of "children of other nationalities." The Romos, now presumably of the white race, had to be admitted to the public schools "on the same terms and conditions . . . as children of other nationalities are now admitted."

Goodwin and Janson, however, were still not satisfied with the court's description of the Romos or the possibility of continued school segregation based on language rationales. The day after the verdict, Harold Janson sent a sharp note to Superintendent Persons reminding him to enroll the Romo children at the Tenth Street School or face contempt charges. "In other words," he wrote, "no discrimination can be made in the matter." On October 30, several weeks later, Goodwin and Janson also filed motions to amend the Findings of Fact and the Judgment. Judge Jenckes agreed to add an eleventh finding that specifically described the Mexican American racial segregation, and to change the "conclusions of law" to omit the Dameron case and civil code references. The eleventh finding stated that the TD3 historically "segregate[d] the children of Mexican-American and Spanish-American descent on the basis of blood, descent and nationality," including the Romos,

131Romo, Findings of Fact and Order [October 5, 1925] at 6; Romo, Judgment [October 8, 1925] at 2.
132Harold J. Janson, Phoenix, to G.W. Persons, Tempe, 6 October 1925 (loose document), TD3 Minutes.
who now attended "a segregated and separate school." The revised judgment now forbade the TD3 from discriminating on the basis of genealogy.

To emphasize the matter of due process, the new conclusion also downplayed civil code exceptions allowing "separation" and black/brown comparisons of Jim Crow. Reducing a one-page conclusion to two sentences, Judge Jenckes removed the "separate but equal" analysis of Dameron that shaped his original judgment. Instead, he emphasized legislative authority, not local authority, over school segregation. He criticized the TD3 for failing to hire equally qualified teachers but also chastised them for "exceed[ing] their authority" by creating the segregated Mexican school. "It is true," he wrote, "the Legislature has the authority to confer such power upon school boards, but in my opinion, the Legislature has not exercised or attempted to exercise any such authority in this State, except as to children of African descent." This new conclusion echoed Maricopa County's original position, which Deputy Cunningham had relayed to Superintendent Persons in February 1925, that school segregation remained a legislative issue. By sharpening the judge's findings and conclusion, Goodwin and Janson, in agreement with Cunningham, attempted to tighten spaces in the law that allowed for the coexistence of dual legal and social constructions of a Mexican American race. They brought the Romos' racial identity into closer alignment with the guarantees of due process that accorded white privilege.

This rewriting of the Romos' racial identity highlights not only how Arizona law structured whiteness but also how it structured citizenship. Whether Tempeans viewed the Romos as white or nonwhite, legal loopholes subjected them to "Mexican segregation" and disenfranchised them in ways similar to African Americans, but on the basis of perceived citizenship. Even as Goodwin and Janson argued to close the gap on local control in public schools to stop race-based segregation, they failed to deal with the issue of "nation" so often tied to children of immigrant heritage. Despite the fact that the Romo children were native-born U.S. citizens, common knowledge of their ethnicity marked them as aliens and diminished their right to belong. This is significant because the federal Johnson-Reed Act of 1924 (the "quota system") designated nationality according to country of birth, but in this instance "common

133 Romo, Notice and Motion for Modifying Findings of Fact (October 30, 1925) at 1; Romo, Notice and Motion for Modification of Judgment (October 30, 1925) at 2.

134 Romo, Amended Judgment (November 9, 1925) at 5.
knowledge" and local Arizona practices superseded national law. The Romos’ Mexican heritage, not their American births, determined their identity. The modified judgment hinted at this complexity as the lawyers bound “blood, descent and nationality” into the final definition of the Romos’ racial status. This mixed racial legacy justified continued segregation at the Eighth Street School for “immigrant” children in need of Americanization. The later Mendez and Gonzales courts confronted similar patterns of racialized citizenship.136

CONCLUSION

Romo resulted in a very sad perversion for the Tempenefios. In the realm of daily life, the Romos and many Mexican Americans gained admission for their children to the Tenth Street School, but in the legal infrastructures of education and politics, Mexican American segregation was not outlawed. In the spectrum of belonging, yes, the Romo children and their extended kin, including Adolpho Romo’s grandniece Irene Gómez Hormell and granddaughter Lillie Parra-Moraga, achieved a level of racial parity as they attended the Tenth Street School for several generations. “Once my grandfather fought the case, people had the choice,” recalled Parra-Moraga.137 During the 1925–26 school year, Mexican American parents enrolled 108 of their children at the Tenth Street School, changing the school demographics by 34 percent. The town of Tempe had intended to have one “Mexican school,” but, in the eyes of white parents, they now had two. Infuriated, Superintendent Persons resigned his post at the end of the school year. A mysterious fire, which the Tempe Daily News later attributed to Persons’ anger, destroyed the district’s administrative offices and most of the school records, except for Secretary Waterhouse’s minute book, with her extra notes on the Romo case, which she kept safely at home.139

139Bill Coates, “What’s in a Name for Old Schools?” Tempe Daily News, n.d., Early Tempe Schools, file TH-611, THM.
In an effort to meet the "separate but equal" legal standard for a "Mexican Training School," and with Judge Jenckes' permission, the college began hiring certified teachers for the Eighth Street School, which still had an enrollment of 420 Mexican American students. This caveat forced the Tempeños to decide whether they could continue to confront school segregation on a daily basis. In spring 1926, TD3 trustees noted that twenty-two Mexican children left the Tenth Street School, decreasing their total enrollment by 24 percent, from 108 to 82.

Hormell recalled from her grandparents' stories that Tempeños who challenged discrimination were blackballed, and many people simply did not have the economic or psychological resources to transgress the racial codes. As a result, many parents sacrificed integrated education for economic welfare. Knowing this, TNS president Matthews assessed the Romo complaint as a surmountable, "unforeseen circumstance." The college newspaper even touted the Americanization work now practiced at the Eighth Street School as a "privilege superior to that of many schools peopled by the wealthiest." On June 15, 1926, Matthews renewed the TD3 memorandum to oversee the Eighth Street School, except this time the trustees deleted any specific references to "Mexicans" or "segregation." Matthews retired from the TNS presidency in 1930 and remained an esteemed professor emeritus until his death in 1942. The segregated Eighth Street School operated under the college's authority through 1945.

140 "School year 1925-26—Enrollment to date at Tenth St" and "Tenth St. School—Mar. 1926," ABOR Minutes, December 12, 1925. The school board approved the following enrollment statistics for December 1925: Tempe State Teacher’s College, 623; Rural Training School, 76; Rohrig Training School, 53; Normal Training School (on campus site), a kindergarten, plus the Eighth Street School, 420. The enrollment total for all the training schools was 549.

141 "School year 1925-26—Enrollment to date at Tenth St." and "10th St. School-Mar. 1926" (loose documents), TD3 Minutes; Garcia, "The Romo Decision," 17.

142 Hormell interviews.

143 ABOR Minutes, October 9, 1925.

144 "Children Received Special Attention in Training School," The Tempe Collegian, May 13, 1926.

145 ABOR Minutes, June 15, 1926.

PIMA INDIANS, WATER RIGHTS, AND
THE FEDERAL GOVERNMENT:
U.S. v. GILA VALLEY
IRRIGATION DISTRICT

Shelly Dudley

INTRODUCTION

The foundation of the United States' Indian policy was established during the first twenty-five years following the signing of the U.S. Constitution. Indian tribes were dealt with as separate nations when negotiating a treaty, but federal laws limited the actual sovereignty of the tribes. By the middle of the nineteenth century, the United States government saw its role in Indian affairs as (1) protecting the lands of the Indians by creating reservations and controlling access; (2) regulating Indian trade and liquor traffic; (3) providing a system of law and order, and; (4) encouraging "white" standards of civilization and education to promote assimilation into the general stream of society. With establishment of this Indian policy, the federal government was

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obligated to take the necessary measures to protect the rights of American Indians.¹

The United States government, however, did not always fulfill its trust responsibilities toward Native Americans. Indians were often forced onto reservations much smaller than their aboriginal holdings—a situation that sometimes constrained their traditional lifestyle. In the Southwest, the lack of congressional appropriations and federal protection prevented the tribes from living satisfactorily on their reservations. For example, Indians could not construct adequate irrigation systems on their own and did not have the means to prevent the diversion of water by non-Indians. The Indians had little opportunity to protect themselves; they had to rely on the federal government to guard their interests. Only after the U.S. Supreme Court established case law reserving water for the Indians in Winters v. U.S. in 1908 were steps taken to furnish irrigation water necessary for farming on reservations that were set aside for agricultural purposes.² The Winters decision, however, did not automatically assure a useable supply of water. In disputes between Native Americans and non-Indians, the federal government generally sought answers from the Court. This procedure demanded time and finances from a government short on resources.

The Akimel O'odham, or Pima Indians, reside in south-central Arizona, with the Gila River following a southeast to northwest course through their whole reservation. The Gila River, with headwaters in the Mogollon, Black, and Pinos Altos mountains of western New Mexico, flows through Arizona to its confluence with the Salt River near the western edge of the Phoenix metropolitan region and westward to the Colorado River above Yuma, Arizona. It was the lifeblood of the Native Americans; in fact, the name Akimel O'odham means "river people."

The Pima were a prosperous community prior to the settlement of Americans in the territory during the middle of the nineteenth century. Following the creation of the Gila River Indian Reservation in 1859, the Pima saw a loss of water flow in the Gila River caused by the new settlers upstream diverting the water to irrigate their fields. The federal government stud-

¹Although a treaty is a compact signed between two independent nations, Congress supplemented the treaties by passing trade and intercourse laws that limited the interaction between Indians and non-Indians. Agents were also sent to the reservations to control the Indians as wards of the government. Francis Paul Prucha, "United States Indian Policies, 1815–1860," in Handbook of North American Indians, vol. 4: History of Indian-White Relations (Washington, DC, 1988), 40. S. Lyman Tyler, A History of Indian Policy (Washington, DC, 1973), 49, 85–86.

ied the situation on numerous occasions, sending engineers and attorneys into the field, but nothing was done to stop the upstream diversions, until the 1920s. Using the Winters decision as a means for protecting Pima water rights, the United States filed suit in *U.S. v. Gila Valley Irrigation District*.

**BACKGROUND**

When Spanish explorers arrived in the Southwest, the Pima and Maricopa Indians already had extensive lands irrigated by water from the Gila River. In the nineteenth century, the Pima provided food for the American military and travelers on their way to the Pacific Coast and became known for their friendly attitude toward Anglo-Americans. The Pima territory came into the possession of the United States following the acquisition of land from Mexico. To protect Pima lands from encroachment, Congress established the Gila River Indian Reservation in 1859, setting aside approximately 64,000 acres of land along both sides of the Gila River. Although this area was not as large as the aboriginal lands of the tribe, the Pima were
still able to farm about 15,000 acres and supply the nearby U.S.
military forts and travelers journeying across the territory.\(^3\)

Following the creation of the Arizona Territory in 1863,
early pioneers began to establish homes around Florence and
Casa Grande. The first irrigation canal in the Florence area was
constructed in 1864; by 1879, white farmers had cultivated
approximately 3,500 acres. More settlers came as early as 1871
to the upper Gila Valley and farmed near the town of Solo-
monville. Brigham Young also sent Mormon colonizers to the
eastern portion of the Arizona Territory to farm the land along
the upper Gila River around the towns of Safford and Duncan.
They acquired and expanded the existing irrigation structures
in the area and had irrigated 5,575 acres by 1904. This activ-
ity depleted the water flowing down the river, diminishing the
supply that reached the Pima living along the Gila River.\(^4\)

During the 1870s, the Pima Indians noticed, particularly in
the Florence area, a reduced flow of water in the Gila River
caused by the upstream settlers. This seriously impeded their
agricultural production. Captain F.E. Grossman, the reserva-
tion's agent, wrote to the commissioner of Indian affairs that
the Pima claimed the Gila River as their property from time
immemorial, and that they "had been promised a settlement of
the water question."\(^5\)

Grossman saw as a solution to the Indian's problems the
extension of the Gila River Indian Reservation boundaries,
which "would furnish them fine facilities for irrigation." Be-
cause it would be several years before the federal government
expanded the reservation, some Indians left the reservation to
be near available water. Echoing Grossman's proposal, the fed-
eral government eventually saw land expansion as an answer
to the water problem. The enlargement of the reservation in
1879, 1882, and 1883, was an attempt to provide the Pima with

\(^3\)Edward H. Spicer, *Cycles of Conquest: the Impact of Spain, Mexico, and the
146–47. David Introcaso, *Water Development on the Gila River: The Construc-
tion of Coolidge Dam*, Coolidge Dam, Pinal County, Arizona, Historic Ameri-
can Engineering Record (HAER) no. AZ-7, Salt River Project, 1986, 4–5, 7.

