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CONTENTS

Introduction
By Stephen F. Rohde, Guest Editor 175

In Re Lee Sing: The First Residential-Segregation Case
By Charles J. McClain 179

Life Hangs in the Balance: The U.S. Supreme Court's Review of Ex Parte Gon-Shay-Ee
By Clare V. McKanna, Jr. 197

Constitutional Convention Debates in the West: Racism, Religion, and Gender
By Gordon M. Bakken 213

Constitutional Rights and Indian Rites: An Uneasy Balance
By Jill E. Martin 245

Rugged Individualism and the Right to Privacy
By Alice L. Hearst 271

Spring Valley Water Works. v. San Francisco: Defining Economic Rights in San Francisco
By Katha G. Hartley 287

Cover Photograph:
Posed for a military review in Hawaii, 1944, are [l to r]: commander of Allied naval forces in the South Pacific, Adm. William F. Halsey; Hawaii governor Ingram Stainback; and “military governor” of Hawaii, Lt. Gen. Robert C. Richardson, Jr. [National Archives]
Criminal Syndicalism: The Repression of Radical Political Speech in California
   By Stephen F. Rohde 309

Constitutional Liberty in World War II: Army Rule and Martial Law in Hawaii, 1941-1946
   By Harry N. Scheiber and Jane L. Scheiber 341

Southern California and the Origins of Latino Civil-Rights Activism
   By Ricardo Romo 379

Memberships and Contributions 409
The two-hundredth anniversary of the ratification of the Bill of Rights on December 15, 1791, is a bitter-sweet occasion. Bitter because it recalls times—distant and not-so-distant—when our cherished freedoms were suspended in the name of patriotism, national security, or dangerous ideas. Bitter because it reminds us that the Bill of Rights often depends upon the tolerance of intolerant people, the faith of insecure people, and the courage of fearful people. Bitter because today there is a rising tide of censorship fueled by demagogues inside and outside government.

But this is also a sweet occasion. Sweet because the Bill of Rights has endured despite these setbacks. Sweet because time and again courageous people—lawyers and judges and ordinary citizens—have valiantly defended the Bill of Rights, enhancing the sum total of liberty enjoyed by us all. Sweet because two hundred years later the Bill of Rights remains an inspiration to peoples and governments around the world, a symbol that individual freedom and national unity can prosper together.

This special issue of Western Legal History reflects the bitter-sweet story of the Bill of Rights in the American West. Others will surely celebrate the seminal achievements in Pennsylvania, Virginia, and New York of great men like George Mason, James Madison, and Thomas Jefferson, who conceived of the Bill of Rights. Others will tell the story of its birth and its growth in the original thirteen states and throughout the East. The essays in this volume, however, will examine how the Bill of Rights took hold in the West and how the western experience advanced (or in some cases retarded) the spread of constitutional rights. In these pages we will meet men and women whom the Bill of Rights was intended to protect. For some that document kept its promise; for others it did not.

In Charles J. McClain's In Re Lee Sing: The First Residential-Segregation Case, we will meet the Chinese residents of San Francisco, herded together by the 1870 Bingham Ordinance, the

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first attempt by an American municipality to segregate its inhabitants on the basis of race. Here the courage of federal Judge Lorenzo Sawyer in striking down the law serves as a reminder of the Bill of Rights's power.

*Life Hangs in the Balance: The U.S. Supreme Court's Review of Ex Parte Gon-Shay-Ee*, by Clair V. McKanna, Jr., shows us an Apache chief who in 1888 confronted the Arizona territorial criminal-justice system, which failed to embrace Native American tribal traditions.

Gordon M. Bakken, in *Constitutional Convention Debates in the West: Racism, Religion, and Gender*, reveals that in mid-nineteenth-century Utah, Nevada, and California not one but several groups were the victims of intolerance: Mormons, nonwhites, and women.

Jill E. Martin's *Constitutional Rights and Indian Rites: An Uneasy Balance* explores the prevailing paternalism toward the religious customs of Native Americans in the Western Territories, an attitude that throughout the nineteenth century imposed measures to "civilize" and "Christianize" the "heathens."

Alice L. Hearst, in *Rugged Individualism and the Right to Privacy*, contrasts the western image of the cowboy, an archetypal figure seeking his own physical and moral space outside the stifling bounds of social convention, with the Puritan image of Horatio Alger, a self-made man striving for individual success within a fiercely competitive world.

With *Economic Rights in San Francisco, 1867-1890*, Katha G. Hartley expands our range to focus on the deprivation of property rights under the Fifth Amendment. The context is the court battles between the City of San Francisco and the Spring Valley Water Works, which tested the limits of government intrusion upon private-property rights in the name of the public interest.

In my article, *Criminal Syndicalism: The Repression of Radical Political Speech in California*, you will meet Charlotte Anita Whitney, niece of a U.S. Supreme Court justice and member of the Communist Labor Party, whose conviction under California's 1919 Criminal Syndicalism Act prompted Justice Louis Brandeis's most eloquent defense of the First Amendment.

*Constitutional Liberty in World War II: Military Rule and Martial Law in Hawaii, 1941-1946*, by Jane L. Scheiber and Harry N. Scheiber, illuminates the imposition of martial law on the entire civilian population of some 465,000 persons in the Hawaiian Islands and the comprehensive suspension of constitutional guarantees.

In *Southern California and the Origins of Latino Civil-Rights Activism*, by Ricardo Romo, we will meet Gonzalo Mendez and his Mexican-American brothers, who in 1947 successfully challenged school segregation in Orange County, ten years before *Brown v. Board of Education*. 
These articles examine the impact of the Bill of Rights on real people in real controversies. More than proving that our constitutional rights are invariably vindicated, they show that in the American West the recurring conflicts between the preservation of inalienable rights and the demands of the state for law and order were contested within the framework of the standards and values of a written declaration to which all parties had consented. Thus, it was a process rather than a result that the Bill of Rights guaranteed.

The articles in this issue reflect a common theme that runs throughout the history of the Bill of Rights. In the words of Justice Robert H. Jackson, writing for the majority in West Virginia State Board of Education v. Barnette [319 U.S. 624 (1943)], “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”

It is tempting to become smug and nostalgic about our commitment to the Bill of Rights. With years of hindsight, we eagerly express our righteous indignation over the struggles of the Chinese, Mormons, Native Americans, Latinos, African Americans, and women. We even embrace the protection of the constitutional rights of radicals and Communists.

From a distant historical perspective, it’s easy to support the constitutional rights of groups and individuals who pose no current threat to us. It is far more difficult to defend the constitutional rights of those who are out of fashion or who represent alien ideologies.

The potential for prolonged war in the Middle East has already generated a rash of anti-Arab sentiment, expressed in everything from hateful songs and jokes to serious death threats. The U.S. Immigration and Naturalization Service has attempted to deport Palestinian students under the infamous McCarran-Walter Act for their mere membership in the Popular Front for the Liberation of Palestine, due to their exercise of the rights of freedom of expression and association fully protected by the Bill of Rights (see American-Arabs Anti-discrimination Committee v. Meese, 715 F.Supp. 1060, C.D. Cal. 1989). As Michael Linfield puts it in his recent book, Freedom Under Fire: U.S. Civil Liberties in Times of War:

Civil liberties and individual freedoms are one of the first casualties of war. As war approaches, a panoply of restrictions are imposed on the civilian population—restrictions that generally last long after peace is declared. War hysteria, xenophobia and fear of subversion all outlive the shooting war. War-time hatred, fueled by patriotic rhetoric, infects the citizenry. Political oppor-
tunists and demagogues have played to these fears, instituting massive restrictions on civil liberties and clamping down on real or supposed dissidents, long after any possible threat to the nation's security has vanished.

Forcing ourselves to confront present-day intolerance and political repression transforms the articles in this issue into more than historical curiosities. They serve to remind us that a true commitment to the Bill of Rights requires eternal vigilance—here and now, each day—lest we are doomed to repeat the violations of the past.
On February 17, 1890, the San Francisco Board of Supervisors passed by unanimous vote an ordinance requiring all Chinese residing or carrying on business in San Francisco to move to a prescribed area of the city within sixty days. Though it was not mentioned in the ordinance, the area designated was the one set aside by law for slaughterhouses, tallow-rendering plants, and other businesses generally considered noisome or offensive. Failure to abide by the ordinance was made a misdemeanor, punishable by six months’ imprisonment in the county jail.

This extraordinary law, the first attempt by an American municipality to segregate its inhabitants on the basis of race, produced a furor in the Chinese community and eventually gave rise to litigation in the Circuit Court of the United States for the Northern District of California. The events leading to the passage of the law and the case that grew out of it constitute one of the more interesting chapters in the legal history of the American West. The episode has a long background, and may even have begun with the first Chinese immigration to the state of California.

It was the misfortune of the Chinese that they chose to settle in the center of San Francisco, cheek by jowl with what was to become the main business district. The location made them a particular focus of Caucasian attention. Inevitably, the area became crowded and quite unsanitary in places [what poor section of a great nineteenth-century city did not?]. But these conditions would probably not have caused nearly so much comment in Caucasian quarters had the district not been in the city center and had it not been inhabited by a despised racial group.

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Complaints about the alleged overcrowding and unsanitary conditions in the Chinese quarter, and appeals to do something about it, date from the earliest period of the immigration. As early as 1854, for example, the San Francisco Herald printed an editorial criticizing the state of the Chinese quarter and wishing that the Chinese could be relocated to a less desirable part of the city.\textsuperscript{1} In 1870 the health officer of San Francisco referred to the Chinese as "moral lepers," whose manner of life was such that they could be counted upon to breed disease wherever they resided. He also expressed the fear that, as they dwelt in the center of the city, any communicable disease that developed in Chinatown might spread rapidly to the whole community.\textsuperscript{2} In the same year the San Francisco Board of Supervisors received a petition—the first of many such—from one of the city's main anti-Chinese organizations, describing the Chinese quarter as a focal point for the spread of Asiatic cholera (a nonsensical charge, according to the health statistics) and urging the board "to provide some means of removing the Chinese beyond the city limits."\textsuperscript{3}

Demands for the removal of the Chinese were renewed in the latter part of the decade, a period of peculiarly intense anti-Chinese agitation. In July, 1878, an official of the radical Working-men's Party presented another petition to the board, setting forth, in its words, "the dangers of pestilence from the presence of the Chinese" and demanding that a Chinese reservation be established. The board seemed disposed to act after a report from its Committee on Health and Police indicated that it did not think such an action would be legal. However, a local journal chided it for its caution. "Can the Board of Supervisors give any good reason why they ignore a respectful petition for the segregation of the Chinese quarter?" the San Francisco Chronicle wrote. It was notorious, the paper claimed, that leprosy existed among the Chinese and that the city needed protection. It pointed to the example of Hawaii, noting that lepers were immediately ferreted out from the general population there and quarantined on the island of Molokai.\textsuperscript{4}

\textsuperscript{1} San Francisco Herald, August 22, 1854.
\textsuperscript{2} Health Officer's Report, Board of Supervisors, San Francisco Municipal Reports for the Fiscal Year Ending June 30, 1870 [hereafter cited as Municipal Reports, 1870]. The available health statistics disclose that, if anything, the Chinese were less prone to disease than their Caucasian counterparts. In the midst of his denunciation of the depravity of the Chinese, the health officer was prompted to observe, "It is indeed wonderful that they have so far escaped every phase of disease." Ibid. at 233.
\textsuperscript{3} Evening Bulletin, June 14, 1870. There were 78 deaths from cholera in San Francisco between July 1, 1877, and June 30, 1878, none of them Chinese. See Municipal Reports, supra note 2 at 216-17.
\textsuperscript{4} San Francisco Chronicle, July 26, 1878.
author of the petition alleged that leprosy was "running wild" in Chinatown and was threatening the whole city. [No support for this charge exists in the available health statistics.]

Elsewhere, he claimed, municipalities had set aside remote areas for their Chinese while in San Francisco they lived in the center of the city. If officials did not act, he intimated that he might urge the masses to do so in their stead. Notwithstanding these pressures, the board, probably convinced of the correctness of its committee's conclusion about its lack of capacity to act, decided not to take any action. In short order, however, the state legislature would remove that as an excuse.

THE CALIFORNIA CONSTITUTION OF 1879

In 1879 delegates elected by the populace at large convened in Sacramento to draft a new constitution for the state. It was clear from the election campaign that the so-called "Chinese question" would be high on the agenda, and early in the proceedings a committee was empanelled to address the topic. The principal result of its deliberations was the incorporation in the new constitution of Article 19, captioned "Chinese." The article contained numerous discriminatory provisions aimed at the Chinese, the most notorious of which was its fourth section, which directed the legislature to "delegate all necessary power to the incorporated cities and towns of this state for the removal of Chinese without the limits of such cities or towns, or for their location within prescribed portions of those limits." The following year the state legislature acted on this constitutional mandate. It enacted a law not simply empowering, but making it the duty of, the legislative body of any city or town to pass legislation providing for the removal of its Chinese inhabitants beyond the city limits or for their enforced residence in some prescribed portion of the city.

See Health Officer's Report, Board of Supervisors, San Francisco Municipal Reports for the Fiscal Year Ending July 1, 1878.

Daily Alta California, August 1, 1878.

California Constitution, 1879, Article 19, Section 4.

Statutes of California, 23d sess., 1880, ch. 66, 114-15. The law in its original form had simply provided for the removal of the Chinese outside the city limits. The alternative of creating a special residential district within the city was apparently included to deal with the protests of state legislators representing districts close to communities with significant Chinese populations. The assemblyman from the county of Alameda, across the bay from San Francisco, said he thought it wrong that San Francisco should be able to empty its Chinese into his or any other county. See Daily Evening Bulletin, February 18, 1880.
THE BOARD OF HEALTH ACTS TO REMOVE THE CHINESE

As it happened, the passage of the removal legislation dovetailed nicely with an effort of the San Francisco Board of Health, already under way, to force the entire Chinese population from its customary place of abode in the city. On February 21, 1880, the board passed a resolution officially declaring Chinatown to be a nuisance. On February 24 the city's health officer posted a notice in Chinatown informing its residents that they would be removed en masse from the area in thirty days. "All the power of the law," the notice read in one of its choicer parts, "will be invoked . . . to empty this great reservoir of moral, social and physical pollution, which . . . threatens to engulf with its filthiness and immorality the fairest portion of our city."

Commenting on the board's action, one leading newspaper held out the glorious prospect that might follow upon this evacuation of the Chinese. "With the Chinese expelled [from Chinatown]," it wrote, "it will automatically become, by reason of its abutting on its East side immediately on the most thronged of the business thoroughfares, and on the other side, on the property the most valuable in the city for residence construction, the most high priced real estate of the city." The paper noted that it had been informed by the health officer that capitalists stood ready to purchase and develop the whole area once the Chinese had been removed.

The mayor of San Francisco, I.S. Kalloch, responded with enthusiasm to the health board's actions, suggesting to the San Francisco supervisors that they confer immediately with the Board of Health to determine how they might be of assistance to it in its efforts, as he put it, "to eradicate this foul cancer from the heart of our otherwise splendid civilization." As to what should be done with the Chinese once they had been forced out of Chinatown, he pointed with approval to the bill, then nearing passage in Sacramento, allowing cities to set aside certain districts for the relocation of Chinese.

In Chinatown the mood was one of apprehension, with some residents apparently fearful that the health authorities were preparing to mount a massive raid on the area. The Chinese Six Companies, the coordinating council of the various Chinese district associations (the Cantonese immigrants came from distinct districts in Kwangtung Province and belonged to corresponding associations), contented itself with posting notices

9 Daily Alta California, February 22, 1880; San Francisco Chronicle, February 24, 1880.
10 Daily Examiner, February 24, 1880.
11 Daily Alta California, February 28, 1880.
advising inhabitants that they should keep their places in good condition to avoid complaint, since feeling was running high against the Chinese at the time. The other principal institution in Chinese San Francisco, however, the Chinese Consulate, decided on a somewhat more assertive course of action. Unlike the Six Companies, whose origins go back to the beginnings of the immigration, it had been in existence for barely more than a year.

The Chinese government, motivated in large part by concern for the tenuous position of Chinese nationals living in the United States, had determined in 1875 to establish a regular and permanent diplomatic presence in this country, but it did not act on that decision until 1878. In September of that year the head of its diplomatic mission, Ch'en Lan Pin, officially presented his credentials as minister to the United States to President Rutherford B. Hayes, and in November informed the Department of State that he was establishing a consulate in San Francisco. He appointed as consuls a relative, Ch'en Shu-t'ang, and Col. Frederick Bee, a Caucasian who for several years had been acting as a

CHAP. LXIV.—An Act to provide for the removal of Chinese, whose presence is dangerous to the well being of communities, outside the limits of cities and towns in the State of California.

[Approved April 3, 1880.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SEC. 1. The Board of Trustees or other legislative authority of any incorporated city or town, and the board of Supervisors of any incorporated city and county, are hereby granted the power, and it is hereby made their duty, to pass and enforce any and all acts, or ordinances, or resolutions necessary to cause the removal without the limits of such cities and towns, or city and county, of any Chinese now within or hereafter to come within such limits; provided, that they may set apart certain prescribed portions of the limits of such cities, or towns, or city and county, for the location therein of such Chinese.