\(^4\)Charles Southworth, "History of Irrigation along the Gila River," 188, In-
dians of the United States, hearings before the House Committee on Indian
rior Court of the State of Arizona, in and for the county of Pinal, no. 2329,

\(^5\)U.S. Department of the Interior, Office of Indian Affairs, *Report of the Com-
mmissioner of Indian Affairs to the Secretary of the Interior for the Year 1870*,
enough land and water to support themselves as well as protect their lands from encroachment.6

Unfortunately, the increased size of the reservation did not solve the water shortage problems of the Pima. In 1886, the Florence Canal and Land Company decided to divert the entire flow of the Gila River about fifteen miles above the reservation. When this happened, the Department of the Interior requested assistance from the attorney general. The Justice Department asked the U.S. Geological Survey to study the upstream diversion of water previously used by the Indians. The investigation determined that the water supply of the Pima no longer met their needs and that if the Florence Canal Company diverted all the water from the Gila River, the Indians could no longer live on the reservation. The report recommended that the attorney general's office stop this diversion of water, but attempts by the Department of Justice to reach a compromise with the canal company failed, and eventually the department abandoned the effort. To compound the problem, a number of government officials believed the water used by the upper Gila Valley farmers would never reach the Indian reservation anyway. They thought it would be unfair to those settlers to destroy their lands. In 1900, the Indian office considered building a storage dam on the Gila River as a solution to the water problem for the Pima Indians, but conflicting recommendations prevented its construction at the time. It would take more than twenty years before a major storage reservoir was constructed.7

By 1910, upstream diversions again raised the concerns of the Indian office. The Department of the Interior once more requested that the attorney general examine the water rights of the Pima Indians. The secretary of the interior believed the Indians had lost their rights to normal flow years before to the settlers in the upper Gila Valley and were left with only the flood waters. The attorney general, aware of Winters v. U.S. and the federal government’s reserve of water for Indians,
wanted to investigate the situation.\textsuperscript{8} One year after the initial request, the Interior Department inquired about the status of the case. J.E. Morrison, the U.S. attorney for Arizona, finally reported that the farmers near the reservation were diverting water from the Gila River only in times of flood, when there was enough for the Indians. He concluded that the diversions in the upper Gila Valley diminished the water supply for both the Pima and the landowners in the Florence-Casa Grande area, but an injunction against the water users in the upper valley area could not be secured. No further legal activity at this time is indicated in the records.\textsuperscript{9}

When Washington officials were notified, in 1913, that another canal was being built that would interfere with the Pima's water, the Department of the Interior again requested help from the attorney general. John F. Truesdell, a special assistant to the attorney general, was sent to Arizona to investigate. After reviewing information gathered by Truesdell, C.R. Olberg, superintendent of irrigation for the Indian office, decided that it would not be equitable to destroy the wealth of the upper Gila Valley landowners because the United States had not protected the water rights of the Indians earlier. To settle the dispute between the Pima and the farmers in Pinal County, Olberg recommended that the federal government construct two diversion dams across the Gila River, one above Florence and another near Sacaton. Congress passed legislation on May 18, 1916, providing for construction of a diversion dam and creation of the Florence-Casa Grande Irrigation Project. The project included lands from the Gila River Reservation and the non-Indian lands, dividing the natural flow of the Gila River between the Indians and the non-Indian landowners according to their rights and priorities.\textsuperscript{10}

\textsuperscript{8}The U.S. Supreme Court established the doctrine that the federal government reserved water for the Indians at the time of the creation of the reservation. For a history of the case, see Norris Hundley, Jr., "The 'Winters' Doctrine and Indian Water Rights: A Mystery Reexamined," \textit{Western Historical Quarterly} 13 (January 1982): 17-42.

\textsuperscript{9}Richard A. Ballinger to the attorney general, 14 March 1910; attorney general to Joseph E. Morrison, 15 March 1910, and 7 April 1911; attorney general to the secretary of the interior, 15 March 1910; Morrison to the attorney general, 31 May 1911. National Archives (hereinafter Washington, DC, unless otherwise noted), record group (RG) 60, year file (YF) 1903-4691.

\textsuperscript{10}Frank A. Thackery to the commissioner of Indian affairs, 11 February 1913; assistant secretary of the interior to the attorney general, 8 March 1913, National Archives, RG 60, YF 1903-4691. Olberg, "Report on Water Rights." Indian Appropriation Act for the fiscal year ending June 30, 1917, 39 Stat. 123. The construction of the Sacaton Dam was authorized the following year.
The irrigation project and its contract resolved the immediate water rights issues between the Indians on the Gila River Reservation and the Pinal County landowners. There remained, however, the matter of the farmers in the upper Gila Valley diverting water from the Gila River.

**U.S. v. Gila Valley Irrigation District**

By the summer of 1923, a difficult situation existed along the middle Gila River because of a drought and the continuing diversion of water by the upper Gila Valley farmers. Charles Burke, commissioner of Indian affairs, wrote to secretary of the interior Hubert Work requesting legal action against the upstream diverters, maintaining that the Indians had a prior right to the use of the water. He recommended that the Department of Justice institute action and suggested that the department employ John Truesdell as the special assistant to the attorney general. The Justice Department took Burke's advice and hired Truesdell.11

Within a year of Burke's request, Congress also took steps to aid the Pima Indians. On June 7, 1924, it passed legislation authorizing the San Carlos Irrigation Project and the construction of a dam on the Gila River. The intent of the act was as follows: "For the purpose, first, of providing water for the irrigation of lands allotted to Pima Indians on the Gila River Reservation, Arizona, now without an adequate supply of water and, second, for the irrigation of such other lands in public or private ownership. . . ."12 The project consisted of 50,000 acres of Indian land on the Gila River Reservation and 50,000 acres of non-Indian land in the Florence-Casa Grande area.

The passage of the San Carlos Act affected the focus of the lawsuit but did not make litigation unnecessary. John Truesdell wrote that "the assurance of having stored water . . . makes priorities and divisions of water . . . somewhat less important." He believed that water shortages would now be less frequent if not entirely eliminated, permitting the continued use of water by the upper Gila Valley users. The adjudication needed to

11Charles Burke to the secretary of the interior, 27 August 1923, National Archives, RG 75, CCF Pima, box 89495-10-339, pt. 2.

12An Act for the Continuance of Construction on the San Carlos Federal Irrigation Project in Arizona, and for Other Purposes, Public Law no. 210, 68th Congress, 1st sess., June 7, 1924, 68 Stat. 211. The San Carlos Irrigation Project is known as SCIP. The non-Indian landowners formed an organization, San Carlos Irrigation and Drainage District [SCIDD].
continue, however, because the government had to know the amount of water it had a right to store.\textsuperscript{13}

The responsibility for processing the adjudication was divided between the Department of the Interior and the Department of Justice. The Justice Department attorneys would handle the actual legal proceedings and develop the trial strategies. The Bureau of Indian Affairs would provide all the necessary data such as water flow, crops, and irrigated acreage. Unfortunately, it initially lacked funds to carry out its work. Truesdell then requested assistance from the Justice Department in acquiring the information; because the Department of Justice was also hampered by a shortage of money, Truesdell was told the matter could wait if funds were not available.\textsuperscript{14}

By the beginning of 1925, the Department of Justice had terminated its contract with John Truesdell, ostensibly due to economics. Truesdell and his supporters believed that the attorney general's office did not like the way he was handling the case. The Indian Bureau, however, decided to hire Truesdell as its superintendent of irrigation, and he was placed in charge of developing the San Carlos Project, as well as writing the contract for the non-Indian landowners joining the project.\textsuperscript{15}

Harold Baxter, who had replaced John Truesdell by February, had graduated with a law degree from Columbia University after working as an engineer in irrigation and reclamation concerns. The Department of Justice noted that the former attorney general and recently appointed U.S. Supreme Court justice Harlan Stone was dean of the Columbia Law Department at the time and had expressed confidence in Baxter.

\begin{itemize}
\item \textsuperscript{13}John Truesdell to attorney general, 11 June 1924, National Archives, Pacific Southwest Branch, RG 48, Office of Field Solicitor, Gila Suit.
\item \textsuperscript{14}Ira K. Wells to John Truesdell, 27 August 1924, National Archives, RG 60, YF 1903-4691. John Truesdell to C.H. Southworth, 12 November 1924, National Archives, Pacific Southwest Branch, RG 48, Office of Field Solicitor, box 384, Gila Suit.
\item \textsuperscript{15}John Truesdell, Memorandum, "Gila River Water Adjudication—San Carlos Project and Protection of Rights of Indians in Both," 13 March 1925, National Archives, Pacific Southwest Branch, RG 48, Office of Field Solicitor, box 384, Gila Suit. A committee of Pima Indians sent Hubert Work, the secretary of the interior, a telegram requesting the reinstatement of Truesdell as the special assistant to the attorney general. Xavier Cawker to Hubert Work, 19 March 1925, National Archives, RG 60, YF 1903-4691. The president of the Florence-Casa Grande Water Users' Association, Mark Twain Clemans, sent telegrams to the Indian Bureau, Congressman Carl Hayden, and Senator Ralph Cameron asking that Truesdell be permitted to stay as the attorney for the Justice Department. Telegrams, M. Twain Clemans to Carl Hayden, Ralph Cameron, and William Reed, chief engineer, Indian Irrigation Service, 27 February 1925, National Archives, RG 75, CCF Pima, 16721-10-341, pt. 3.
\end{itemize}
Baxter sensed that the Justice Department wanted immediate action, so he suggested that the prosecution of the case begin at the earliest possible moment. He believed enough data had been collected to file a complaint with the United States as the only plaintiff and claiming all the water of the Gila River for the use of the Indians on the reservations. He prepared a bill in equity on behalf of the Indians against all the canals, ditches, and irrigation organizations on the Gila River, expecting to settle the case before the completion of Coolidge Dam. The Indian Bureau became concerned over the focus of Baxter's complaint and thought an agreement could be reached to avoid litigation. By summer 1925, the Interior Department had expressed its dislike of the proposed complaint and had requested that William Reed, chief engineer for the Indian Field Service, review Harold Baxter's work. Reed could not understand why Baxter planned to claim the whole flow of the river on behalf of the Pima Indians with a priority date of 1876. Reed submitted his own recommendations, stating that the suit should establish time-immemorial rights for the Pima Indians, and rights for the Apache Indians and the Florence-Casa Grande Project. Like many Indian Bureau officials, Reed thought all parties could reach an amicable agreement on certain matters that would save time in the case. Truesdell said that Baxter's complaint showed a lack of knowledge of water law and facts and needed to be redrawn.16

Upon learning that the Interior Department did not want the suit instituted immediately, Harold Baxter informed the attorney general. He said the bureau's action would delay construction of the dam and the settlement of the water rights. According to Baxter, the Interior Department sought a compromise without an adjudication, which he believed was legally impossible. He suggested returning the matter to the Department of the Interior so that the Justice Department would not be blamed. The Department of Justice, nevertheless, decided to proceed with the lawsuit. After receiving a copy of the complaint, the Indian Bureau suggested a few changes, but none were made. The attorney general notified the Indian Bureau that the unchanged bill would be filed. Charles Burke said that his office had done all that it could, and the litigation was the responsibility of the Justice Department. This lack of cooperation appears to have existed throughout the lawsuit and per-

16Harold Baxter to the attorney general, 17 March 1925; Baxter to C.H. Southworth, 2 April 1925; William Reed to Charles Burke, 21 April 1925, National Archives, RG 60, YF 1903-4691. John Truesdell to Burke, 22 June 1925, National Archives, RG 75, CCF, Pima, box 16721-10-341, pt. 3.
Harold Baxter, a special assistant to the attorney general, expected to settle the case for the Indians before the completion of Coolidge Dam, seen above during construction, c. 1928. [Courtesy of Library of Congress, HAER ARIZ,11-PERI.V,1--25]

haps stems from the fact that each organization perceived its role differently.17

On October 3, 1925, Harold Baxter filed the complaint entitled *U.S. v. Gila Valley Irrigation District* in U.S. District

17Telegram, Harold Baxter to the attorney general, 3 June 1925, National Archives, RG 60, YF 1903-4691; E.B. Meritt, acting commissioner of Indian affairs, to the secretary of the interior, 13 July 1925; Charles Burke to the secretary of the interior, 29 August 1925, National Archives, RG 75, CCF, Pima, box 16721-10-341. Daniel McCool believes that the Justice Department was caught in the middle of a bureaucratic conflict in trying to represent both the federal government and the individual Indian tribes. Indian water rights, according to McCool, were not a top priority for the federal department, but it "made an effort to protect Indians when it was not popular to do so." McCool, *Command the Waters: Iron Triangles, Federal Water Development and Indian Water* (Berkeley, CA, 1987), 43, 62.
Court. The bill named as defendants the irrigation districts, water users, and canal companies diverting the waters of the Gila River upstream from the Gila River Indian Reservation. It listed the United States as the plaintiff on behalf of the Gila River and San Carlos Apache Indian reservations and the landowners of the Florence-Casa Grande Project. The bill claimed that the United States had reserved and appropriated the waters of the Gila River and its tributaries, including the natural flow or flood waters necessary for the irrigation and cultivation of the plaintiffs' lands, and the defendants were diverting the water that belonged to the plaintiffs. Baxter based the priority of water rights for the Indian reservations on Indian occupancy and possession of the land prior to the coming of the non-Indian settlers and on the reservation created by the U.S. when Arizona was a territory under the Winters doctrine. The United States sought a determination of the relative rights of the parties along the Gila River.\(^\text{18}\)

Shortly after Baxter filed the suit, Arizona congressman Carl Hayden met with officials of the Indian Bureau and representatives of the upper Gila Valley organizations and the Florence-Casa Grande area. Hayden later made it known that he wanted the federal government to provide an adequate, permanent water supply for ten acres for each man, woman, and child who was a member of the Gila River Indian Reservation, approximately 4,000 people. Hayden also wanted to ensure that the upper valley water users could still irrigate their lands. A series of conferences followed this initial gathering, because all parties wanted to settle the suit by stipulation, thus avoiding the expense of a trial. The lower Gila Valley water users also did not wish to deprive the upper valley of any water previously used but wanted to stop the cultivation of new lands. The Department of Justice later viewed these negotiations as a delaying tactic and did not want Edward A. Smith, who replaced Baxter after his termination, to participate. The Indian Bureau regarded the

Arizona congressman Carl Hayden believed that the federal government should provide an adequate water supply for all members of the Gila River Indian Reservation, but he also wanted to ensure that the upper valley water users could irrigate their lands. (Courtesy of Library of Congress, LC-B2-1249-3 [P&P])
negotiations differently, believing the conferences would shorten the litigation. At the end of 1926, the upper Gila Valley irrigation districts suggested holding a conference in an attempt to settle the lawsuit outside of the courthouse. The Gila Valley Irrigation District submitted a proposed agreement for ending the litigation. In the proposal, the upper valley recognized the doctrine of prior appropriation as the basis for establishing a water right. The currently cultivated Indian lands on the Gila River and San Carlos Reservations would take priority over the non-Indian lands in the Florence area and the upper Gila Valley. The agreement recommended the use of the Doan Decree, the state water commission adjudications, and the Lockwood Decree, previous Arizona water decrees, to establish the water rights of the non-Indian landowners. The upper Gila Valley water users would acknowledge the right of the Indian lands within the San Carlos Irrigation Project to the unappropriated waters of the Gila River as provided by the congressional acts for the San Carlos Reservoir. The farmers of the upper Gila Valley lands also wanted to become a part of the San Carlos Project.

Attorneys for both the Indian Bureau and the Justice Department rejected the proposal submitted by the Gila Valley Irrigation District, because it based all water rights claims on prior appropriation. The agreement would have restricted the Indians to water beneficially used in irrigation and would not have provided for future needs on the reservation. Even though

19Carl Hayden to John Sargent, attorney general, 18 October 1925; Hayden, "Statement by Carl Hayden Relative to Water Rights on the Gila River," c. 1927, National Archives, RG 75, entry-657, Irrig. Div. Edward Smith to the attorney general, 1 December 1926; B.M. Parmenter to Smith, 8 December 1926, National Archives, RG 60, YF 1903-4691. Proposed agreement submitted by the Gila Valley Irrigation District, c. November 1926. John Truesdell to Edward Smith, 13 December 1926; Truesdell to the commissioner of Indian affairs, 30 December 1926, National Archives, CCF Pima, box 16721-10-341, pt. 3. Ethelbert Ward to the attorney general, 16 December 1926; Burke to the secretary of the interior, 18 January 1927, National Archives, Pacific Southwest Branch, RG 48, Office of Field Solicitor, box 384, Gila Suit.