Sec. 2. This Act shall take effect and be in force from and after its passage.


quasi-official spokesman for the San Francisco Chinese community. On February 26, 1880, Consul Ch'en wrote to Delos Lake, a prominent local lawyer and former state judge, asking for an opinion on the legality of the health authorities' proposed actions. Lake promptly delivered the opinion that those actions went far beyond the limits the Board of Health's authority. He pointed out that judicial proceedings were necessary to remove a nuisance, and that an administrative agency could not act unilaterally. Furthermore, an agency could not seek to condemn a whole area as a nuisance on the basis of, as he put it, "a quick visit to certain premises in that area." If the board persisted with its plans, he added, individual property owners in Chinatown would be privileged to resist with force. The letter, which the consulate


14 San Francisco Chronicle, March 1, 1880. Lake pointed out that judicial proceedings were necessary to abate nuisances, and that government officials could not, on the basis of a visit to certain premises in a large urban district, condemn the whole district as a nuisance.
made available to the city's newspapers, apparently succeeded in causing the health authorities to have second thoughts about their plans to evacuate the Chinese quarter. The letter was reinforced by two decisions handed down by the federal circuit court in San Francisco shortly thereafter.

In March, 1880, the court struck down the provision of Article 19 of the 1879 constitution that made it a criminal offense for corporations to employ Chinese. In June the court nullified an 1880 law that forbade Chinese from fishing in the state's waters. Although neither decision specifically addressed the constitutionality of Section 4 of Article 19, or the law empowering municipalities to segregate their Chinese inhabitants, by clear implication they left the remaining anti-Chinese provisions of the state's law under a cloud.

That was certainly the opinion of many Caucasian officials. For example, on May 24, 1880, when the San Francisco Board of Supervisors sought advice on a petition it had received from a state assemblyman urging it to enforce the act providing for the removal of the Chinese, its judiciary committee (citing the first of the two court decisions) reported to the full board that it did not think such action was within the power of local government.

The constitutional provision and statute remained on the books nonetheless, and continued during the 1880s to tempt legislative bodies in various California municipalities. In late May, 1880, for example, the small town of Nevada City, in the foothills of the Sierra Nevada mountains, passed an ordinance calling for the removal of Chinese beyond the city limits (the town relented when the Chinese Consulate notified it that any attempt to enforce the law would be resisted in the courts). Early in 1886 the Sacramento Board of Trustees narrowly defeated a similar ordinance.

### The Bingham Ordinance

What led the San Francisco Board of Supervisors in early 1890, after years of refusing to take action, to cast caution to the winds and attempt to implement the Chinese-removal provisions of state law remains something of a mystery. One cannot point to any single catalyst. Anti-Chinese agitation was no more intense at the time than at many others during the late nineteenth

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15 *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880) [hereafter cited as *In re Tiburcio Parrott*]; *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880) [hereafter cited as *In re Ah Chong*].

16 *San Francisco Daily Report*, June 2, 1880.

century. Concern about Chinatown’s strategic geographic position was certainly high, but no higher than it had been five years earlier, when a special committee of the board had issued a report on the Chinese quarter that was almost hysterical in tone. It described the area as variously “a moral cancer on the city” and “a Mongolian vampire sapping [San Francisco’s] vitals,” and suggested that urgent action was needed to scatter the Chinese, not only out of Chinatown but out of the state of California altogether. The authors of the report included a detailed map of Chinatown, highlighting the uses to which every parcel of property in the area was being put and showing in the most graphic way its proximity to the San Francisco business district. (One newspaper commented that the map revealed that the Chinese occupied the best part of the most desirable business district in San Francisco and were gradually encroaching upon what remained.) Perhaps something had caused Caucasian frustrations and fears to reach breaking point.

On February 3, 1890, Henry Bingham, a member of the Board of Supervisors, introduced a resolution providing that after the expiration of sixty days from the date of passage it would be unlawful for any Chinese person to settle, live, or carry on business anywhere in San Francisco except in an area bounded by Kentucky, First, I, Seventh, and Railroad avenues. This was the area set aside by previous legislation for slaughterhouses, tallow factories, hog factories, and other businesses deemed prejudicial to the public health or comfort. Bingham argued for quick passage of the ordinance but agreed that it should first go to the Judiciary Committee for consideration.

There was much external support for the resolution. The central committee of the Democratic Party endorsed the measure at a special meeting called for the purpose. “We have in our midst hordes of Chinese who have located in the heart of our city and there erected one of the most pernicious plague spots ever known in the history of civilization,” the resolution read. It alluded to the growing importance of that part of the city from a commercial standpoint and the steady push of the Chinese population outward beyond the borders of Chinatown. A similar theme was struck by the Evening Bulletin, which described Chinatown as a blight athwart the northern portion of the city, cutting off some of the fairest residential areas of town from the commercial center.

18 San Francisco Daily Report, July 25, 1885. The full report can be found in Board of Supervisors, San Francisco Municipal Reports for the Fiscal Year Ending June 30, 1885.
19 Examiner, February 4, 1890. For the ordinance designating the area for offensive trades, see Order 1587, Sec. 2, General Orders of the Board of Supervisors (San Francisco, 1890) 17.
20 Examiner, February 9, 1890.
Moreover, the quarter was a "cancer" that was gradually spreading outward "toward the old aristocratic quarters . . . perilously near Nob Hill and . . . threatening the old select regions of Powell and Mason streets." With the removal of the Chinese would come a healthy expansion of manufacturing establishments, of commerce and of living quarters for whites.21

The Examiner, a Hearst paper, argued that Chinatown was a "social, moral, industrial, sanitary, and business curse" and wondered why it had taken so long to act on the state constitutional provisions. In explaining the delay, the editors acknowledged that in previous instances the courts had nullified anti-Chinese measures passed by the city and implied that this ordinance might also face rough going if challenged. However, the paper seemed to encourage the supervisors to pass their measure and then dare the courts to nullify it. "The glorious future that would lie before this city with Chinatown removed is surely worth an effort to attain it," it wrote.22

The Judiciary Committee of the Board of Supervisors met on February 4 and decided to report favorably on the proposed ordinance, but voted to refer it to the city and county attorney for his opinion. This the city attorney furnished a week later. Abandoning the position taken by his predecessors, he now thought the order within the power of the board to enact. Limiting himself to the narrow question of whether the municipality had been specifically granted power to do what it proposed to do and citing the pertinent provisions of the state constitution and state law, he declared: "If those laws do not delegate power to the Board of Supervisors to take such action as contemplated by the proposed order, then it is difficult to understand what language or law would be sufficient to delegate such power."23 At its regular meeting of February 17 the San Francisco Board of Supervisors voted unanimously to pass the measure to print. A final vote of approval was taken on March 3, and the ordinance received the mayor's endorsement on March 10.

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21 See the Evening Bulletin, February 9, 12, 1890. The Bulletin noted that the Bingham ordinance provided for the removal of the Chinese to a part of the city they did not own, and that they would have to rely on private landowners to sell or lease to them. Therein might lie the ultimate solution to the Chinese question, thought the paper: "No treaty compels any owner to lease land to Chinese if he does not want to do so. If the Chinese cannot get any land he must go."

22 Examiner, February 12, 1890.

23 Ibid. In 1882 the then city and county attorney had informed the board that such action would in his view be unconstitutional. Daily Evening Post, May 2, 1882.
First Arrests and the Initiation of Litigation

The Bingham ordinance went into effect on May 10, but the city authorities decided to proceed in a cautious and orderly fashion in implementing it. A plan appears to have been worked out with the consent of the Chinese Consulate, by which a single Chinese would be arrested for violating the law. The arrest would then serve as a vehicle for getting a quick court test of the ordinance's validity. Until that determination was reached, the understanding was, no other Chinese would be harassed or molested in any way. Accordingly, on May 12, the chief of police and the prosecuting attorney had a sergeant of the Chinatown squad swear out a complaint against a prominent Chinese merchant living in the district. The man was arrested and committed to the city prison to await trial. No sooner had the arrest been made than the Chinese vice-consul, Frederick Bee, appeared with a writ of habeas corpus issued by Judge Ogden Hoffman of the Federal District Court, returnable that afternoon. In short order the prisoner was turned over to the U.S. Marshal and admitted to bail (set at $2,000), and the matter was set for hearing on July 14.

These well-laid plans were sabotaged by none other than Bingham himself, who had decided to take the matter into his own hands. On May 20, accompanied by his attorney, he went to the local police court, where he obtained some seventy-five essentially blank warrants for the arrest of alleged Chinese violators of the law. (Since he did not know their real names he gave them fictitious ones such as "Jack Pot," "One Lung," and so on.) These he placed in the hands of the chief of police. In the company of the supervisor and a contingent of the local press, a squad of police then descended upon the Globe Hotel in Chinatown, where they randomly arrested twenty Chinese, not without a certain amount of brutality. A father was forcibly pried away from a sick child, for example, and the queues of the Chinese prisoners were at first tied together to prevent them from escaping. They were later untied, and the prisoners were marched off, two in the custody of each police officer. One of the Chinese prisoners voiced his protest. "Wha' fo' we here?" the Morning Call reported him as saying, "No mo tleaty us. No constituton! Chinaman not good as 'Melican man: no mo', eh?"