20The court cases were Montezuma Canal Company v. Smithville Canal Company, 11 Ariz 99, 218 U.S. 371, also known as the Doan Decree; In the Matter of the Determination of the Relative Right to the Use of the Waters of the Gila River and Its Tributaries, in Greenlee County, Arizona, Superior Court of Arizona, no. 1154; In the Matter of the Determination of the Relative Right to the Use of the Waters of the Gila River and Its Tributaries, in Graham County, Arizona, Superior Court of Arizona, no. 1168; Lobb v. Avenente, Superior Court of the State of Arizona, in and for the County of Pinal, no. 2329, "Decree," April 6, 1916, 13-18. The Lockwood Decree established the water rights for a large portion of the lands in the Casa Grande and Florence areas.

the Indians were not irrigating as much of their acreage as in
the past, under the federal doctrine of reserved rights estab-
lished by the Winters decision, the water rights of the United
States and its wards could not be abandoned. The Department
of Justice requested the advice of Ethelbert Ward, an assistant
U.S. attorney and, for many years, a special assistant to the
attorney general "who achieved a reputation as an outstanding
authority on litigation involving Indian lands and reclamation
land irrigation problems." Ward wrote, "[T]he government
has reserved for the Indians ahead of all the non-Indian set-
tlers sufficient water for the irrigation of all the irrigable lands
of their allotments regardless of whether they have ever been
cultivated." However, the proposal was seen as a starting point
for negotiations.

By the beginning of 1927, both the Justice and the Interior
Departments considered amending the original complaint.
After Edward Smith sought John Truesdell's advice, Truesdell
wrote the special assistant that when a case involving Indian
water rights came to the court, those rights were capable of
determination. Truesdell based the Indians' water rights on the
Winters doctrine, but also on Indian title to the land, govern-
ment ownership of unnavigable streams unless otherwise
granted, and appropriations made for the Indians and the two
irrigation projects. He suggested that the new bill should state
that the government had allotted ten acres to each Indian
"with the idea that this is the proper amount of irrigable land
for them," instead of asserting that the Indians of the Gila
River Reservation "would have utilized the entire flow" of
the Gila River. The emphasis, wrote Truesdell, should be on
the needs of the Indians as seen by the government, not what
the Indians might have done with the total flow of the river.
Truesdell said that the utmost quantity of water that could
be reserved would be the amount needed to irrigate all of the
irrigable lands on the reservation. In practice, however, the
government claimed enough water to irrigate the Indian al-

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23Truesdell to Edward Smith, 13 December 1926; Truesdell to the commis-
sioner of Indian affairs, 30 December 1926, National Archives, CCF Pima, box
16721-10-341, pt. 3. Ethelbert Ward to the attorney general, 16 December 1926,
National Archives, Pacific Southwest Branch, RG 48, Office of Field Solicitor,
box 384, Gila Suit.
lotments and the administration area of the Gila River Indian Reservation, approximately 50,000 acres.  

On August 1, 1927, Edward Smith submitted his proposed amended complaint to the attorney general. In this bill, the government asked for a decree defining and protecting its water rights for the Gila River and San Carlos Apache Indian Reservations and for the Florence-Casa Grande Project and the San Carlos Irrigation Project. In its amended complaint, the United States based its claims on the theory that the federal government was the original owner of all water rights in the stream, except such rights as might be recognized as belonging to the Indians, and the government reserved such rights for the Indians. The government later reserved other rights for the Florence-Casa Grande Irrigation Project and the San Carlos Irrigation Project.

Another prevalent theory—not held by the federal government—was that water rights not already reserved or granted by the United States became state rights upon admission of the state to the Union. Under that theory, all rights acquired after that date, even by the United States, would have to be granted by the state. In his complaint, Smith submitted the different claims for water because of these divergent theories of water law, in case the court held against reserved rights with a time immemorial priority.

During the second week of August, the Department of Justice wired Smith not to file his amended complaint but to modify the original one. The attorneys in Washington believed progress was needed in the case and wanted to review the first bill. Washington officials sought the advice of Ethelbert Ward, the Denver, Colorado, special assistant to the attorney general; Ward suggested that the bill should include appropriation rights in the event the court did not uphold the reserved rights of the Indians. Because the Indians had been irrigating prior to the arrival of non-Indian settlers, Ward believed their claim to the water would come first anyway. Although the Conrad Investment Company case did not limit the amount of water, Ward felt that if the government allotted land to the Indians, the water claimed should be the amount necessary for the ir-

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24 Charles Burke to John Truesdell, 3 February 1927; Edward Smith to the attorney general, 1 March 1927; Truesdell, memorandum, 12 May 1927; Smith to the attorney general, 1 August 1927; Truesdell to Smith, 3 August 1927, National Archives, Pacific Southwest Branch, RG 48, Office of Field Solicitor, box 384, 408, Gila Suit. Truesdell to the commissioner of Indian affairs, 12 May 1927, National Archives, CCF Pima, 16721-10-341, pt. 4.

25 B.M. Parmenter to Smith, 21 July 1927; Smith to the attorney general, 1 August 1927, National Archives, RG 60, YF 1903-4691.
A Pima Indian draws irrigation water from the U.S. Reclamation Service canal at Sacaton, c. 1914. (Courtesy of U.S. Bureau of Reclamation)

Irrigation of those allotments. Ward thought that if the waters of the river were tied up indefinitely, the non-Indian settlers would be prevented from utilizing any surplus water.

Edward Smith also discussed his method of fixing the quantity of water claimed for the Pima Indians in the amended complaint with Washington. He based the amount on the population of the Indians on the reservation at the time Congress set aside the land in 1859. The number of residents on the Gila River Indian Reservation had remained practically the same from 1859 to 1927, approximately 5,000 people. According to bureau policy, the Department of the Interior allotted ten acres of land to each Indian, resulting in a claim of water for 49,896 acres.

26Conrad Investment Company v. United States, 161 Fed. 829. (9th Cir., 1908) allowed for a flexible reservation of water for the land on the Blackfeet Indian Reservation in Montana.

27B.M. Parmenter to Edward Smith, 12 August 1927; Ethelbert Ward to the attorney general, 6 August 1927; Parmenter to Ward, 18 August 1927, National Archives, RG 60, YF 1903-4691. Ward to the attorney general, 30 August 1927, National Archives, RG 75, CCF Pima, box 16721-10-341, pt. 4.
of allotted land, in addition to the 650 acres of land used for administrative purposes.\(^{28}\)

In late fall 1927, a question arose as to whether the amount of water claimed for the San Carlos Apache Reservation was correct. In response, John Truesdell said that the irrigable area on the Apache reservation from the Gila River was 3,000 acres. The claim in the proposed amended complaint was for that acreage with a proper duty of water estimated by the engineers. The situation on the Gila River Reservation was different, since the irrigable acreage exceeded the quantity of land the government contemplated irrigating for the Indians. Truesdell assumed that the irrigation allotments covered the total area the government thought necessary for the Pima Indians to irrigate. He agreed with Ward's conclusion: the government should define the extent of the rights to which it claimed title. To do otherwise would make all other rights in the Gila River indefinite, creating an intolerable situation. Truesdell thought Smith's proposed amended complaint stated the government's claims "amply."\(^{29}\)

After reviewing the correspondence of the government attorneys, the Department of Justice approved the filing of the amended complaint. On December 5, 1927, Edward Smith filed the revised bill before Judge Sawtelle in U.S. District Court. It named as defendants approximately nine hundred irrigation districts, canal companies, and landowners located upstream from the Gila River Indian Reservation that were diverting water from the Gila River. The suit was brought by the United States as guardian for the Pima and Apache Indians and for its projects.\(^ {30}\) The government claimed the following:

1. 632 second feet limited to a yearly amount of 252,730 acre feet with an immemorial priority date as well as a priority of February 28, 1859, and 350 second feet with the yearly limitation of 140,000 acre feet with an immemorial priority date for the Gila River Reservation.\(^ {31}\)

\(^{28}\)Smith to the attorney general, 2 September 1927, National Archives, RG 60, YF 1903-4691.

\(^{29}\)Truesdell to the commissioner of Indian affairs, 29 October 1927, National Archives, RG 75, CCF Pima, 16721-10-341, pt. 4.


\(^{31}\)Water flowing in a stream can be measured in cubic feet per second, which is equivalent to a stream one foot wide by one foot deep flowing with a velocity of one foot per second. One cubic foot per second equals 1.984 acre feet per day. Oklahoma State University, Oklahoma Cooperative Extension Service, BAE 1501.
2. 37.5 second feet of water with an annual limit of 15,000 acre feet and 32 second feet with a yearly limitation of 12,800 acre feet with priority dates of 1846, December 14, 1872, and dates from 1873 to 1901 for the San Carlos Apache Reservation.

3. 775 second feet with a limitation of 310,000 acre feet per year and 337.5 second feet with a yearly limitation of 135,000 acre feet having priority dates of May 18, 1916 and May 22, 1916 for the non-Indian landowners in the Florence-Casa Grande Project.

4. Sufficient water to fill the Coolidge Reservoir with a capacity of 1,285,000 acre feet and keep it filled each year, with a priority of not later than May 18, 1896.32

Local residents anticipated rapid progress on the suit, especially following a conference in late August 1928, when a proposed decree was submitted to the defendants. Washington officials seemed pleased at the prospect of avoiding time-consuming litigation and the heavy costs that were expected. The Indian Bureau recommended that, as a courtesy to the Department of Justice, its attorneys should not attempt to settle the litigation without the knowledge or consent of the Justice Department.33

In October 1929, the U.S. District Court called the suit for consideration at Globe, Arizona, and notified all parties to be present. Members of the court were annoyed at the lack of progress in the case and required that all outstanding defendants answer the amended complaint within thirty days.34 The Department of Justice hired another attorney, Oliver P. Morton, to aid Edward Smith in the litigation. Morton, a friend of Truesdell, had been the lawyer for the San Carlos Irrigation and Drainage District just prior to becoming a government attorney.35

On March 4, 1930, Coolidge Dam was dedicated, with former president Calvin Coolidge and humorist Will Rogers among the dignitaries attending the ceremony. Hugh Patton,

33Edward Smith to the attorney general, 1 September 1928, National Archives, Pacific Southwest Branch, RG 48, box 405, work sheets, Gila Decree. B.M. Parmenter to Smith, 12 September 1928, National Archives, RG 60, YF 1903-4691. Memorandum, Charles Burke to the interior secretary, 11 December 1928, National Archives, RG 75, CCF Pima, 16721-10-341, pt. 5.
34Oliver P. Morton to the attorney general, 9 October 1929.
chief of the Pima Indian Council also spoke, claiming, "Today is the brightest page in the long varied history of the Pima people." While people were celebrating the completion of the dam, the attorneys for the government, including Truesdell, spent their time assembling the historical evidence, preparing maps, and arranging the testimony of witnesses. As the trial date neared, Seth Richardson, assistant attorney general, became concerned with the possibility that Judge Sawtelle, who had ruled in *U.S. v. Wightman*—a case involving the San Carlos Apache Reservation—would preside over the trial. Richardson thought Sawtelle's decision indicated a position that varied from the government's stand on reserved rights and its claims on behalf of the Indians in the present case.36

Judge Sawtelle set November 10, 1930, as the commencement of the actual proceedings and appointed Clifford R. McFall, clerk of the U.S. District Court, as the special master. McFall heard testimony in Phoenix from November 12 through December 5, 1930. The hearings were later indefinitely postponed when negotiations appeared promising.37

As a result of the conferences between the government and the Gila River water users, a tentative plan was formulated to settle the lawsuit and avoid further litigation. The prior rights of the Pima Indians and the landowners under the San Carlos Irrigation Project would be first satisfied out of the flood waters stored in the

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36John Truesdell to Seth Richardson, 19 March 1930; Chief Irrigation Division to J.H. Scattergood, 5 May 1930; C.J. Rhoads, commissioner of Indian affairs, to Northcutt Ely, assistant to the secretary of the interior, 7 June 1930, National Archives, RG 75, CCF Pima, 1672-1-341, pt. Sa. In *U.S. v. Wightman*, 230 Fed. 277, Judge Sawtelle determined that the creation of an Indian reservation did not invest the Indians with the right to use the water on the land, except to carry out the purposes for which the reservation was created. Sawtelle wrote, "The United States cannot be held to have reserved waters which it had never used for Indian reservation purposes, and which are physically incapable of supplying irrigation to an amount of land in the reservation sufficient to support more than one or two people, which, in effect, would be a denial or subordination on the part of the United States of the use to which the United States had itself applied the waters on lands outside the reservation." Sawtelle also said, "The United States certainly had the right to devote waters rising within the reservation to the use of people living outside the reservation, and the Indians could not complain." *U.S. v. Wightman*, U.S. District Court, D. Arizona, January 11, 1916. Seth Richardson to Oliver P. Morton, 26 September 1930; Morton to the attorney general, 4 October 1930, National Archives, RG 60, YF 1903-4691.

reservoir. The upper valley water users would be entitled to continue the diversion of water from the Gila River to the extent used in 1924, except when there was not adequate stored water. E.C. Finney, solicitor for the Department of the Interior, recommended this plan because it would preserve the equities of the upper valley water users but award the Indians a prior right to the water. 38

During spring 1931, the government attorneys worked on a draft of the proposed decree. After Edward Smith left the Department of Justice, further progress was delayed. U.S. assistant attorney general Seth Richardson threatened Oliver Morton with termination if he did not either obtain a signed consent decree or take positive action in the courtroom. Truesdell requested that the Interior Department help Morton retain his position, but the Indian Bureau did not "wish to embarrass the Attorney General by such a request." 39 The Department of Justice dispensed with the services of Oliver Morton in summer 1932; John Gung’I, the U.S. attorney in Tucson, assumed control of the case. The Department of Justice also sent a request to the Indian Bureau that Truesdell devote more time to the case. It does not appear that Gung’I was ready to move quickly on the case either. The process of a negotiated decree required time, and by February 1933, Richardson was displeased with Gung’I’s handling of the case and planned to replace him.