24 Daily Alta California, May 22, 1890.
25 Morning Call, May 14, 1890; Examiner, May 13, 1890. The chief of police told a reporter for the Examiner that, should the ordinance be upheld, "You can state for me that I will do everything in my power to carry [it] out to the full extent." He said that in an emergency the city jails could accommodate up to 600 prisoners and he intended to keep them full.
26 Morning Call, May 21, 1890; Examiner, May 21, 1890.
The *Daily Alta*, San Francisco's leading Republican journal and an outspoken antagonist of the Democratic-controlled Board of Supervisors, had, from the moment the Bingham ordinance was introduced, dealt with it as not to be taken seriously. To the paper it was nothing more than a grandstanding play on Bingham's part. (According to the *Alta*, when the ordinance was passed, the public looked upon it as "a bit of humor.") It treated the first arrests made under the law in the same vein, comparing the raid on Chinatown to Don Quixote's tilt at windmills.27

The diplomatic representatives of the imperial Chinese government did not see the matter in the same light. The Chinese Consulate reacted to the arrests with indignation. Bee described them as "a high-handed outrage," and warned the city that the

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27 *Daily Alta California*, May 21, 22, 1890. The *Alta* did, however, venture to predict that the city might have to pay a "very heavy bill of damages" on account of "the ridiculous attempt on the part of the author of the Bingham ordinance to pose as a great public benefactor."
Chinese government would bring civil suits for damages on behalf of each arrested Chinese. The City of San Francisco, he predicted, would be held strictly liable in damages.\(^{28}\) More important, the arrests set off a major diplomatic brouhaha at the ambassadorial level in Washington.

On May 23, 1890, three days after the twenty arrests were made under the Bingham ordinance, an official of the Chinese Legation in Washington, Pung Kwang Yu, wrote a strongly worded letter to Secretary of State James G. Blaine, informing him that he had received news of the arrests. He complained bitterly of "the enormity of the outrage which is sought to be inflicted upon my countrymen," and demanded that the federal government (by which he clearly meant the executive branch) intervene immediately and forthrightly to stop it. This, in his view, was mandated under Article 3 of the 1880 treaty between the United States and China, which provided: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."\(^{29}\)

Blaine quickly acknowledged receipt of Pung's letter, but denied that the executive branch was under any obligation to act under Article 3 of the treaty. He pointed out that the U.S. Constitution made treaties the supreme law of the land and that the judicial power of the United States extended to all cases that arose under treaties. He noted that the Chinese who had been arrested could apply to the courts for release from imprisonment and a determination of the legality of the San Francisco ordinance, and implied that this was sufficient compliance with the treaty. He informed Pung that he had forwarded a copy of his letter to the attorney general for his consideration.\(^{30}\)

Pung replied that under the circumstances he thought something more was called for than pointing out that the courts of the United States were open to Chinese subjects. They always had been, he noted. He emphasized that during the negotiations leading to the 1880 treaty China had surrendered certain rights regarding immigration at the United States' insistence, and had done so with the understanding that Chinese subjects remaining

\(^{28}\) Daily Alta California, May 22, 1890.


\(^{30}\) Blaine to Pung, May 27, 1890, ibid.
in the United States would receive some *special and additional* protection from the federal government. Pung wrote with more than a trace of sarcasm: "It would hardly have been considered by the Imperial Government as a sufficient inducement to enter into the new treaty to be assured that, when the authorities of the great and powerful city of San Francisco should seize upon the Chinese subjects in that city and drag them from their long-established homes and business, the Federal Government would do nothing more than point them to the courts, where they would have the poor privilege of carrying on a long and expensive litigation against a powerful corporation in a community where they were treated as a despised and outcast race."\(^{31}\)

Blaine, however, persisted in a narrow and literal interpretation of the treaty language, contending that it meant that the federal government was bound to take new steps only where existing measures or remedies were found to be inadequate. As yet, he insisted, there had been no such showing. The Chinese had an ample and immediate remedy in the courts. He noted that he had received a reply from the attorney general confirming him in this view and informing him that in the attorney general’s opinion the San Francisco ordinance violated both the treaty and the Fourteenth Amendment to the federal Constitution. Blaine reminded Pung that in more than one instance federal courts had vindicated the supremacy of federal treaties over the positive law of the state of California.\(^{32}\)

What Blaine said was literally true but, one suspects, not of much comfort to the Chinese. It seems clear that the minister was looking for some concrete manifestation of solidarity from the national government—an intervention in court by the U.S. attorney on the scene, for example, or even a statement from some prominent federal official. He was to get none of these.

In the meantime, the consulate in San Francisco had in the meantime already taken decisive steps of its own. Only a few hours after the twenty Chinese had been arrested in Chinatown, Bee had filed a petition for a writ of habeas corpus on their behalf in the federal circuit court for the Northern District of California. The petition alleged that the ordinance under which they had been arrested was unconstitutional and void inasmuch as it abridged rights, privileges and immunities granted the Chinese under the U.S. Constitution, statute and treaty and constituted a rank discrimination against them as opposed to other ethnic groups.\(^{33}\) In the afternoon the prisoners were brought before Judge

\(^{31}\) Pung to Blaine, June 7, 1890, ibid. at 221-22.

\(^{32}\) Blaine to Pung, June 14, 1890, ibid. at 223-26.

\(^{33}\) Petition for Writ of Habeas Corpus, Case File, *In re Lee Sing et al.*, Case 10730, Record Group 21, Old Circuit Court Cases, National Archives, San Francisco Branch [hereafter cited as *In re Lee Sing*].
Hoffman, who was sitting in the capacity of an acting circuit judge. They were released on bail and their cases were consolidated with that of the single merchant whose case was already pending.34

The hearing on the Chinese habeas cases had originally been scheduled for July 14, but the city moved successfully to have the matter postponed several weeks. It then filed an extended amendment to its original return to the habeas petition, in which it sought to set forth at some length its justification for the ordinance under challenge. The pleading deserves a brief discussion inasmuch as it represents one of the more appalling statements of racial bigotry in western legal history. Among other things, it alleged that the Chinese were criminal as a race, vicious and immoral; that they were incorrigible perjurers; that they abandoned their sick in the street to die; that their occupation of property anywhere deteriorated the value of surrounding property; that their presence in any number anywhere was offensive to the senses and dangerous to the morals of other races; and that these racial and national characteristics could only be made tolerable if they were removed from the center of town to a remote area where they would have less contact with other races. (To its credit, the court eventually ordered most of these allegations concerning the racial propensities of the Chinese stricken from the record—whether on motion or sua sponte is not clear.)35 The case of Lee Sing came for oral argument on August 18 before Circuit Judge Lorenzo Sawyer.

Sawyer had been federal circuit judge in California since 1870. Before that he had served as a justice—and for a time as chief justice—of the state supreme court. Over the years his circuit court had acted as a kind of federal censor of Sinophobic legislation passed by the state of California and its municipalities, striking much of it down on the grounds that it trenched on rights guaranteed to Chinese residents by federal law. Sawyer had written a concurring opinion in the 1880 case that struck down the California constitutional provision making it illegal for corporations to employ Chinese, and had also written the opinion that nullified the California law forbidding Chinese immigrants from fishing in the state's waters. In 1886 he had struck down a Stockton ordinance aimed at driving the city's Chinese laundrymen out of business.36 During the 1880s his court had had to

34 Daily Alta California, May 22, 1890.
35 Amendments to Return, Case File, In re Lee Sing, supra note 33.
handle an avalanche of individual cases arising from the successive Chinese-exclusion acts Congress had enacted in that decade.

The attorney for the Chinese, Thomas Riordan, a man well known to the circuit court as a defender of Chinese interests [he had represented the Chinese in both the fishing-rights and Stockton-laundry cases], argued to the bench that the San Francisco ordinance constituted the broadest and most scandalous discrimination imaginable against the Chinese. He pointed out that it compelled all Chinese, not merely those living in Chinatown, to move into the new district or leave the city, whereas some 30 percent of the city's Chinese lived outside the Chinese quarter. If implemented, the ordinance would cause enormous financial damage to Chinese merchants, whose business in San Francisco amounted to $15 million a year.

The city, for its part, claimed that the ordinance was a measure of self-defense. Counsel likened it to an immigration law excluding paupers, lepers, and known criminals from landing on a nation's shores. Chinatown, he said, was "an ulcer in the very heart of a prosperous city." During oral argument Sawyer betrayed considerable irritation with the ordinance and with the city's attempt to defend it. Echoing Riordan's point, he noted that it painted with the broadest brush imaginable, being directed at a whole community regardless of class or business. He curtly rejected an offer by counsel for the city to present evidence on the extent of vice and crime in Chinatown. It was a well-known fact, said the judge, that there were ten times as many Caucasian prostitutes in the city as there were Chinese.37

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**JUDGE SAWYER'S OPINION**

Sawyer read his opinion in open court on August 25. It was pithy, to the point, and, though it did not mention that body by name, extremely sarcastic toward the Board of Supervisors. Three provisions of positive law were applicable to the case: the Fourteenth Amendment to the Constitution, with its guarantees to all persons of the equal protection of the laws and due process of law; Article 6 of the Burlingame Treaty with China, which assured Chinese subjects visiting or residing in the United States that they would have the same "privileges, immunities, and exemptions" as the citizens or subjects of the most favored nation; and Section 1977 of the Revised Statutes of the United States, which provided that

All persons within the jurisdiction of the United States shall have the same right in every state and territory to

37 *Daily Alta California*, August 19, 1890.
make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

That the ordinance discriminated against the Chinese, in violation of each of these, should, Sawyer said, be apparent to any intelligent person, whether lawyer or layman. The ordinance was not aimed at any particular vice or immoral occupation or practice, but was designed, as he put it, "to forcibly drive out a whole community of twenty-odd thousand people, old and young, male and female, citizens of the United States, born on the soil, and foreigners of the Chinese race, moral and immoral, good, bad, and indifferent, and without respect to circumstances or conditions, from a whole section of the city which they have inhabited, and in which they have carried on all kinds of business appropriate to a city, mercantile, manufacturing and otherwise, for more than 40 years." Upon no groups other than the Chinese were such disabilities imposed, he noted.

Besides discriminating against the Chinese and being unequal in its operation as between them and other groups, the ordinance amounted to an arbitrary deprivation of property. Forced to leave their customary places of abode and relegated to a single section of the city, the Chinese would be at the mercy of the landowners in that vicinity. "They would," as he put it, "be compelled to take any lands, upon any terms ... or get outside the city and county of San Francisco."

Sawyer considered the question of the ordinance’s invalidity not worthy of extended discussion. Aiming another barb at Supervisor Bingham and his colleagues, he wrote: "To any reasonably intelligent and well-balanced mind, discussion or argument would be wholly unnecessary and superfluous. To those minds, which are so constituted, that the invalidity of this ordinance is not apparent upon inspection ... discussion or argument would be useless." He concluded by citing a long line of federal decisions vindicating Chinese rights against hostile governmental action, among them his own in *In re Ah Fong* (the Chinese fishing-rights case) and *In re Tie Loy* (the Stockton-laundry case), and that of the U.S. Supreme Court in *Yick Wo v. Hopkins*, four years previously, which voided a San Francisco

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38 *In re Lee Sing et al.*, 43 F. 359 [C.C.N.D. Cal. 1890], at 360.
39 Ibid. at 361.
40 Ibid.
41 Ibid. at 361-62.
laundry ordinance because of the discriminatory manner in which it was being applied.\footnote{118 U.S. 356 (1886).}

The \textit{ Examiner} reported that a large number of Chinese were present in Sawyer's courtroom when he read his opinion and that it gave them general satisfaction. The paper's editors said the decision was exactly what was to be expected from Judge Sawyer — "Mandarin Sawyer," as it dubbed him. "To Judge Sawyer's mind discussion or argument on any question affecting the Chinese is wholly unnecessary. The only thing needed is a glimpse of the almond eye."\footnote{Examiner, August 26, 1890.} The city, for its part, does not appear to have given any thought to appealing the decision.

\section*{Conclusion}

The author of a major study of race relations and the law in the late-nineteenth and early-twentieth centuries has called residential segregation "racism's ultimate expression,"\footnote{Benno Schmidt, "Principle and Prejudice: The Supreme Court and Race Relations in the Progressive Era. Part 1: The Heyday of Jim Crow," \textit{Columbia Law Review} 82 (1982) 444, 500.} and it is difficult to imagine any more vicious expression of Caucasian antipathy toward the Chinese race than the state constitutional provision, the state statute, and the local ordinance that have been the subject of this discussion. The extremity of the state law provisions, calling as they did for the forcible uprooting of thousands of people from their customary places of abode, doubtless made them suspect from the beginning even in the minds of their sponsors. This may be why California towns and cities were reluctant to act on them. That there was a will to act cannot be doubted. As noted earlier, at least one California municipality did enact a removal statute and several others came close to doing so. It must also be remembered that in the years immediately preceding the enactment of the San Francisco ordinance marauding bands forcibly drove Chinese inhabitants out of any number of communities in the western states.\footnote{For a discussion of these events, see Charles McClain, "The Unusual Case of \textit{Baldwin} v. \textit{Franks}," \textit{Law and History Review} 3 (1985) 349.} Had the decision concerning the San Francisco law come down the other way, it would unquestionably have led to the enactment and the implementation of similar measures in other California municipalities. The circuit court decision ended once and for all any thought of that.
Given subsequent events, it is somewhat odd that *Lee Sing*, with its ringing condemnation of racial segregation, did not have a greater impact upon constitutional history. Attempts to achieve the residential separation of blacks and whites by law did not begin until the early twentieth century. In 1910 the city of Baltimore enacted a residential-segregation ordinance, and several other cities in border and southern states followed suit in subsequent years. The typical form these ordinances took was to forbid blacks from buying property on blocks where the majority of occupants were white, or vice versa. Though nominally less extreme (most did not disturb the rights of existing property owners), these measures had much in common with the San Francisco law. They were an expression of deep-seated racial hostility and of fear about the alleged lowering of property values from the presence of non-white populations. They also had the same object. Like the San Francisco law, they were calculated—albeit more indirectly—to ghettoize a racial minority in undesirable areas. The laws were initially challenged in state courts, where, unlike other Jim Crow laws, they met a mixed reception. The Maryland Supreme Court, for example, struck down the Baltimore ordinance, and the Georgia court, at least initially, nullified a similar ordinance passed in Atlanta.

Eventually the National Association for the Advancement of Colored People, alarmed by the spread of such legislation, determined to seek a definitive test of de jure residential segregation in the federal courts. The vehicle chosen was a challenge to a segregation ordinance passed by the city of Louisville, in Kentucky. In 1917 the U.S. Supreme Court, in *Buchanan v. Warley*, ruled unanimously that the Louisville law and all similar measures violated the rights of blacks to be free of racial discrimination in the purchase and sale of property and the property rights of whites as well as blacks. Though *Lee Sing* was the only federal precedent on the subject of residential segregation by race, it played little role in the argument or decision of any of these cases. Counsel for the plaintiff-in-error challenging the law in *Buchanan* cited the case in support of his argument that the Louisville law was unconstitutional. While the NAACP's Moorfield Storey also mentioned it in his brief, neither discussed it extensively, and it is not mentioned at all in the decision by Justice Day.

47245 U.S. 60 (1917).

48 See Brief for Plaintiff-in-Error, 40-41; Brief for Appellant, 25; Supreme Court Records and Briefs, *Buchanan v. Warley*. The thrust of Storey's argument was that the ultimate purpose of the Louisville law was "to establish a Ghetto for the colored people of Louisville."
LIFE HANGS IN THE BALANCE: THE U.S. SUPREME COURT'S REVIEW OF *Ex Parte Gon-Shay-Ee*

By Clare V. McKanna, Jr.

An editorial in the Flagstaff *Arizona Champion* on October 26, 1889, typified the hostile feelings that many Anglo-Americans harbored toward Apaches. It read in part: "Florence [Pinal County, Arizona Territory] will soon have a hanging picnic of five Apaches. . . . A step in the right direction. If the civil authorities had dealt with these 'Red Devils' all along since Arizona became a Territory, the Apache troubles would have been quelled long before they were." In light of such animosity, it is not surprising that the conviction rate for Indian defendants, as compared with whites, was staggering.

Before 1924 most Native Americans (except those covered by the Dawes Act or veterans of World War I) had not been granted U.S. citizenship. However, like other citizens or noncitizens charged with homicide in federal or territorial courts, they were entitled to protection by the Bill of Rights. This protection included, at the very least, the defendant's right to be informed of the charges, with an indictment by a grand jury; to have protection by counsel; not to be subjected to double jeopardy; not to be a witness against him or herself; to enjoy due process of law and speedy and public trial by an impartial jury; and to have witnesses produced for his or her defense. The cases cited below give no indication that any of the Indian defendants were denied their constitutional guarantees as established by the Bill of Rights. On the other hand, this does not mean that they received the same

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treatment as Anglo defendants charged with the same crime. Clearly, they faced obstacles that Anglos did not have to confront.¹

Anglo-American society organized and operated the Arizona Territorial criminal-justice system based on rules established by the U.S. Congress and territorial legislatures. The federal district courts ruled over criminal cases that occurred on federal military posts and Indian reservations, while crimes committed in other areas fell under the territorial judicial system. Federal law recognized only one form of murder—first degree. Federal Statute Title 70, Chapter 3, Section 5339, states: “Every person who commits murder ... within any fort ... or in any other place or district of county under the exclusive jurisdiction of the United States ... shall suffer death.”² Usually cases prosecuted under this statute occurred on board U.S. war or merchant ships or on government military posts. However, territorial law differentiated between first- and second-degree murder; only defendants charged under the former were placed at risk to pay the supreme penalty.