Richardson assigned Ethelbert Ward to aid the U.S. attorney in Phoenix and also suggested that G.A. Iverson help in the case. 40


40 Telegram, Truesdell to the Indian Office, 3 April 1931; William S. Post, director, Indian Field Service, to the commissioner of Indian affairs, 21 April 1931, National Archives, RG 75, CCF Pima, 16721-10-341, pt. 6. Truesdell to Morton, 19 March 1932; Richardson to Morton, 19 April 1932, William D. Mitchell, attorney general, to Ray L. Wilbur, 7 May 1932; Joseph M. Dixon, first assistant secretary of the interior, to the attorney general, 30 August 1932; Smith to the attorney general, 20 May 1931; Richardson to Morton, 16 October 1931; Morton to Richardson, 16 December 1931; Ethelbert Ward to the attorney general, 31 December 1932; Seth Richardson to Ward, 27 December 1932, memorandum, Richardson to Assistant Attorney General Appel, 31 January 1933, National Archives, RG 60, YF 1903-4691. The Department of Justice reassigned Ward from the U.S. v. Walker River Irrigation District so he would be able to work on this case. In Walker, the U.S. District Court [11 F. Supp. 158] did not recognize the Winters doctrine because the Indian reservation was not created by a treaty. This decision was overturned in 1939 by the Ninth Circuit [104 F. 2d 334]. Henry F. Dobyns, "Globe Equity 59: A History of the Case from 1925 Complaint to 1935 Gila River Decree," unpublished report, copy available at Salt River Project, Research Archives, 1994, 6.
Truesdell and Ward continued to work on the proposed decree. Although the final form was not finished, Truesdell sent a draft of the settlement to Washington in March 1934. In his memorandum to John Collier, the commissioner of Indian affairs, and Nathan R. Margold, the solicitor of the Interior Department, Truesdell reviewed the government's claim in the case on behalf of the Pima Indians, basing it on the legal principle of an implied reservation for enough water to carry out the purposes in reserving the land for the Indians. In this case, he explained, the government planned to irrigate 50,000 acres on the Gila River Reservation.\[^{41}\]

Attorney General Homer S. Cummings approved the settlement and terminated the litigation, notifying Harold L. Ickes, secretary of the interior, that he accepted the decree in substance as submitted, allowing for later modifications which might be necessary. Cummings acknowledged the compromises in the decree regarding the rights of the Pima and Apache Indians but noted that the conclusion was "satisfactory and as adequately fitting the prevailing conditions." Ickes concurred with those sentiments, realizing that certain provisions were not arranged as the Interior Department would have preferred, but that a compromise was necessary and unavoidable. He recommended that the proposed decree be entered into as quickly as possible.\[^{42}\]

In fall 1934, the Gila River Tribal Council protested the equal division of the stored water between the Indians and the landowners in the San Carlos Project. The Indians, who were still without an adequate supply of water for their lands, believed the San Carlos Project Act of 1924 gave them a prior right to the water. The Indian Bureau disagreed, citing congressional documents and government reports as the basis for sharing the water in the San Carlos Reservoir. A.L. Wathen, director of irrigation for the Indian Bureau, concluded that the stored water was to be shared equally by all landowners in the San Carlos Project. Nathan R. Margold, solicitor to the secretary of the interior, disagreed with the officials in the Justice Department and the Indian Bureau. He interpreted the concept of shared storage as follows: (1) When there is sufficient water, Indian and non-Indian lands would share the water equally; and

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\[^{41}\text{Memorandum for the commissioner of Indian affairs and the solicitor of the Interior Department, John Truesdell, acting district counsel, 26 March 1934. National Archives, RG 75, 16/721-10-341, pt. 5a.}\]

\[^{42}\text{Memorandum, Angus MacLean to the attorney general, 2 May 1934; Homer S. Cummings to Harold L. Ickes, 3 May 1934; Ickes to the attorney general, 3 July 1934, National Archives, RG 60, YF 1903-4691.}\]
(2) during times of shortage, the Indians would receive all the necessary water for the irrigation of their lands.43

The secretary of the interior did not agree with the opinion of Solicitor Margold, and on June 7, 1935, Ickes wrote to the attorney general, "advising that the original draft of the final consent decree to be entered . . . especially the provision providing for the equal distribution of stored and pumped water between Indian and non-Indian lands of the San Carlos Project, is in conformity with existing law covering the water rights of the United States on account of its wards, the Pima Indians."44

By April 12, 1935, all of the defendants in the upper valleys had approved the decree, and on April 25, Attorney General Cummings notified Ickes of his approval of the consent decree; Ickes informed the attorney general of his approval on June 7. Four days before Judge Albert M. Sames, in the U.S. District Court, approved the Gila Decree, the Gila River Tribal Council attempted to intervene in the case.45

The council believed the decree was contrary to the congressional acts of 1916 and 1924 and the agreements between the Indians, the federal government, and the landowners. The Pima Indians protested the fact that, although their lands were granted a first and immemorial right to the water of the Gila River prior to any other user, the method of distributing the waters was contrary to that provision. The decree, the tribal council argued, deprived the Indians of the use of water for irrigation at certain low stages. The Department of Justice instructed the U.S. attorney to oppose the intervention, asserting that the Indians were already parties to the suit and that the consent decree conformed to the prior leg-

43William Zimmerman, assistant commissioner of Indian affairs, to Rudolph Johnson, vice president, Gila River Tribal Council, 20 December 1934; A.L. Wathen to Zimmerman, 18 December 1934; Nathan R. Margold to the secretary of the interior, 19 February 1935; Geraint Humpherys to Charles Fahy, 4 May 1935, National Archives, CCF Pima, 1672-10-341, pt. 5a.

44Harold Ickes to the attorney general, 7 June 1935, National Archives, CCF Pima, 1672-10-341, pt. 5a.

45Judge Albert M. Sames was elevated to the U.S. District Court in Arizona after Judge Sawtelle left for the Ninth Circuit Court of Appeals in 1931.
islation and agreements. The petition for intervention was denied by the court.46

**GILA DECREE**

On June 29, 1935, U.S. District Court Judge Albert Sames signed the consent decree in *U.S. v. Gila Valley Irrigation District*. The Gila Decree established the rights of the plaintiff and the defendants to the water from the Gila River. Under the San Carlos Project, the decree granted the Indians on the Gila River Reservation water to irrigate 50,000 acres, while the Gila Crossing District acquired a return flow right for approximately 3,000 acres. The San Carlos Irrigation and Drainage District also received a decreed right for water to farm 50,000 acres.

The first four parts of the decree, which was divided into thirteen articles, listed the defendants involved in the suit. Article V contained the major portion of the decree: the schedule of rights and priorities. Each party that was entitled to divert water from the stream was named, along with the date of priority, point of diversion, name of diverting or carrying structure, number of acres and location, parties owning the lands, diversion right in acre feet, and maximum rate of diversion in cubic feet per second. The schedule listed rights in the order of their priorities. Article V provided for the diversion of a total of 2,220,443.64 acre feet of water each irrigation season. The United States, through thirty-seven separate entries, was entitled to divert 1,956,572.98 acre feet from works constructed on the river.

Article VI set forth the rights of the plaintiff as follows:

1. Diversion of 210,000 acre feet of water from the Gila River on behalf of the Indians of the Gila River Reservation, from the natural flow with an

immemorial date of priority and to the extent that such waters are available under the priority, at a rate not to exceed 437.5 cubic feet per second for the reclamation and irrigation of the irrigable Indian allotments on the reservation, which amount to 49,896 acres and for 650 acres for the administrative area, to the extent that the described water, which is sufficient for and limited to the needs of 35,000 acres, will reclaim and irrigate the same. The waters available under this right and priority are to be distributed to the lands of the Florence-Casa Grande Project.

2. Diversion of 6,000 acre feet of water from the Gila River on behalf of the Indians of the San Carlos Reservation, from the natural flow with a priority date of 1846, at a diversion rate not to exceed 12.5 cubic feet per second for the reclamation and irrigation of 1,000 acres of irrigable lands within the reservation. The water right may be purchased for the benefit of the San Carlos Project.

3. Diversion of 372,000 acre feet of water from the Gila River for the reclamation and irrigation of the 62,000 acres of the irrigable lands of the Florence-Casa Grande Project from the natural flow with a date of priority of 1916, with a rate of diversion not exceeding 775 cubic feet per second.

Article VI also detailed the storage and diversion rights of other parties. In section 4, the diversion of 603,276 acre feet of water from the natural flow of the Gila River, with a priority date of June 7, 1924, was granted for the reclamation and irrigation of 100,546 acres of the San Carlos Project and to supply water for local municipalities and state and federal agencies. Section 5 decreed the storage rights of the San Carlos Reservoir for the full 1,285,000 acre-feet capacity of the reservoir, with a priority date of June 7, 1924. Section 6 provided the right of the Indians residing in the Gila Crossing District to divert 17,950 acre feet from the Gila River for the irrigation of 2,992.5 acres, with dates of priority from 1873 to 1903.

Article VII provided that all lands within the San Carlos Irrigation Project, both Indian and non-Indian, were to share equally in all of the stored and pumped water of the project insofar as it was physically feasible. If there was not a sufficient supply of water for all the lands in the project, the unstored flow of the Gila River would be divided among the Indian and
non-Indian lands in accordance with the apportionment and division decreed in Article VI, section 3.

The division of water between the upper valley water users and those below Coolidge Dam was specified in Article VIII and was known as the substitute storage plan. It authorized the court water commissioner to permit diversions by the upper valley water users in disregard of the priorities of the plaintiff in relation to the water stored in the San Carlos Reservoir for use on project lands. The diversions by the upper valley landowners were not to exceed six acre feet per acre of land, or an annual consumption of 120,000 acre feet. If there was no available storage in the San Carlos Reservoir, the upper valley water users would not receive an apportionment of the natural flow. Most of the time, this plan allowed the upper Gila Valley farmers to continue irrigating their crops in the same manner as they had been for the past fifty years. The only limitations imposed by the decree were the prohibition of new cultivated acreage receiving surface water from the Gila River and restrictions when the San Carlos Reservoir did not have an adequate supply according to the decree formula. The farmers upstream from Coolidge Dam achieved the real victory in the decree, because they did not have to give up their agricultural lands. Articles IX and X described the rights of the Kennecott Copper Corporation and three other defendants, who were granted diversion rights similar to the upper valley water users in Article VIII.

Article XIII prohibited all of the parties decreed in this case from ever claiming the waters of the Gila River against any of the parties in the suit. All parties were “perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River . . . to prevent or interfere with the diversion, use or enjoyment of the said waters by the owners of prior or superior rights therein as defined and established by this Decree.”

The Gila Decree provided water to the Indians on the Gila River Reservation, but the irrigated acreage envisioned by the federal authorities was not achieved under the decree. Two years after Judge Sames signed the decree, the Indians irrigated 30,727 acres within the San Carlos Project, but that amount of acreage was never reached again; fifty years later, the Pima irrigated only 20,000 acres.47 The Gila Decree, or *Globe Equity N. 59*, has been returned to federal court numerous times, primarily to modify the administration of the decree; the Pima

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Indians were never able to claim more water than the initial decree established.

Today, with water from the Central Arizona Project and the 2004 Arizona Water Settlements Act, and with funding from the federal government and state and local entities, the Gila River Pima Indian community is finally able to irrigate thousands more acres of land on the reservation.
Judge John M. Roll [Photograph by Ray Manley Portraits, 1987]
Judge John M. Roll: An Oral History

Editor's Note:
The following interview of the late chief district judge John M. Roll was conducted in 2007 by his colleague, district judge Paul G. Rosenblatt, at the Ninth Circuit Judicial Conference. Tragically, Judge Roll was a victim of the 2011 shooting in Tucson that also claimed the lives of five others and wounded thirteen, including U.S. Representative Gabrielle Giffords. This brief interview was originally recorded as a video and intended to supplement a longer, more thorough audio interview that, unfortunately, was never done. Still, we are lucky to have this brief overview of the life of a remarkable judge and human being.

John McCarthy Roll was born in Pittsburgh, Pennsylvania, in 1947. After his family moved to Arizona, he attended Salpointe Catholic High School in Tucson. In 1969, he was awarded a bachelor's degree from the University of Arizona, then moved on to the law school, where he earned his J.D. in 1972. He eventually pursued further legal studies, earning a master's degree in law from the University of Virginia in 1990. He recounts much of his early legal career and some of his more high-profile cases in the following interview.

Judge P.G. Rosenblatt: My first question, John, would be how is it that you decided to become a lawyer?

Judge John M. Roll: P.G., it didn't have any genesis as far as my family is concerned, because neither of my parents had graduated from high school, and I was the first one in my family to graduate from college. But just following current events . . ., frankly, Robert Kennedy was attorney general at the time when I was in college, and he was an attorney, and I was struck by his idealism. That really was one of the factors that motivated me to think about going to law school.

PGR: So he was both a role model and an influence on your becoming a lawyer.

JMR: Yes, when I was twenty years old.

PGR: And when did you graduate from law school?

JMR: I graduated in 1972 from the University of Arizona College of Law.

PGR: Tell us a bit about your earliest law practice. Where did that take place?
JMR: I couldn't keep a job for quite a while. I started off as a bailiff-law clerk for a superior court judge, Joe Jacobson [phonetic], whom you probably knew. I worked for him and sat in on every court proceeding, as was his desire, and all the jury trials. So I had a chance to see a lot of lawyers. I did that for six months. I was a city prosecutor for five months, waiting for an opening in the Pima County Attorney's Office. And then I was in the Pima County Attorney's Office for seven years before becoming an AUSA¹ for another seven years. [I had] a lot of career changes in the first fifteen years.

PGR: So you saw a progression in the types of cases that you prosecuted?

JMR: Yes. I started off in city court with drunk drivings and shopliftings, and my first job with the county attorney's office was at juvenile court, and that was only because Ajo [?] was not open. They used to send the newest lawyers to Ajo. Dennis DeConcini was the Pima County attorney at the time, but we already had a lawyer in Ajo, so they sent me to juvenile, and then I worked my way to downtown, to justice court with drunk drivings and shopliftings there, and then eventually into a felony caseload, and then sex crimes caseload, major crimes, homicides, and so on.

PGR: Do you have any specific, memorable cases that you prosecuted?