The enforcement of federal and territorial criminal law in the West changed significantly with the development of Indian reservations during the second half of the nineteenth century. Even by 1880, legal jurisdiction over Indians committing homicides was not entirely clear. Indian agents had used Indian police for reservation law enforcement as early as 1862, and the practice broadened when John P. Clum, the Indian agent at San Carlos, significantly increased the Indian police force in Arizona. By 1878 the commissioner of Indian Affairs had incorporated this concept into official policy. However, the courts established by Indian agents normally dealt with minor crime only, while major offenses such as homicide were under federal or territorial jurisdiction. Federal authorities prosecuted cases involving Indians killing other Indians or whites on the reservations under Section 5339.


In 1883 the case of Ex Parte Crow Dog brought about an important change in Indian criminal law. Crow Dog had killed Spotted Tail, a popular pro-white Brulé chief, on the Sioux Reservation. Since the crime occurred between two Brulés on an Indian reservation, the homicide was settled by tribal tradition. The two families met and negotiated a settlement to prevent a continuing tribal feud. Spotted Tail's family resolved the issue by accepting compensation from Crow Dog. Intense public indignation over the killing of an Indian friendly to whites, however, caused the federal government to take action. Federal officials quickly arrested, tried, convicted, and sentenced Crow Dog to death for murdering Spotted Tail on an Indian reservation. Supporters of Crow Dog appealed his case to the U.S. Supreme Court.  

In this decision the court noted that the federal "district court has two distinct jurisdictions. As a territorial court it administers the local law of the territorial government; as invested by Act of Congress with jurisdiction to administer the laws of the United States, it has all the authority of circuit and district courts." It could impose either a life sentence or the death penalty if the conviction were under territorial law, but it had to impose death in the case of conviction under federal statute. In a moving passage that cut to the heart of the Crow Dog case and the Indian/Anglo-American legal issue in the West, Associate Justice Stanley Matthews declared:

It is a case of life and death. It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries

3 Deloria and Lytle, American Indians, supra note 1 at 168-69.

4 Ex Parte Crow Dog, 109 U.S. 560 (1883); and Revised Statutes, 1873-1874, supra note 2 at 1038.
them not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.⁵

The court, concluding that the First United States Judicial District Court of Dakota had no jurisdiction over the defendant, ordered Crow Dog's release.⁶

This unpopular decision elicited a good deal of protest in the West, where many considered the release of Crow Dog a travesty of justice. Pressure on Congress brought about the passage of the Indian Appropriations Act of March 3, 1885, commonly called the Major Crimes Act. Section 9 stated: "All Indians, committing against the person . . . of another Indian or other person any of the following crimes, namely, murder, manslaughter . . . within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory . . . and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commissions of such crimes."⁷

Less than a year later, in United States v. Kagama, the first case to test the new law, the Supreme Court held that because Congress had the right to pass legislation to control behavior on Indian reservations, the Major Crimes Act was legal and binding. After discussing Ex Parte Crow Dog, the limitation of state power, and the constitutional powers reserved for Congress regarding crimes committed between Indians on reservations, Justice Samuel F. Miller noted:

It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . They owe no allegiance to the States, and

⁵This statement clearly applies to conditions that existed between Apaches and the dominant white society in the Arizona Territory, see Ex Parte Crow Dog, 109 U.S. 571 (1883).

⁶It is important to note that the decision did not suggest that Congress lacked the authority over Native American crime committed on reservations; rather, it noted that Congress had failed to take legislative action to ensure control of Native American behavior within that jurisdiction.

⁷See ch. 341, in Statutes at Large of the United States of America, December 1883-March 1885 (Washington, 1885) 365-85. The Major Crimes Act placed seven crimes—homicide, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny—under the jurisdiction of the territorial courts.
receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.... The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.8

Criminal law relating to Indians, as discussed in *Ex Parte Crow Dog*, and modified by the Major Crimes Act of 1885 and confirmed by *United States v. Kagama*, seemed quite clear in 1886: the government could prosecute Indians for committing murder and for six other major crimes on reservations. That issue, however, soon became clouded by events in the Arizona Territory. During the 1880s Arizona territorial and U.S. government officials waged a protracted war against various Apache tribes.

Underhanded dealings by Anglo authorities and atrocities on both sides hardened positions. Eighty-five Apaches had been killed by Tucson residents in 1871, in what became known as the Fort Grant Massacre, while the Cochise and the Chiricahuas had been alienated by their dealings in 1861 with Lt. George Bascom, a recent West Point graduate with no experience with Indians. Such episodes only exacerbated antagonisms. Gen. George Crook provided effective leadership and innovative techniques that eventually brought about the final surrender of most of the "hostiles." Like many U.S. military leaders, he had difficulty trying to keep Indians on the reservations, with poor soil for farming, inadequate water supplies, insufficient game for hunting, often uncooperative agents, and a white population with an almost insatiable desire for land. Crook's approach was to hire Indian scouts, use army officers as acting Indian agents, establish Indian courts, and employ Indian police to arrest uncooperative Indians. His Indian scouts hunted down, punished, and captured hostile bands that left reservations. He broke Indian resistance by using the "head-hunting" technique, whereby his scouts brought back the heads of those who refused to surrender. Most white settlers in the Arizona Territory applauded these tactics, which brought the Apaches virtually under control by 1886.

The Apache wars' conclusion brought significant changes to Indian societies in the Arizona Territory. The Anglo settlers and miners still hated the Apaches, and there is little doubt that the feelings were reciprocated. The Apaches, however, were by then at a decided disadvantage. Anglo-American territorial society incorporated value systems and criminal-justice procedures altogether alien to the Indians within its boundaries. Moreover, reservation and county officials made few attempts to bring the Indians into this new and complicated society.

This is not to say that the Apaches were not guiltless. They did commit homicides, but most of them occurred on or near reservations between 1886 and 1889—at the end of the Apache wars.

By 1886 the Apaches had been confined to a small, sterile reservation with little to replace their old way of life, raiding for cattle, horses, and other booty. Many of them turned to tiswin drinking as a way of relieving the drudgery of farming and the

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pressures generated by spatial confinement. The women normally prepared the tiswin while the men fasted for two or three days. In some cases the drinking parties turned into melees that ended in fights and sometimes death.11

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GON-SHAY-EE, CAPTAIN JACK, AND NAH-DEIZ-AZ

Of the eighty-four cases involving Apaches accused of murder or manslaughter during the period 1880 to 1912, few court transcripts remain.12 A brief discussion of three of the cases illustrates how the criminal-justice system treated these Native Americans.

The best-known case involves Gon-shay-ee, an Apache indicted, tried, and convicted of murder in the Second U.S. District Court, in Maricopa County, Territory of Arizona. After the Indian wars, band chief Gon-shay-ee found it difficult to adjust to living at the San Carlos Agency. In May 1888, the U.S. district attorney indicted him for murdering William Deal, a white man, about fifty miles southwest of San Carlos in Pinal County on June 3, 1887. During the trial two interpreters translated from English to Spanish and back again, a cumbersome method that caused some confusion. Two members of Gon-shay-ee’s band offered damaging testimony against him. Defense counsel H.N. Alexander asked one of them if he knew what it meant to raise his hand and take an oath when called to the witness stand. Va-ca-she-viejo replied through the interpreter, “He says in order to tell the truth he does not need to raise his hand.” The witness admitted that he rode with Gon-shay-ee the day of the alleged killing and stated through the interpreter: “He says when Gon-shay-ee came back he told before the other Indians that he had killed a white man with a pistol—had shot him.” Say-es, another witness and band member, also admitted that “Gon-shay-ee himself said that he himself had killed the man.” With such damaging testimony by witnesses so close to the band chief, the jury found Gon-shay-ee guilty of murder, and, according to

11 The army officers who acted as Indian agents at the San Carlos Agency complained that the Apache men refused to be broken of the habit of drinking tiswin, an alcoholic drink made by fermenting corn. See Capt. F.E. Pierce, “Report on San Carlos Agency,” in Report of the Commissioner of Indian Affairs, 1886 (Washington, 1886) 48.