JMR: Yes, and neither of them was successful. I had a month-long trial with Bob Hirsch [phonetic], back in late 1975 and 1976. It was an insanity defense, and Bob Hirsch, of course, is one of the top criminal defense lawyers, and his specialty was insanity. He had a trilogy of "not-guilty-by-reason-of-insanity" verdicts, and I was the middle "not-guilty-by-reason-of-insanity" in the trilogy. All three of us who lost cases to him went on to the state bench afterwards, so we said he was sort of a career-builder for us.

Another case that I had involved the prosecution of Christopher Dean, who was a South Tucson police officer. I prosecuted him for second-degree murder when he shot and killed someone in 1977, over the Fourth of July weekend. That was an acquittal too.

PGR: When did you make a transition to the bench?

JMR: In 1987, I was in the U.S. Attorney's Office. I learned about a vacancy that was created by a mutual friend of both of ours, Judge Ben Birdsall, who had been diagnosed with cancer, and I decided to apply for his seat on the Arizona Court of Appeals, Division II. Although I had been a trial lawyer for most

¹Assistant United States attorney.
of the time in the U.S. Attorney's Office, when I was in the office, if you tried the case, you also argued the case on appeal. I had close to thirty jury trials when I was in the U.S. Attorney's Office, and I ended up writing twenty-four briefs and arguing eighteen times at the Ninth Circuit. And I thought that appellate practice would be interesting as far as sitting as a judge. Ben Birdsall was really a role model of mine. When I was in law school, for one summer I had the opportunity to work as his intern. I still have his picture in my chambers. Of course he died twenty years ago. He was a great judge.

PGR: Yes, a wonderful man. I served with him on the superior court. . . .

JMR: I know you did.

PGR: . . . for the State of Arizona for many, many years. But you didn't practice before him in superior court, or did you?

JMR: I did. I litigated a number of cases in front of him when he was on the Pima County Superior Court. About the time that he went on the court of appeals is the time that I went to the U.S. Attorney's Office. I never argued a case on appeal to him, but I tried a number of cases, including a very high-profile case involving a woman who was kidnapped from her home and murdered somewhere between Tucson and Tijuana. They found her body in Tijuana. The expert on the firearms identification was from the Charles Manson trial. He was with the Los Angeles Police Department, and it was just a really unique collection of circumstantial evidence that we were able to piece together. It was a very high-pressure trial because it was a very, very serious and moving case, and the defendant had a long record. Judge Birdsall was the trial judge on that case. I tried a number of other cases, too, but I particularly remember his demeanor during that. He was just unflappable and always patient and calm with the lawyers. And I thought, "I would like to be a judge like that if I ever get a chance to be."

PGR: What was it like being an appellate judge?

JMR: It was very removed. Sometimes I would go days without anyone calling me, unless Maureen, my wife, called me. I used to volunteer for all these other assignments. I would offer to be the duty judge, to take applications for special interlocutory appeals, orders that needed to be issued, and different things, just so I could see members of the bar and other people, because it was largely reading briefs, and of course there weren't even that many oral arguments. We would hear arguments one day a week, and the rest of the time we were reading briefs and writing orders and opinions.
PGR: How long did you serve as the Arizona Court of Appeals judge?
JMR: Almost five years.

PGR: Tell us how you became a United States district judge.
JMR: P.G., I would like to say that I became a district judge by just picking up the phone and answering a call from the senator inviting me to be a district judge, but it wasn't that simple, as nothing seems to be in my life. I learned that Judge Fred Marcus was taking senior status, so a vacancy was going to be created in the Tucson Division. At the end of 1989, I think is when I heard about that. Then, in 1990, Senator John McCain, who was going to select the federal judge or make the recommendations to President George H.W. Bush at the time, decided to create a merit selection committee. So he created a blue-ribbon committee of former mayor Lew Murphy, Sandy Froman [phonetic] from Snell and Wilmer; Joel Valdez, the former city manager; and a number of other people. I think there were twelve people on the committee. They interviewed applicants—and there were more than two dozen—over a two-and-a-half-day period and sent three names to Senator McCain. Senator McCain interviewed the three of us and sent my name to the president.

PGR: Do you remember much about the confirmation process?
JMR: It was very uneventful. It was one month, though, after Justice Clarence Thomas' hearings.

PGR: So maybe the Senate subcommittee was exhausted?
JMR: [chuckles] That was my hope at the time. You know, most of the time they're uneventful, especially for the district judges, and mine was uneventful. Senator [Paul] Simon from Illinois and Senator Strom Thurmond from South Carolina were the two representatives of the parties who were there, and the rest were all aides. But Senator [Dennis] DeConcini came over and introduced me, and of course Senator McCain was there as well.

PGR: Dennis sat with me at the same time, and I looked around, and I said, "Dennis, where is everyone?" He said, "You knucklehead, don't you understand? If anyone's here, you're in trouble." I'm sure that was similar to your experience.
JMR: Yes. Well, Senator McCain was reading all the reasons why he had nominated me, and Senator DeConcini was next to me, and he said, "Even if it isn't true, isn't it wonderful to have somebody say these nice things about you?" I said, "Senator, absolutely." As I said, he was the county attorney when I was hired in the Pima County Attorney's Office, and he was always very supportive of different things I wanted to do. I'm very appreciative of that.
PGR: Did Senator Strom Thurmond ask you a question?
JMR: Yes.

PGR: What were those questions, do you remember?
JMR: I don't remember. They had a briefing with the justice department the day before, and they gave us an idea of some of the questions. I think one of them was, "Do you think that federal judges should run the state prisons?" "Do you think that federal judges should run the universities?" You know, questions along those lines. And, of course, you're kind of walking a tightrope because you have Senator Simon on the one hand and Senator Thurmond on the other, and you want to answer, of course, candidly and truthfully, but you don't want to stray off point where you cause yourself problems.

PGR: You mentioned Ben Birdsall as a judicial role model. Did you have others?
JMR: Yes. I remember, of course, a number of the ones that you would also know from the superior court: Judge Marian Richey [phonetic] was on the superior court before she went on the district court. I tried a number of cases before her, and I thought she was a terrific judge. And Judge Alice Truman, of course, was on the Pima County Superior Court. At one point there in Tucson, they were talking about having one county attorney or deputy county attorney appointed to each judge, and she asked me if I would mind if she asked me. Of course, I couldn't imagine anything too much better than getting to try all my cases to Judge Truman. And the Roylston twins, Robert and Richard, were gentlemen and really very civil and very, very good trial judges, I thought. On our district court I very much enjoyed the opportunity of trying some cases before Judge Marcus, and Judge Bill Browning who, of course, is on senior status now and has serious medical issues, but he was a great trial judge.

PGR: Do you remember your first day on the federal bench?
JMR: Yes, I do. As I recall, one of the things—nothing happens until you make it happen, and that was a little bit of a different experience for me. I had a chance, before going on the federal bench, to sit as a trial judge for four months. I switched places with Jim Carruth, who was on the superior court. And Jim sat as a court of appeals judge on the state court, and I sat as a trial judge. It convinced me all the more that I really belonged in a courtroom and closer to trials than as an appellate judge. So I had that experience. It wasn't like the first time that I had actually presided over any cases. Lloyd Fernandez had also arranged for me to go sit in Pinal County a few times even before I switched with Jim Carruth, "so that," he said, "you can make all your mistakes. You can start the jury trial without the jury
in the box and then remember it and bring them in, and no-
body in Tucson will ever even hear about it." So I had a little
bit of boot camp before I went on. But I remember the first
time, and I remember the courtroom that they assigned to me
when I went on the district court, which was a courtroom that
I had spent seven of the worst weeks of my life in with Judge
[Richard] Bilby, on a big organized crime drug task force case,
and he declared a mistrial the morning the case was to go to
the jury after a seven-week trial, and hundreds of exhibits, and
many, many witnesses and wire taps, and so on. I thought it
was ironic that that was the courtroom they gave me to sit in,
since I'd spent so many bad days in there.

PGR: That was not Judge [William] Browning's courtroom,
that was . . .

JMR: It used to be Judge Bilby's courtroom, and then he moved
across the street. It was on the ground floor, which is now the
Walsh Building, where bankruptcy is located, only it was on
the ground floor where the post office used to be in Tucson.
That was my first federal courtroom, and that's where I had
tried that case in front of Judge Bilby.

PGR: Could you tell us some of your memorable federal cases
that you presided over?

JMR: Well, of course, in Tucson an awful lot of what we do is
criminal, being a border court. When I started, it wasn't to the
same extent as now, where we have five or six hundred sen-
tencings per judge per year in Tucson. When I started, it wasn't
anything like that pace, but among the cases that I had was a
case involving alleged members of the Irish Republican Army
sending explosives to Northern Ireland, and we had five defen-
dants go to trial in connection with that case, and they were
attempting. . . . A couple of the codefendants were convicted
in Florida of buying a Stinger missile from an undercover agent
that they were going to use to shoot down aircraft, and that
was a very memorable case. In fact, my lead defendant was the
grand marshal of the St. Patrick's Day parade in Phoenix that
year. I think that was about 1994.

I also had a case involving a border patrol agent who stood
trial for first-degree murder. It was a case that was indicted
in Santa Cruz County, and it was transferred to federal court
because he was on duty at the time, and he requested that the
matter be tried before a federal judge. So it was a state prosecu-
tion, presided over by a federal judge, in Tucson. That also was
a memorable case.

I had a Dalkon Shield case that was an opt-out of the settle-
ment action that was all about products liability from the use
of the Dalkon Shield. And, of all things, a very interesting case
involving ERISA and Circle K, and all the Circle Ks and their retirement plan, that was also a lengthy trial. And then there are any number of other criminal cases.

PGR: Going back to the IRA case, what was the outcome of that?

JMR: The jury acquitted in the case. None of the defendants had actually set foot in Arizona. The codefendants, who had pleaded out in the Southern District of Florida, were the ones who had been to Tucson to buy the explosives, the detonators. They were supposedly acting at the direction of the other four people, but those individuals had never set foot into Arizona. It was all based on vicarious liability, including the jurisdictional component of it. And the jury ended up acquitting them.

PGR: A question about the Santa Cruz case: was there a jurisdictional issue? How was that addressed? Could you tell us about that?

JMR: There was no jurisdictional issue that either party raised, and there wasn't anything that . . , I mean, it appeared that the jurisdiction—for it to be tried in federal court by virtue of a federal agent being charged for conduct in the performance of his official duties—that there was a removal right, absolute removal right, by the officer. So the case came to federal court.

PGR: Arizona is one of the busiest [federal] districts in the country. Tell us, if you would, a bit about your caseload and how you're able to manage that caseload in today's world.

JMR: Arizona, presently, as of this date [2007], is first in the Ninth Circuit, in criminal caseload. And we are fourth in the country, of the ninety-four districts, in criminal caseload. As far as the number of sentencings goes, we are first in the Ninth Circuit and third in the country. And again, of course, the caseload. I sit in Tucson, where the criminal caseload is largely located. In Tucson, we do about two-thirds of all the criminal cases in the district. But Phoenix does a third, plus they do 84 percent of all the civil cases. So the Phoenix district judges have a criminal caseload, but they have a very heavy civil caseload. In Tucson, we don't have that civil component, but we have the criminal caseload. Each of us sentences between five hundred and six hundred defendants per year, and it is a certain grind. And there's a certain similarity. A lot of these cases are "illegal-reentry-after-deportation" cases. But a lot of them are alien-smuggling cases as well. And of course a lot of drug cases, a lot of port-of-entry cases. Some of the port-of-entry cases involve corruption. Judge Cindy Jorgenson, one of our judges, recently completed a very large case involving a

\[\text{At this time, there were five authorized Article III judgeships in Tucson.}\]
number of different law enforcement officers who were arrested in a sting operation in connection with the transportation of cocaine and their intent to distribute it. The alien-smuggling cases are becoming as complex as any of the drug cases. Right now I have a fifty-five-defendant, 711-count alien-smuggling case, with so many ins and outs and overt acts that it is... Of course we'll end up breaking it down into different groups, smaller groups, when those defendants who want to proceed to trial go to trial. But they are certainly not like what we used to see, where you just have a couple of people in the back seat of a car that happens to be stopped by border patrol. In fact, they have a cutoff. I don't think that they even charge people now unless they have at least twelve people in the vehicle that they're transporting. We see any number of those. I see a lot of child-smuggling cases. I've sentenced forty-five child-smugglers in the last four years. And these are young children, some of them eighteen months or two years old—most of them, almost all, under eight years old, so very young children. And they're stranger cases, where they do not know the parents, they don't have any connection at all. They're doing it for money, to bring the children across. And a lot of them have records or drug addictions or whatever, and someone offers them $50 or $100 or $200 to smuggle a child, and they take that and bring them across the border. So that's a little bit about the types of cases that we see.

All of us meet with the probation officers after we've read all of the reports for each day, and we typically, in Tucson, schedule four to six of these hearings every day. We read the reports the afternoon before, when we're not in trial, and then we meet with the probation officers before the sentencings, and then we go into court and impose the sentence.

We also get a lot of revocation hearings with that many sentencings. We are first in the country in revocation hearings for revocation of supervised release or revocation of probation. It's like a treadmill—you cannot fall behind, and you can't just take the luxury of deciding, "I guess we won't do sentencings for a few days," because you have to keep them moving through. With the Speedy Trial Act, of course, these cases come up very quickly. The Speedy Trial Act doesn't apply after they have pleaded guilty, but until then these cases are on a fast track.

PGR: What are your chances of getting more judges?
JMR: We hope that the chances are good. Right now there is not a new judge bill that's in the hopper, but the judicial conference has recommended that Arizona get five new district judges. Four of them would be permanent and one temporary.
So, hopefully, we will get those, and hopefully at least a couple will end up in Tucson. I mean, with Phoenix's caseload, I know that they need them also, but if we got our five, a couple could end up there. And it would make a difference, because our caseload, we received. . . . Arizona hasn't had a new judge since 2003, and that was in Phoenix. Two thousand two was the last time we had any judges added in Tucson. Cindy Jorgenson and Judge David Bury were appointed at that time in 2002. Our caseloads are now back up practically to where they were when Cindy Jorgenson and David Bury were appointed, and they were to help out and fill that [need]. And you know, the cases we see just aren't likely to be the ones that are going to go away. I don't know that there is the immigration bill that's been drafted that would give amnesty to the people that I see. Everybody that I see has at least a felony conviction and sometimes multiple felony convictions, or aggravated felonies with drug trafficking, child molesting, burglary, and so on. So I don't see a change occurring there. Of course, our drug cases tend to be the larger cases. They don't prosecute under five hundred pounds of marijuana now in Tucson in federal court.