12 The court transcripts of Gon-shay-ee, Captain Jack, and others exist only because their cases were appealed to the Arizona Territorial Supreme Court and the U.S. Supreme Court. They provide good testimony. See United States v. Captain Jack, Gon-shay-ee, Say-es, Miguel et al., and Bat-dish et al., cases 48-57 and 67, in Arizona Supreme Court, Territorial Records, Criminal Cases, 1871-1912 (Arizona State Archives, Phoenix).
Federal Law Section 5339, the judge sentenced him to death, the sentence to be carried out on Friday, August 10, 1888.13

The second case tried before the Second U.S. District Court involved Captain Jack, chief of a band of Apaches at San Carlos. At least a month before the incident in question, members of Ca-sa-do-ra's band, a rival group, had murdered one or possibly two of Captain Jack's band. Although the testimony is not clear, it appears that one of the victims was either Captain Jack's father or a brother. By Apache tribal custom, Captain Jack or a member of his band had to make retribution against the attackers or he would lose face and possibly his position as chief. After several weeks Captain Jack was disturbed because neither he nor a member of his band had killed a member of the offending group. He approached Col. Snyder, a military officer at San Carlos and a man he trusted, and explained his predicament. Snyder testified: "It was customary among his people that where an Indian had been killed in order to avenge him that relatives of the Indian were justified in killing one of the other band in satisfaction." Snyder also noted that Captain Jack felt "very bad, he could not eat, he could not sleep thinking about this all the time and he thought that the time had come for him to take action in the matter and he was going to settle it to suit himself." Snyder cautioned him not to take the law into his own hands.14

On April 10, 1888, Ca-sa-do-ra's band, all armed with rifles, approached the San Carlos Agency, passing close to Captain Jack's camp. Although the testimony differs as to what occurred and what motivated both groups, it seems clear that Ca-sa-do-ra's band approached Captain Jack's camp and that the latter group opened fire, either to protect themselves or in retribution for the previous killings. In cross-examination, the prosecuting attorney asked Captain Jack, "Have you hated Casadora [sic] and his band since they killed one of your men?" Captain Jack replied, "If you ask me that question, I will ask you if you had a brother killed would you not hate the killer? I so hate them since they killed that man." The evidence submitted by the prosecution, as well as the defense, clearly suggests that Captain Jack did not participate in the actual shooting, which seems to have been done by five of his band. Nevertheless, the jury found Captain Jack, Ilth-kah, Lah-cohn, Has-tin-du-to-dy, Til-ly-chil-lay, and Tzay-zin-tilth all

13See United States v. Gon-shay-ee, 1889, Case 49, in Arizona Supreme Court, Territorial Records [Arizona State Archives, Phoenix); and Section 5339 in Revised Statutes, 1873-1874, supra note 2 at 1038.

14Snyder's comments help to explain the motivation of an Apache male toward his enemy. See typed trial transcript, United States v. Captain Jack, 1888, Second U.S. District Court, Maricopa County, Arizona Territory, in Case 48, 23-24, Arizona Supreme Court, Territorial Records [Arizona State Archives, Phoenix] [hereafter cited as United States v. Captain Jack]; and Ex Parte Captain Jack 130 U.S. 354.
guilty of murder. They were sentenced to the Ohio State Penitentiary for terms ranging from ten to thirty years.\textsuperscript{15}

The final case concerns the killing of Lt. Seward Mott at the San Carlos Agency by Nah-deiz-az on March 10, 1887. Mott, a recent West Point graduate, received orders to report to San Carlos, where he arrived in late November 1886. A junior-grade officer, he worked with the Indian police for two months before taking charge of Apaches farming on the lower Gila River in February 1887. With virtually no Indian experience, he apparently had been heavy-handed in dealing with the Apaches trying to farm the infertile land at San Carlos.

Nah-deiz-az himself had recently returned from the Carlisle Indian School, where he had spent one or two years learning

\textsuperscript{15}See \textit{United States v. Captain Jack}, supra note 14 at 39-41, and at “Judgment and Commitment, No. 89, August 10, 1888.”
farming techniques. On the day of the shooting, Mott arrested and jailed Nah-deiz-az's father for allegedly failing to work on the farm. The old man had complained of a crippling shoulder injury that made it difficult to work in the fields, but Mott ordered the Indian police to take him to the guardhouse. Hearing of his father's arrest, Nah-deiz-az mounted his horse, galloped to the farm, and confronted the lieutenant. The Apache asked angrily, "What did you put my father in the jail for?" Mott's reply is not known, but Nah-deiz-az retorted, "You will not put me in jail," leapt from his horse, drew a pistol and fired. Mott fell from the saddle, jumped up, and began running down a hill with his assailant in pursuit. Nah-deiz-az fired at least five shots at Mott, inflicting three wounds, one of which was fatal.

The incident was typical of the tragedy that sometimes marked reservation life—an inexperienced army officer and an Apache chafing from white arrogance becoming involved in a deadly affair. In a one-day trial, the jury found Nah-deiz-az guilty of murder and sentenced him to life imprisonment at the Arizona Territorial Prison.  

While the federal marshals kept Gon-shay-ee at Phoenix awaiting his execution date, Captain Jack arrived at the Ohio State Penitentiary on July 23, 1888, to serve a thirty-year sentence. Eight other Apaches convicted of either murder or manslaughter joined him in Columbus, but little is known of their sojourn as the prison register lists only the prisoner's name, number, age, height, sentence, and the sentencing court. Under the register's column entitled "Habits," the following was listed for each Apache: "Unknown unless it be killing, scalping, etc." Two of them, Ilth-kah and Hah-skin-gay-gah-lah, died there only a month before the U.S. Supreme Court reviewed the Gon-shay-ee and Captain Jack cases. Prisons were especially hard on Indians, who seldom survived when they were shut up in dark, damp cells devoid of light and ventilation. Meanwhile, Nah-deiz-az languished at the Arizona Territorial Prison in Yuma.


Legal counsels petitioned the Supreme Court on behalf of both Gon-shay-ee and Captain Jack. The court agreed to hear arguments on March 18, 1889, and delivered the opinion on April 15, 1889. A careful reading of the twenty-five-page district-court transcript suggests that Gon-shay-ee probably committed the crime. The question of evidence, however, was not deemed important to the case. The appeal claimed that the U.S. District Court under which the proceedings of both cases occurred did not have jurisdiction as specified by the Major Crimes Act of 1885, and defense counsels therefore asked for writs of habeas corpus. In a decision that held important implications for eleven similar homicide cases involving Apache defendants in the Arizona Territory, Justice Miller cited Ex Parte Crow Dog, the Major Crimes Act of 1885, and United States v. Kagama, noting that "the allegation of the petitioner is that the court which tried him had not at that time ... any jurisdiction of the case against him." Further, he indicated that "the controversy in this case seems to turn upon the question whether the offense for which Gon-shay-ee was tried was an offense against the laws of the United States ... or whether it was an offense against the laws of the Territory, and should have been tried under those laws and by the court sitting to administer justice under them." He stated, "We ... have little hesitation in holding that under the Act of 1885 the case of Gon-shay-ee should have been considered as an offense against the laws of the Territory. ... These Indians, then, are subjected by this statute not to the criminal laws of the United States but to the laws of the Territory." In this case, the territorial court sitting in Pinal County should have tried Gon-shay-ee.18

The reasoning of the high court is quite clear: although the district courts held their sessions within the county seats and had the same judges as the county courts, they were supposed to be treated as separate entities. The Pinal County sheriff should have secured the prisoner, the county grand jury should have issued the indictment, the county district attorney should have prosecuted the defendant, and the county judge should have heard the case. By assuming jurisdiction, the district court had usurped its powers. Miller noted that "the Indian shall at least have all the advantages which may accrue from that change [the Major Crimes Act], which transfers him, as to the punishment for these crimes, from the jurisdiction of his own tribe to the jurisdiction of the government of the Territory in which he lives." The writ was issued.19 Since similar conditions existed in the Captain Jack case, he, too, was released.

18 Ex Parte Gon-shay-ee, 130 U.S. 349-50 (1889), 344 and 351.
19 In the Gon-shay-ee case, this procedural change appeared critical, since the territorial court had two degrees of homicide, while the federal law allowed only for first-degree murder, punishable by death. Ex Parte Gon-shay-ee, 130 U.S. 353 (1889).
The decisions, in *Ex Parte Gon-shay-ee* and *Ex Parte Captain Jack* brought about the release of ten Apaches convicted of murder in district court. The U.S. Supreme Court sent those cases back to the Arizona Territorial Supreme Court, which in turn reversed the convictions. Nevertheless, overturning the convictions did not ensure that the defendants would go free. Some were retried in the county courts and convicted, others were acquitted, and a few were not retried.

County officials retried, convicted, and issued death warrants for both Gon-shay-ee and Nah-deiz-az. Say-es, who had also been convicted of murder in the Second U.S. District Court, was retried in Pinal County, found guilty of first-degree murder, and sentenced to life in Yuma Territorial Prison. Together with five other Apaches, he died in prison within a few years. Others survived their incarceration. Although the U.S. and the Arizona Territorial supreme courts ruled on these murder cases involving Indians in accordance with legal precedence, an examination of data from the territorial county court may help to explain the Apaches' plight at the lower-court level.

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**FIGURE 1**

**ARIZONA TERRITORY CONVICTIONS, 1880-1912**

**APACHE INDIANS**

![Bar chart showing convictions in US District Court and Territorial Court](chart.png)


During a three-decade period following 1880, the dual criminal-justice system that presided over the Arizona Territory handled eighty-four cases involving Apache defendants accused of murder or manslaughter. The conviction rate reached 79 percent for the territorial county courts and 81 percent for the U.S. district courts (see Figure 1). Only seven cases received a verdict of not guilty. Fifty percent of the Apache defendants tried in territorial courts received either the death penalty or a life sentence. Compared with defendants from other ethnic groups accused of homicide, the statistics involving Indians are even more dramatic (see Figure 2). A survey of six counties in the Arizona Territory indicates that Anglo-Americans fared well in the court system, but that Indians had much higher conviction rates. The graphic displays are dramatic: Indians—particularly Apaches—received much harsher judgment from a criminal-justice system that failed to understand their culture and that incorporated racism.