PGR: You are now the chief judge of the District of Arizona.
JMR: Yes.

PGR: How has your life changed with that elevation?
JMR: Well, it's another layer of responsibility, but you know, my colleagues have been absolutely fantastic. They have been very supportive. I think the nicest thing about being chief judge is how it has brought me in such closer contact to the judges in the Phoenix Division, because I think sometimes our caseloads are so heavy in Tucson and Phoenix, we don't even come up for air and get a chance to see the other judges. As chief judge, I regularly get a chance to visit and interact with our Phoenix Division colleagues, and of course with our magistrate judges in Yuma and Flagstaff.

PGR: People have said that there are two cultures in Arizona: the Tucson culture and the Phoenix culture. Do you believe that's true?
JMR: I suspect that Phoenix is probably, just by virtue of the different nature of the cases that we see—with Phoenix predominantly civil and Tucson predominantly criminal—I suspect that has an impact and shows up in some respect.

PGR: We're just about running out of time, John, but I'd like to ask you if there's some question that I have not asked you that you would like to tell me about.
JMR: Not particularly. You reminded me when you asked me about when I became a judge, I was thinking of my investiture,
and how at the end of that whole stressful process—all the
interviews, and the merit selection, and the interview with the
senator and so on—I always joke that I hugged Judge Marcus
and shook my wife’s hand after I finally had the oath admin-
istered to me. I’ve gone to other investitures since then, and I
heard Susan Bolton say when she had her investiture, that she
looked to her husband and said, “Honey, none of this would
mean anything if you weren’t here with me.” And I thought, “I
should have said that to Maureen, my wife.” I remember Judge
Jim Teilborg’s investiture when he talked about all the people
who had helped mould him into the lawyer and the judge that
he ultimately became, and he said, “But I never forget who the
master potter is.” And I thought, “Why didn’t I say that at my
investiture?!?” All the things. But it’s like the trial, you know:
you always think of the things you could have done differently.

PGR: Yes. I recall mine as more similar to yours than theirs, and
it’s kind of a blur, but somehow we made it through, didn’t we?

JMR: Yes.

PGR: Well, thank you very much, John. It’s been wonderful of
you to give us of your time and participate in this video [oral
history] project. This is the first time that we’ve tried this, and
it looks like it’s going to be very successful. So thank you very
much for coming.

JMR: I’m very honored. And P.G., I’m glad you’re the one who
did the interview. Thank you.
When 16-year-old Argonaut Eddie Wells loaded his father's wagon, hooked up the oxen, and headed for the goldfields of the West, little did he realize that three-quarters of a century later, as he approached the end of his life, he would be recognized as one who contributed greatly to the settlement and development of the Arizona Territory and its rise to statehood. He was, by one account, acclaimed as the "first citizen of Arizona."

Over the relatively short history of the territory and state of Arizona there have been a great number of men and women...
Judge Edmund G. Wells, above, one of the earliest arrivals to Prescott, contributed greatly to the development of Arizona Territory and its advancement to statehood. (Courtesy of Arizona State Library, 02-0290)
whose contributions have placed them at the forefront of a roll of distinction, and it is clear that Edmund W. Wells earned his place among them. It can well be said that none ranked higher.

Few people today readily recognize his name; he was a pioneer, miner, cattleman, farmer, lawyer, banker, entrepreneur, political leader, jurist, and author. Blessed with high moral and ethical standards throughout his multifaceted career, he richly deserves to be remembered.

As a young man, Wells was one of the earliest arrivals, in July 1864, to the newly created territorial capital of Prescott, Arizona Territory. The town—to the extent it deserved such a designation—had been organized formally just a little more than a month before. In truth, it consisted of a few cabins and lean-tos, but, fully platted in the wilderness, it abounded with hope and promise.

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PRESCOTT, ARIZONA TERRITORY, IS BORN

On February 24, 1863, in the midst of the Civil War, Congress passed, and President Abraham Lincoln signed, the bill creating the Arizona Territory. There had been several attempts to create a territory separate from New Mexico. All had failed. One obstacle was that Tucson, the largest settlement, was a hotbed of Confederate sympathizers. However, the desire to control the known but war-abandoned mineral resources in the general vicinity of the “Old Pueblo,” as well as the promise of gold in the unexplored mountains of central Arizona, led to the passage of the legislation.

A unique feature of the enabling act gave the governor, John N. Goodwin, the power to locate the territorial capital wherever he chose. When the territorial party arrived in Santa Fe, New Mexico, on its way to Arizona late in 1863, General James H. Carleton, the commander of the Union forces in the territory, recommended that the governor come to the area in the Bradshaw Mountains near the Hassayampa River and Lynx Creek, where gold recently had been discovered. People were pouring into the mountains in search of this precious metal. General Carleton himself was said to have interests in the discoveries. With this information, even the territorial party began suffering from gold fever. It is not surprising, then, that after arriving in early 1864 and traveling around the territory, the governor chose a remote location on the banks of Granite Creek for the new capital. It was near the gold fields, inhabited only by gold seekers and their retinue. Prescott was created there. It was named after the noted historian and author William Hickling
Prescott. The location had the added advantage of a nearby military post, Fort Whipple. Established only months before, the fort provided protection for the miners, as well as for all federal interests.

**BIRTH OF AN ARGONAUT**

Edmund William Wells, Jr., was born on February 14, 1846, to Mary Arnold Wells and Edmund W. Wells, Sr., in Licking County, Ohio. The family moved to Oskaloosa, Iowa, in 1852, where Edmund, Jr., attended public schools. When he was fifteen his mother died; within a year, he left with his father to search for gold, and his life as an Argonaut began. On April 1, 1862, father and son rendezvoused with other gold-fevered explorers and headed west to Colorado. After an adventurous trip through Indian country, the wagon train arrived in Denver in July 1862. Once there, the wagons dispersed, and small groups headed to the various gold fields. The Wells' destination was the Central City area, where the boy labored in the mines and lumber camps. He clerked in a store, started an apprenticeship with the Central City Register newspaper, and searched for gold. Although these were valuable learning experiences, the riches envisioned by the Wellses eluded them.

In early 1864, having heard of the newly discovered gold fields in the central mountains of Arizona, and with little money, father and son headed south and west to the new territory. Ed Wells, Sr., was the captain of a wagon train composed of sixty-five members. Their arrival during the formative days of the territorial government afforded them opportunities of an unusual sort.

Shortly after their arrival in Prescott, Ed Wells, Sr., was appointed justice of the peace. Wells, Jr., now eighteen years old, was appointed assistant clerk when the First Territorial Legislature convened on September 26, 1864. He held this position in the Second Territorial Legislature in December 1865 as well. This experience gave him a good understanding of governance and of the legislative process. In addition, he became acquainted with the governing party, the legislators, and the political leaders from other parts of the territory.

By that time, Wells, Jr., had helped build the stockade at the newly established Fort Whipple. In addition, he provided logs for the construction of the fort. Together with King S. Woolsey, another early settler and a member of the legislature, he ob-

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tained a charter to build a Prescott-to-Fort-Wingate road. The young man, blessed with unusual work habits, was ambitious and creative.

Ed Wells, Jr., wasted no time trying to prosper. He purchased some cattle and placed them with Jake Miller and Ed Shepherd at the Burnt Ranch on Willow Creek to graze and gain. In a famous retold story, Indians attacked the herd and the two men. The battle appeared lost, but the two men somehow prevailed. However, many of the herd were killed or driven off, and the Indians set fire to the cabin; thus the ranch's name. In spite of the financial loss, the young entrepreneur persevered.

In March 1866, Wells, Jr., served as the civilian clerk for Captain Washburn of the First Arizona Volunteer Infantry located at Camp Lincoln on the Verde River. While there, he engaged in mining, ranching, and farming activities. His father, meanwhile, returned to Colorado in 1867.

Although he was successful in the Verde Valley, Wells, Jr., came back to Prescott to serve as clerk of the district court, a position that changed his life. Appointed on August 24, 1867, he served until 1874. The main reason for his return was that he was in love with Rosalind [Rose] Banghart, the eldest daughter of George and Mary Peck Banghart. Mary was the sister of Ed Peck, a famous scout and pioneer. The Bangharts lived at the Del Rio Ranch near Prescott. Ed Wells, Jr., and Rosalind Banghart married on October 5, 1869, in a ceremony performed by Chief Justice William F. Turner. Marriage brought new responsibilities as well as the need for additional income. Thus, in 1871, Wells also served as clerk of the board of supervisors, as well as recorder of Yavapai County.

It was during this period that he started to read the law under Chief Justice Turner, who saw great promise in the industrious young man. After eight years of study under exceptional tutelage and with an agile mind, Wells was admitted to the bar in 1875. Shortly thereafter, he was elected district attorney of Yavapai County and was reelected to a second term in 1877. In 1876, he formed a partnership with John A. Rush, an attorney who had moved to Arizona from Sacramento, California, where

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5The Prescott and Ft. Wingate Road Company, E.W. Wells, president, with King S. Woolsey, partner. Arizona Miner, Dec. 14, 1864. This was one of several toll roads authorized by the first legislature. There is no record of the road beyond incorporation.

6Jake Miller was a member of the Joseph Reddeford Walker party that had discovered gold in the area.

7The couple had six children, five of whom survived them. Wells became the brother-in-law of Governor Nathan O. Murphy and John Marion, a noted newspaperman. Both had married Rose Banghart's sisters.
he had engaged in the practice of mining law. Together Wells and Rush established one of the premier law firms in the territory. Their partnership lasted for thirteen years.

In 1879, the breadth of Wells' already wide experience expanded when he represented Yavapai County as a member of the Territorial Council, the upper of the two legislative bodies in the Tenth Legislative Assembly. He again served as Yavapai councilman for the Twelfth Territorial Legislature that met in Prescott on January 8, 1883. He left the council when he was appointed United States attorney for northern Arizona on May 19, 1883, a position he held until 1885.

With ever-growing means, on April 1, 1882, Wells invested in the recently formed Bank of Arizona at Prescott, purchasing a one-quarter interest. In 1888 he became vice president of the bank, and in 1911 he became president. He served in that capacity until he left the bank in 1928.

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**Revising the Territory's Legal Code**

Wells' next substantial contribution to Arizona requires some background. The Howell Code, created shortly after the territorial government arrived in 1864, was showing its age and limitations. Commissioned by Governor Goodwin, the code was the territory's first body of law. It was grounded on the state codes of New York and California, while at the same time incorporating many Spanish and Mexican laws already in use. For example, its water laws were Spanish. Its community property laws were Spanish. Its mining laws were Mexican. These were in sharp contrast to the common law as adopted by a great portion of the states on the eastern seaboard, which looked to England for their law. As adopted, the amalgamation served its purpose in bringing law and order to a territory that was, until then, essentially lawless. However, after being amended and expanded regularly by succeeding legislative sessions, the code had become outdated and difficult to use.

To address all of the complaints and difficulties, in 1887 Governor C. Meyer Zulick appointed Wells, Benjamin Goodrich, and Cameron King members of a commission to revise and codify the laws of Arizona. The governor asked the assembly to appoint "three competent lawyers, residents of the territory, with discretion and authority to revise the laws of the territory to the best of their skill and judgment, eliminating there from all crude, useless, imperfect, and contradictory matter, and inserting

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*Named for associate justice William T. Howell, its primary author.*
such new provisions as they may deem necessary and proper." The three men appointed on January 18, 1887, were given until March 4 of that year to complete their work. They met their assignment by working sixteen hours a day for forty-six days, including Sundays. Their compensation was $15 per day apiece.

The finished product was noteworthy in many ways. For the first time, the code contained an index, making it easier to use, and the criminal code was separated from the civil code. New laws dealt with the issues of a developing economy and population. The legislature adopted the completed code later in 1887.

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**TERRITORIAL JUDGE AND ATTORNEY GENERAL**

In February 1891, President Benjamin Harrison appointed Wells associate justice of the Supreme Court of the Territory of Arizona, assigned to the newly created Fourth Judicial District. The Enabling Act, which formed the territory in 1863, authorized three judicial districts, each to be presided over by a justice appointed by the president. District One encompassed Tucson and Pima County, which boasted the largest population in the territory. Yuma Crossing, or Arizona City, as it was sometimes called, was included in the Second Judicial District. The settlement was the major crossing of the Colorado River, with water access to La Paz, 120 miles north. La Paz was the center of placer mining along the Colorado River in Yuma and Mohave counties. The Third Judicial District included Prescott and the vast remainder of the territory, all of which was included in Yavapai County.

Each of the judges was assigned to one of the three districts and was responsible for resolving the legal disputes in that district. In that capacity, they sat as district judges. The three trial judges also sat together as the Arizona Territorial Supreme Court. This meant each judge participated in a review of his own decisions. The obvious result was that almost all trial court decisions were affirmed. This arrangement did not sit well with the growing legal community, and certainly not with the citizenry.

The creation of a fourth judicial district was intended to address the problem. Thereafter, a judge generally could no longer sit in review of his own decisions. He was automatically recused, and the other three reviewed the cases he had decided.9

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9 There were exceptions. A judge could sit on appeal of a case he had decided as a trial court judge under circumstances where another jurist was disqualified for other reasons, e.g., he had acted as counsel for a party to the dispute in that matter.
As associate justice for the Fourth Judicial District, Wells presided over an active civil and criminal caseload as the district judge for Apache, Coconino, and Yavapai counties. This meant he was able to continue to live in Prescott, traveling to other towns and counties as needed.

As a justice of the supreme court, Wells authored several opinions, which are found in the Arizona Reports. One of his opinions involved the famous William O. "Buckey" O'Neill. As sheriff, O'Neill had claimed mileage expenses while in pursuit of miscreants but had not made an arrest. The judge opined that the issue was whether the effort was undertaken in good faith. The case is Yavapai County v. O'Neill, 3 Arizona 363 (1892). He also wrote opinions in Albuquerque National Bank v. Stewart, 3 Arizona 293 (1891) and Butler v. Shumaker, 4 Arizona 16 (1893), cases that gave him the opportunity to showcase his knowledge of banking law. Another case authored by Wells was appealed to the Supreme Court of the United States and was affirmed. Bryan v. Pinney, 3 Arizona 412 (1892) aff. 162 U.S. 419 (1892).

Wells enjoyed his judicial career. His term lasted until April 15, 1893, when he resigned to return to the bank and to continue his ranching and mining efforts. It was said that, as a jurist, "he showed the utmost impartiality and his decisions were always considered just."

Content as he was with his banking and other interests, the call to civic duty arose again when Governor Alexander O. Brodie, of Rough Rider fame in the Spanish-American War, appointed him attorney general of the territory of Arizona. He served in that capacity for more than two years, until November 14, 1904. 

CONSTITUTIONAL CONVENTION DELEGATE

One of the first laws passed by Congress after the ratification of the United States Constitution was the procedure for adding new states to the union. The Northwest Ordinance provided for territories to be created and supervised by Congress. Thereafter, the territory could seek admission to full membership as a state. The territory of Arizona sought such admission for thirty years without success, until finally, in 1910, Congress authorized the people to draft a constitution.

By 1891, the original four counties had been carved into eleven counties.

While terms of government service often appear to be of short duration, the appointments were at the pleasure of the president, so that changes in the administration resulted in new appointees.
The process authorized a constitutional convention composed of duly elected delegates who would prepare a constitution for the people to approve. Yavapai County chose Edmund W. Wells and five others, including Morris Goldwater, as its delegates. The convention met on October 10, 1910, to carry out its charge. After taking the oath of office, the delegates elected the president of the convention. The Democrats nominated G.W.P. Hunt, while the Republicans nominated Wells. Hunt won 41 to 11, along party lines. The two candidates voted for each other as a mark of civility.

Laboring until December 8 of that year, the convention approved their work product by a vote of 40 to 12. Judge Wells voted against it because it provided for the recall of judges. He knew from his experience that judges are called upon to make controversial and often unpopular decisions. He was the only Republican to oppose the provision. He voted against the constitution as finally approved by the convention. The people ratified the draft and sent it to Washington for approval by both houses of Congress and the president. However, President William Howard Taft vetoed the legislation as promised, because the constitution provided for the recall of judges, taking the same position as Wells. They both thought the people should be able to recall all other publicly elected officers but saw the importance of judicial independence. Arizona agreed to delete the judicial recall provision. Taft then signed the revised bill, and Arizona became the forty-eighth state on February 14, 1912.

Candidate for State Governor

Once Arizona had attained statehood, it was time for the election of state officials. For governor, the Republicans nominated Wells, after he won in the primary election in every county except Maricopa. The Democrats put forth their standard-bearer, George W.P. Hunt. Hunt won the general election in 1911 by a vote of 11,123 to 9,166. The Socialist candidate polled 1,247 votes. Wells won in Apache, Coconino, Navajo, Pima, and Yavapai counties, a remarkable showing considering the heavily Democratic registration in the new state.

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12 The development of the copper mines in Gila and Cochise counties had shifted control of politics in Arizona to the Democrats by a substantial margin. The later election results for governor reflected a much narrower result.

13 In the next general election, the people of the state of Arizona quickly restored the recall provision for judges.
The election represented Judge Wells' swan song of political campaigns. He returned to his banking, ranching, and mining enterprises, all of which were extensive. He continued as president of the Bank of Arizona. He was involved in a good number of mines and mining companies, primarily in Yavapai County, but elsewhere too, including Alaska. Among others, these included the Davis, Burkburnett, Hillside, Jerome, War Eagle, and Hillside interests. His quest for gold and other mineral riches never ceased. At the same time, his ranching and farming activities ranged from the Del Rio and Agua Fria ranches to holdings in the Salt River Valley as well.

PUBLIC SERVANT AND AUTHOR

Despite all of his many commercial and professional undertakings, the judge still had room for more public service. As a member of the board of regents from 1918 to 1925, he provided oversight for the University of Arizona in Tucson, the Normal School at Tempe (now Arizona State University), and the Arizona State Teachers College at Flagstaff (now Northern Arizona University). During that time, he was also vice president of the Arizona Pioneers Historical Society. He had witnessed the creation of that organization years before; he had been the assistant clerk when the first legislature created the society in 1864.

At this stage of his illustrious career, the judge paused for reflection. He wrote Argonaut Tales, a book published in 1927. It was a compilation of colorful stories, many of which recounted his personal adventures as a boy moving west to Colorado and then on to Arizona Territory so many years before. The stories are rich in drama, told through the clear eyes of the author and the vivid recall of his youth. In some instances, he blended fact with romantic authenticity. An unusual book, it was well received, and he donated the proceeds to the Boy Scouts of America.

It must not be overlooked that Wells, while embracing a wide range of activities, remained a part of his community as a man of faith. He served on the board of trustees of the Presbyterian Church for many years, before turning to and organizing the First Church of Christ Scientist in Prescott on July 15, 1900. Rose Wells engaged as a practitioner there. In addition, he joined the Masonic Lodge in 1868, becoming master of the lodge in 1883. As might be expected, newspaper accounts reflect the participation by Ed and Rose Wells in the social events of the times.

Judge Wells sold his interest in the bank in 1928 and retired. He was a successful, self-made man, and his many undertak-
ings paid off to such an extent that occasionally he was also referred to as Arizona's first millionaire.

Throughout his illustrious career, Wells was regarded as honorable and honest. His integrity, his industry, and his commitment to public service were universally known. As a contemporary described him,

He came to this state in 1864, and has made Prescott his home ever since. He is the Dean of the Arizona Bar. He has held many public positions with honor and distinction. As an attorney, legislator, district attorney and judge, and member of the Constitutional Convention, he exemplifies the finest type of a lawyer, and as a citizen he is honored, respected, and loved. We can well take pride in claiming him as our first citizen.

Rose Wells, the judge's energetic and industrious wife, died on May 14, 1922. He died on July 4, 1938, his life as an Argonaut fully completed. They are both entombed with family in the mausoleum of Mountain View Cemetery in Prescott.

Proof of Guilt offers us a micro-history of a white woman executed in the mid-twentieth century and a serious study of gender in an old capital punishment system. As the subtitle suggests, many features of the old capital punishment system made it unlikely for women to be sentenced to death and even more unlikely for women actually to be executed. Barbara Graham, whose capital trial in 1953 and execution in 1955 just as the old capital punishment regime was coming to a close in the United States, provides a fascinating example of what it has taken for the state to kill a woman then and now.

The first three chapters detail Graham's capital crime and her trial, as well as her life as the eldest daughter of a single mother in the interwar years. The crime was the kind that easily attracted a capital murder charge then and still could now. Margaret Mahan, a single woman sometimes described as "elderly," was bludgeoned and possibly killed by a cloth pulled over her head during a brutal home invasion robbery in Burbank, California. Graham was arrested along with two men with whom she was living, while a third became the prosecution's lead witness. Graham and the two men were convicted and sentenced to death after a trial that focused overwhelmingly on Graham's role. Graham would insist to the very end that she had nothing to do with either the robbery or the murder, but her life had followed the kind of track that criminologists of the era would have seen as leading to violent crime and even murder.

In this study of women as subjects of criminal law and punishment—Cairns' third—it is Barbara Graham's execution that makes her distinctive. While women normally enjoy cultural presumptions that they are not aggressive and are unlikely to initiate violence, these presumptions go along with certain narratives and scripts that, when violated, can allow a woman criminal to appear to be a super-villain. Cairns' portrait captures Graham's flouting of these conventions.

Chapters 4 and 5 cover Graham's two-year battle to save her own life. Once she was convicted and condemned, many of the features that made her easy to cast as a "femme fatale" made her very appealing to the male journalists who imagined rescuing her from the gas chamber. In one chapter, Cairns
details one of the more remarkable stories of what might be called "abolitionist" journalism: Edward Montgomery, who covered Graham's trial for the San Francisco Examiner and quite favorably for the prosecution, ultimately became convinced of Graham's innocence and led a campaign in the media to exonerate her. After Graham's execution, his articles formed the basis of a fictionalized film about her, I Want to Live, starring Susan Hayward.

Montgomery's campaign, which eventually brought the case to the legislature (although primarily on procedural issues) provided an early exposure of the changing politics of abolition, which would eventually make it plausible for elected politicians to oppose capital punishment (successfully at times) in the 1960s. Graham's trial brought up features of capital prosecution that may have been typical at the time but became enduring elements of criticism.

In chapter 6, Cairns pulls back and sets Graham's capital sentence into the larger racial and gender contexts surrounding the death penalty during the mid-twentieth century. What made Graham's execution so unusual was not that she was a female, but that she was a white female. As Cavalier magazine documents, southern states in particular were not reticent about executing African American women, even for killings that would have been mitigated by provocation or lack of premeditation. But whiteness was not immunity. As Cairns points out, the 1950s were a time of striking hostility toward deviance, making women like Graham or condemned atomic spy Ethel Rosenberg, executable notwithstanding serious concerns about their innocence.

Proof of Guilt gives us a look at capital punishment in the midst of its last decade as a normal part of America's justice system, just before the moratorium of the 1960s and the constitutionalization of a much remade capital punishment trial in the 1970s. The fictionalized film version of Barbara Graham's case, I Want to Live, would help propel questions about the legality of capital prosecution to state legislatures at a moment of rising political support for the abolition of the death penalty. In a slightly different history from the one that, but for a vote or two on the U.S. Supreme Court in 1972 and 1976, we have been living, the Graham case might be remembered as a decisive one in the abolition of the death penalty in the United States. (The case of Ruth Ellis, the last woman executed in Britain at around the same time as Graham, served to abolish the death penalty there in 1964.) Barbara Graham, California's third—and possibly penultimate (one more died within a year of Graham)—female victim, provides a fascinating subject around which to begin
to understand the role of women in mid-twentieth-century crime and criminal justice history.

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In this illuminating and timely study, historian Leigh Ann Wheeler unearths the complex history of the concept of sexual rights in the twentieth-century United States. *How Sex Became a Civil Liberty* can be viewed as a sequel to Wheeler's first book, *Against Obscenity: Reform and the Politics of Womanhood in America, 1873–1935*, which detailed the history of women who campaigned against what they deemed to be indecent popular entertainment. Her new book, which covers the period from roughly 1920 through the 1990s, also focuses on the law, censorship, and sexuality, but her agenda is more ambitious. She seeks to explain how Americans came to believe that adults have a constitutionally protected right to have consensual sex with whomever they choose, to consume sexually explicit material, and to control the reproductive consequences of their sexual activity. Wheeler argues that these sexual rights did not inhere in the Constitution, waiting to be discovered, but are instead the product of nearly a century's worth of legal and social activism. The fact that Americans now tend to assume a right to sexual privacy simply underscores the thoroughgoing character of the revolution in law and the culture that she so ably documents.

Wheeler attributes the lion's share of this change to the indefatigable efforts of a cadre of lawyers and activists associated with the American Civil Liberties Union (ACLU), which she portrays as a "major and stunningly effective advocacy group." Founded in 1920 to defend critics of capitalism and pacifists from unjust persecution, the ACLU over the next two decades evolved into a leading defender of birth control advocates, nudists, theatrical producers, and others vulnerable to obscenity charges. These foci reflected the legal dilemmas and private preoccupations of ACLU founders and their friends, which to a remarkable degree dictated the organization’s agenda.

It is therefore fitting that Wheeler begins her narrative with a fascinating, if also depressing, discussion of the tumultuous personal and sexual relationships of several Greenwich Vil-
lage couples—including longtime ACLU executive director Roger Baldwin and his wife, Madeleine Doty—whose private lives became “laboratories for experimenting with sexual civil liberties.” The inescapable conclusion is that “free love” in the 1920s and 1930s proved much more liberating for men than for women—a finding in keeping with arguments advanced by Christine Stansell in *American Moderns: Bohemian New York and the Creation of a New Century*. According to Wheeler, tensions between women and men who inhabited this new cultural milieu informed the ACLU’s staunch support of birth control—an issue on which both sexes could agree, and one that mediated the differences between them.

By mid-century, ACLU leaders had begun to flesh out the core ideas that would ultimately undergird the concept of sexual rights. Critically, they reinterpreted the First Amendment to include not only the right to speak but also the right to consume speech—a major change that they sought to sneak in under the radar. This new reasoning, which cast the purchaser [rather than the producer] as the victim of censorship resonated powerfully in the consumer-oriented climate of the postwar years. As a result, it attracted more mainstream and commercially oriented constituencies and benefactors, including Hugh Hefner and readers of *Playboy* magazine.

At the same time, the ACLU moved haltingly toward developing a notion of privacy that extended to sexual behavior. Some of the most compelling passages of this very rich book recount cases of homosexual men and women who appealed to the ACLU in the 1950s—often after losing jobs or being cruelly humiliated by postal inspectors. Although ACLU leaders typically responded sympathetically, most had difficulty perceiving how such cases fit within the rubric of civil liberties. Only in the 1960s, after the Supreme Court articulated a right to “marital privacy” in the landmark 1962 birth control case *Griswold v. Connecticut*, did the ACLU champion a more expansive constitutional right to privacy that encompassed non-marital sexual behavior.

In the 1970s and 1980s, the ACLU confronted new challenges from feminists, both within and outside the organization. Wheeler is very good at delineating the organization’s vexed relationship with feminism, specifically in regard to the issues of rape and sexual harassment. Attitudes toward rape had been forged decades earlier, when the ACLU championed the cause of black male defendants accused of raping white women. This history predisposed ACLU leaders to oppose rape shield laws designed to limit the kinds of questions that victims could be asked in court and the types of evidence that could be introduced. Sexual harassment also proved to be a difficult and divisive issue within the ACLU, as many defenders of civil
liberties almost reflexively recoiled from proposals that sought to restrict freedom of speech or expression.

As these cases suggest, Wheeler does not present a simple celebratory history of expanding rights, for, in her view, the new regime has its costs. The ACLU's approach, which "tilted toward freedom to and against freedom from," undermined older concepts of privacy and stymied new, alternative ones that would have made it easier for individuals to seek protection from "unwanted sex." This argument will no doubt spur lively debate, for Wheeler's use of the umbrella term unwanted sex at times seems to elide the distinction between unwilling exposure to sexual images and harassment or rape. Clearly, graphic sexual images have become far more ubiquitous in recent decades, but are women today really more vulnerable to rape and sexual harassment than in the past, or less likely to find justice in the court system? [Statistics on rape—which admittedly are hugely problematic—suggest a steep decline since the 1970s.] However one assesses the benefits and costs of sexual libertarianism, Wheeler's excavation of prior, now quite foreign conceptions of "privacy" and "free speech" effectively lays bare the historically contingent nature of contemporary definitions. With How Sex Became a Civil Liberty, Wheeler has established herself as a leading scholar of the law's shifting relationship to sexual expression and behavior. Her work will be read and debated profitably not just by scholars, but also by all those who are concerned with ongoing attempts to curtail, protect, or expand the hard-won sexual rights that most Americans now take for granted.

Rebecca Jo Plant
University of California, San Diego


In the early decades of the twentieth century, about 30,000 immigrants from South Asia arrived in western Canada and the western United States. Nayan Shah's book, Stranger Intimacy, focuses on these immigrants, the lives they made for themselves, and the difficulties they faced when confronted by hostile citizens and a bureaucratic state apparatus that sought to constrain, control, and sometimes exclude them.

Central to Shah's argument is an assertion that these Canadian and American societies privileged permanence, and with
it the nuclear family and assumptions about the binary nature of sexuality. South Asian migrants constituted a transient group, one whose predominantly male composition gave rise to concerns about threats to order and morality, and whose social and cultural practices did not fit comfortably into North American behavioral and sexual norms.

Drawing on a wide variety of primary sources, with particular emphasis on court records and legal documents, Shah's story of South Asian migrants moves, over the course of the book's three main sections, "from the local encounter to national citizenship" (p. 4). At each level, fascinating case studies demonstrate clearly the suspicion of Indian immigrants that permeated the political, criminal justice, and legal systems, and society more generally, in the North American West. Police entrapment of Indian workers in sodomy cases; prosecutorial arguments and judicial rulings in criminal and civil trials involving Indian men; and legislative and legal decisions regarding immigration and citizenship for South Asians in Canada and the United States all reflected and helped to perpetuate a narrative of normalcy and deviance, with Indians usually placed firmly in the latter category.

Shah's broad argument is convincing. In local settings such as police operations and courtrooms, as well as in national settings such as the formulation and implementation of immigration policy, Shah demonstrates that the stable, white, nuclear family—the "heteronormative" family, in the parlance of gender and queer studies—became the standard against which South Asian immigrants were judged and usually found wanting. Drawing on recent scholarship about "whiteness," Shah notes that individual Indians could sometimes invoke particular personal qualities and habits in order to forge exceptions to the racial categories constructed by the state, but the ability to make exceptions and render some Asians "white" in special cases only served to strengthen, rather than undermine, the overall policies of exclusion.

Although Shah's overall argument is strong and the case studies are absorbing, there are a few places where he might have done more with his evidence. Central to many of the case studies is a close reading of testimony and newspaper accounts of court cases involving Indian men. In these cases, Shah finds witnesses, prosecutors, and judges who clearly deploy the language of racial difference and sexual deviance when discussing Indian men, and he convincingly marshals this evidence in support of his thesis. In a few of these court cases, however, the results seem to complicate the picture more than Shah would like to admit, and also provide an avenue for exploring more closely the role of the legal system.
itself within the broader sweep of Shah's argument about the role of the state.

For example, in Vancouver, Canada, in 1916, police used two newsboys to entrap an Indian man, Jawalla Singh, whom they arrested for sodomy. The judge in the case was critical of the entrapment and was also sceptical of the newsboys' credibility, given their own previous brushes with the law. As a result, he issued a suspended sentence, despite the testimony of a police witness who had viewed the encounter by peering over the transom at the boarding house where Singh was staying. Shah discusses a few other cases where judges and juries refused to convict Indian defendants in cases of entrapment, and a case in Gate, Washington, where an Indian man had a sodomy conviction overturned on appeal due, in part, to the fact that the evidence against him was circumstantial, with no eyewitness evidence of his complicity in the actual crime.

None of these cases undermines Shah's overall argument about broad public attitudes toward Indian immigrants in North America. They do, however, point to the fact that there were times when principles other than heteronormativity and racial solidarity rose to the surface. The legal system, with its formalism, its rules of evidence, and its concern for due process, provided a forum where rational, liberal ideals of truth and justice could sometimes trump deep-seated assumptions and prejudices. There is no reason to believe that the judges and juries in these cases were atypical in their attitudes toward race and sexuality, but they recognized injustice when they saw it, or at least when it was so obvious that it could not be ignored.

Finally, Shah's use of the language and analytical approaches of gender and queer theory, among other recent theoretical frameworks, might discourage non-specialist readers. Many of the points Shah makes here are important, and my point is not to dismiss his analysis or his conclusions. Readers not steeped in the style and the terminology, however, might find some of Shah's analytical sections difficult going and even frustratingly obscure. Shah is clearly an author with true democratic sympathies, and a more considered choice of language might have made his own important work more democratic, without sacrificing its intellectual rigor.

None of this should stop any interested party from picking up Shah's book. It is a fascinating and important piece of work, and any reader willing to put in some effort will be well rewarded.

Michael Henderson
California State University, San Marcos
Those interested in Stacey Smith’s new study of unfree labor in California would be well advised to ignore the book’s advertising copy, which asserts that Smith’s book demonstrates that battles over unfree labor in California “reached eastward to transform federal Reconstruction policy and national race relations for decades to come.” Freedom’s Frontier does nothing of the sort. Indeed, while potential links between events in California and those transpiring in the rest of the United States (most particularly the states of the former Confederacy) exist, Smith provides only a handful of truncated assertions regarding the relationship between California and the nation, pays strikingly little attention to events “back east,” and bypasses well-established scholarly discussions concerning slavery’s expansion, its demise in the cauldron of war, and the ambivalent nature of freedom for ex-slaves in the postwar South.

Instead, the value of Smith’s book rests in its employment of “unfree labor” as a synthetic device for understanding the first generation of life after statehood in California. Specialists in the history of the American West will find the raw material comprising Freedom’s Frontier—the murderous dispossession of California’s Indians, the continued existence of variants of chattel slavery in the 1850s, the contentious nature of state politics, the hue and cry over Chinese “coolies” and prostitutes—to be familiar. Yet, even if it is easy to dismiss Smith’s position that historians have steadfastly regarded California as free soil [her notes’ reliance on studies from 1914, 1967, and 1970 provides implicit acknowledgment of the shift in scholarly viewpoints], no one else has spent as much time thinking about the centrality of free and unfree labor and the discourse surrounding it to early California (pp. 48 and 259n2). Consequently, some of Smith’s conclusions not only strike hard, but provide new conceptual vistas. A good example of this is her observation that the Anglo practices of guardianship and apprenticeship toward Native Americans and African Americans in California “recast relations of labor exploitation as family relations,” so that, “when the law transformed young people from captives or slaves into wards,” their labor and bondage became “invisible” (p. 111). A similar story emerges in chapter 5, the book’s most effective one, which buttresses the conclusion that “the politics of female trafficking were almost always linked to the politics of empire” by noting that the presence of
"squaw men" and Chinese prostitutes, understood by Anglo critics as "a nightmarish merger of the domestic sphere and the market," neatly elided the "economic exchange and dependency that structured middle-class American marriage" (pp. 143 and 146-47).

A fair amount of the evidence deployed by Smith comes from the legislative and legal worlds. While the legislative material is often frustrating (Smith seemingly delights in exploring legislative debates and proposals that went nowhere), it is hard to judge the evidence drawn from California's legal system. Since Smith never provides an overview detailing the number of surviving probate court cases concerning the guardianship of non-whites, it is hard to assess the validity of her conclusions. Her contention that judges in Santa Barbara County generally ignored the requirement in state law that "parents or friends" of an Indian child about to become a ward of whites assent to the arrangement, for example, comes across as much less persuasive when one realizes that her analysis rests on only three cases (pp. 118-19). Moreover, Smith's failure to present the legal reasoning undergirding judges' decisions weakens the impact of her evidence from the legal arena. Of course, the extant sources may not contain this level of detail; if that is true, it would have been nice to have been informed of this fact. At other times, Smith's approach to legal history contains clear missteps, as in her ignorance of Gerald Neuman's work on states' regulation of immigration during the nineteenth century, or the promise of federal protection granted by the Angell Treaty of 1880 to Chinese living in the United States (pp. 106-107 and 226).

By the end of Freedom's Frontier, readers are likely to experience a series of competing thoughts concerning the work's merit. As a scholar who works in western history but who also serves as associate editor for the journal Civil War History, I feel comfortable in saying that this is a book that should be read widely. I also feel comfortable saying that it is regrettable that Smith failed to integrate her findings with the work of specialists in the Civil War era such as Jim Downs, Carol Faulkner, Thavolia Glymph, Paul Cimbala, and Susan O'Donovan [just to name a few]. Those who till the scholarly fields of the Civil War era have known for some time that the transition from slavery to freedom in the American South, which was mediated by the ambiguities and limitations of free labor ideology and included many of the same developments that Smith sees in California [e.g., debt peonage, harsh guardianship, and apprenticeship regimes, an insistence on cheap labor, racial judgments, and oppression], also failed "to follow a straightforward trajectory" (p. 176). Only through a full consid-
eration of this literature will the scholarly promise spelled out in Smith's introduction be realized.

Kevin Adams
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*Baseball on Trial: The Origin of Baseball's Antitrust Exemption*, by Nathaniel Grow. Urbana, IL: University of Illinois Press, 2014. 296 pp.; illustrations, notes, bibliography, index; $95.00 cloth; $35.00 paper.

The 1922 *Federal Baseball* opinion of Justice Oliver Wendell Holmes is the piñata of Supreme Court jurisprudence. Justice William O. Douglas deemed the decision "a derelict in the stream of the law"; Second Circuit judge Jerome Frank termed it an "impotent zombi[e]"; and Holmes biographer G. Edward White regarded it as "remarkably myopic, almost willfully ignorant of the nature of the enterprise."

The holding that "base ball" was not interstate commerce within the meaning of the Sherman Act led, with later cases, to the anomaly that a single industry enjoys a judicially created antitrust exemption. The exemption's scope is debated to the present day, including a Ninth Circuit case pitting the city of San Jose against major league baseball over the reservation of Santa Clara County to the San Francisco Giants, contrary to hopes to relocate the Oakland Athletics.

In *Baseball on Trial*, Nathaniel Grow, an assistant professor of legal studies at the University of Georgia business school, places this brief decision in the context of both the case law and the disputes in which it arose. His original research at the Baseball Hall of Fame confirms the view of those who have defended the opinion as consistent with then-extant precedent on the meaning of "commerce." Grow skillfully shows that the result also stemmed from "strategic—and in some cases questionable—decisions by counsel" (p. 2).

Despite the subtitle, the bulk of Grow's book concerns the rules of equity confronting anyone who seeks an injunction restraining employment. The original reserve clause bound players to their current year's employer for next year's services (thus continuing indefinitely), while the contract was terminable by the club on ten days' notice. Plaintiffs early on challenged such contracts as lacking mutuality and being unconscionable. Conversely, litigants who induced players under contract to sign new pacts were alleged to have come into court with unclean hands, unworthy of equitable relief.
The National League and the upstart American League had launched the 1903 National Agreement governing the major and minor leagues, spreading use of contract forms with the player restraints. The Federal League emerged as a contender in 1913 by signing several major league players (including future Hall of Famer Joe Tinker), but some of them promptly signed contracts with their old clubs. Thus lawsuits were filed by both sets of teams, defending their own contracts or attacking the contracts of others.

Grow details the clever lawyering that reduced the vulnerabilities of the agreements over time. The Federal League clubs brought an antitrust and conspiracy case against the major leagues in Chicago; evidence was taken under submission by Judge (and future baseball commissioner) Kenesaw Mountain Landis, but no decision was forthcoming for months, and in late 1915 the majors settled with seven of the eight Federal League clubs.

The holdout was the Baltimore Terrapins, and the antitrust battle was joined in suits filed by the team first in Philadelphia in 1916 and then in Washington, D.C., in 1917. Philadelphia's George Wharton Pepper, counsel for the majors, cited precedents that exhibitions or services transpiring in a single state, such as vaudeville shows or specific sales of insurance policies, were not interstate commerce. But Grow shows that Pepper also shrewdly defended the substance of the clauses; without them, the courts agreed, players would surely gravitate to the largest cities with the largest payrolls and the game's competitiveness would be injured.

Grow is especially insightful about the litigators' choices and their consequences. Baltimore's counsel, William L. Marbury, produced evidence that equipment manufacturers, umpiring services, and Western Union reporting of scores aided the sport economically across state lines. Pepper did not dispute these aspects, instead calling them "incidental" to the single-state exhibitions. By dropping state law antitrust claims, Grow contends, Marbury sharpened the federal issue but limited his chances of success. The Baltimore lawyers labeled the majors with a string of pejoratives. In advice that could be addressed to present-day advocates, Justice Joseph McKenna cautioned Marbury to "cut down the adjectives and get down to the nouns" (p. 214).

Grow explains that the afterlife of Federal Baseball is more remarkable than the conclusions in the case itself. In Toolson v. New York Yankees (1953), the Supreme Court per curiam noted that, in thirty years, Congress had not overruled Holmes and, "without re-examination of the underlying issues," affirmed the holding "so far as that decision determines that Congress
had no intention of including the business of baseball within the scope of the federal antitrust laws." Nowhere did Holmes divine legislative intent with respect to baseball, so Toolson converted a judgment about baseball and commerce, as they appeared to the justices in 1922, into a form of federal industrial policy. The lengthy opinion in *Flood v. Kuhn* (1972) similarly let the exemption stand until Congress might speak. When Congress did speak, in the Curt Flood Act of 1998, it applied the antitrust laws to employment in the majors but otherwise declined to address the exemption.

With careful and measured scholarship, Grow urges later readers of *Federal Baseball* to recognize that the case was heard before widespread interstate radio coverage, and before the broad interpretation of "commerce" in the New Deal decisions. Grow aptly quotes Holmes' speech, "The Path of the Law" (1897), in which Holmes expressed revulsion at a rule's being enforced for no reason other than "so it was laid down in the time of Henry IV." The Yankee—from Olympus, that is—might well feel he has been unduly pine-tarred.

Robert A. James
San Francisco, California
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.


Campney, Brent M.S. "'Ever Since the Hanging of Oliphant': Lynching and the Suppression of Mob Violence in Topeka, Kansas," *Great Plains Quarterly* 33 (Spring 2013): 71–86.


Lindell, Lisa R. “’Awake to All the Needs of Our Day’: Early Women Lawyers in South Dakota,” *South Dakota History* 42:3 (Fall 2012): 197–236.


Merrill, Timothy G., and Brian Q. Cannon. "'Ox in the Mire': The Legal and Cultural War over Utah's Sunday Closing Laws," *Journal of Mormon History* 38 (Fall 2012): 164–94.


Orton, Chad M. "'We Will Admit You as a State': William H. Hooper, Utah and the Secession Crisis," *Utah Historical Quarterly* 80 (Summer 2012): 208–25.


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