**Figure 2**

**Arizona Territory Convictions, 1880-1912**

<table>
<thead>
<tr>
<th>Ethnicity</th>
<th>Cochise</th>
<th>Coconino</th>
<th>Gila</th>
<th>Pima</th>
<th>Pinal</th>
<th>Yavapai</th>
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<td>Indian</td>
<td>39</td>
<td>21</td>
<td>42</td>
<td>38</td>
<td>47</td>
<td>41</td>
</tr>
<tr>
<td>Anglo</td>
<td>70</td>
<td>70</td>
<td>71</td>
<td>80</td>
<td>75</td>
<td></td>
</tr>
</tbody>
</table>

**Notes:**

22 This high life-sentence and death-penalty rate was common among Native American defendants at the time. In San Diego County, 70 percent of the Native American defendants convicted of murder received life in prison or the death penalty. See Clare V. McKanna, Jr., “The Treatment of Indian Murderers in San Diego, 1850-1900,” *Journal of San Diego History* (Winter 1990) 55-67 [hereafter cited as McKanna, “Treatment of Indian Murderers”].

23 Virtually the same conviction rate for Native Americans occurred in California during the late nineteenth century. In seven counties surveyed, the conviction rates for homicide and manslaughter defendants were 39 percent for Anglos and 71 percent for Native Americans. See McKanna, “Treatment of Indian Murderers,” supra note 22.
FAILURES OF UNDERSTANDING

The failure of the white authorities to understand Apache tribal tradition and to bring the Apache people into the legal system was unfortunate, to say the least. Although their beliefs were quite different, the Apaches had a deep-rooted system of moral values that paralleled the Anglo-American social code. Frank C. Lockwood has observed that the Apache “adhered more strictly to his social code than the white man does to his.” However, the Apache way of life posed some almost insurmountable problems of adjustment, since the Apaches believed that the “highest conception of a virtuous man was that he engage in war and excel as a thief.”

Apache society provided various rules to control behavior. If a man raped another man’s wife, the aggrieved party might try to kill his wife’s attacker. An unfaithful wife also might incite a deadly attack. In such cases, Apache tribal rules usually supported the aggrieved party, who had the right to kill the violator of Apache customs and laws. If a person were killed by accident, or in anger, it was common for atonement to be paid. If the payment were accepted by the aggrieved party, the issue would be settled. On the other hand, the victim’s family had the right to kill the perpetrator if the atonement were insufficient, or if great anger were aroused by the killing. Blood feuds existed from time to time, but whenever possible Apache leaders tried to pressure both parties to settle the issue amicably. Most well-documented Apache murders of their tribal members seem to have occurred after drinking parties. On some of these occasions old grudges resurfaced, and when an Apache decided to fight he meant to kill his adversary.

The Arizona Territory’s criminal-justice system failed to provide methods for bringing the Native Americans into this complicated new legal structure. How could the Apaches possibly understand it? They seldom spoke English, did not understand their legal rights, and were unlikely to receive sound legal counsel. This is evident in the high number of plea bargains for Indians

24 See Lockwood, Apache Indians, supra note 9 at 44 and 42. Lockwood sometimes maintains a hostile attitude toward the Apache, yet his work is still one of the best accounts of the clash between two diverse cultures.

compared with low rates for Anglos.\textsuperscript{26} The few attempts made to help Native Americans adjust during the late nineteenth century may help to explain the high conviction rates among them.

The treatment of Apache murderers within the criminal-justice system of the Arizona Territory from 1880 to 1912 varied somewhat from county to county. Nevertheless, the statistical data clearly indicate that Apaches had higher conviction rates and received longer sentences than whites. With the Apache wars just ending, it was a period of intense racial animosity that naturally influenced the criminal-justice system. One observer noted: “It must be remembered . . . that a large portion of the white population were as barbarous in their modes of warfare as the Apaches themselves; that Arizona was still a refuge for the criminal and lawless men of other states and territories; that war and pillage had been bred into the Apaches, until they were the most savage and intractable Indians in the country.”\textsuperscript{27} With deep-seated mutual animosity, little concern to help the Apache adjust, few attempts to explain their legal rights fully to them, and unsympathetic juries, it is no wonder that Native Americans suffered in the court system.

\textsuperscript{26}In nineteenth-century California, 19 percent of the Indian defendants plea-bargained, while only 2 percent of the Anglos took that option in homicide cases. See McKanna, “Treatment of Indian Murderers,” supra note 22.

\textsuperscript{27}Quote by Jacob Piatt Dunn, \textit{Massacres of the Mountains} (1886), in Robert M. Utley, \textit{A Clash of Cultures: Fort Bowie and the Chiricahua Apaches} (Washington, 1977).
Franklin D. Richards (1821-1899), president of the Twelve Apostles of the Church of Latter-Day Saints and church historian. [Utah Historical Society]
In the second half of the nineteenth century, when western states held the majority of their constitutional conventions, debates over the meaning of rights often resulted in the inclusion of federal Bill of Rights provisions in state declarations of rights. Nevertheless, there was a definite and concerted effort to restrict liberty rather than to expand it. To understand the impact of certain issues at the time, it is necessary to look beyond the words included in those declarations of rights to other sections of state constitutions, convention politics, and previous and subsequent judicial decisions and legislation.

As an example, the great gains in female suffrage in the United States began in the West, but the historic record is not one of uniform expansion of liberty. Rather, some constitutional convention delegates were caught up in dealing with members of minority groups who they believed threatened the community at large. Anti-Mormonism was particularly strong in Nevada, Idaho, and Utah, and polygamy became a national issue as federal legislation dealt with the remaining specter of "barbarism" aided by federal marshals and territorial courts. On a broader plane, territorial legislatures and state constitutional conventions devised limitations on religious rights, and the U.S. Supreme Court itself declared the existence of a wall between church and state.

Racism in general emerged at California's 1849 constitutional convention, when delegates considered the impact of the Treaty of Guadalupe Hidalgo in their attempts to exclude racial minorities from political participation. In 1878-79 the threat seemed to be the Chinese, and again the impact of a federal treaty and decisions of the U.S. Supreme Court had to be considered in

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making a state constitution. It became evident that a transient majority was able to dominate, and only the federal courts' subsequent intervention prevented the hysteria of the times from circumscribing guarantees of liberty.

These examples remind us of how the concept of rights had changed by the late nineteenth century. A hundred years earlier, there had been almost universal agreement that civil rights were not grants from the government, but the property of the people. Liberty and property were intimately associated. One of the people's privileges was the right to be governed by the rule of law, and not by the arbitrary caprice of an unrestrained sovereign. But what would protect liberty if a transient majority held the reins of power?

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**THE ANTI-MORMON CONTEXT**

As an aspect of state politics and lawmaking, anti-Mormonism was part of nineteenth-century America's national prejudice and regional settlement patterns—an agitation that focused on plural marriage, bloc voting, and communal behavior. In Nevada and Idaho the settlement patterns of early Mormons gave politicians volatile local issues around which to build coalitions, seek litigation, and form legislation and state constitutional provisions.

Anti-Mormon agitation in Utah virtually co-existed with the creation of the communitarian faith and became rabid against the practice of plural marriage. The genocide committed at Mountain Meadows in 1857 and the "Mormon War" of 1857-58 further convinced many that the Mormons were deviants who must be dealt with by law or with force. At the national level, Congress passed a series of statutes attacking polygamy and Mormon church structure. The Utah troubles had their counterparts in Nevada and Idaho.

In Nevada the earliest anti-Mormon agitation took the form of demands for a separate territory. Created in 1850, the Utah

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1 John Phillip Reid, *The Concept of Representation in the Age of the American Revolution* (Chicago, 1989) 78.
4 One of the most notable examples of the assault by law was the case of *Reynolds v. United States* [1879], 98 U.S. 145.
Territory sprawled over 220,196 square miles, from the eastern rim of the Rockies in central Colorado to the Sierra Nevadas farther west. Mormons were able to penetrate the Carson Valley and set up a trading post to service the lucrative gold-rush traffic, but the territorial government did not reach the area, and the growing number of settlers wanted the stability of government and their hands on its machinery. In 1851 local government was established at a settlers’ meeting held at Reese's Mormon Station. Utah reacted in 1852 by extending the boundaries of its existing counties into Nevada, but government personnel did not follow territorial law.

In addition to creating a popular government, the settlers petitioned Washington for separate territorial status; when that failed, they petitioned California for annexation for judicial purposes. In 1854 Utah again acted by law, creating the county of Carson, but failed to provide any officials to run the government. However, the following year it established Carson County as the third judicial district of the territory and appointed judges for the district. Non-Mormon reaction to the influx of territorial officials and a Mormon expeditionary missionary force grew, and in mid-1857 most of the Mormons withdrew and the district was attached to Salt Lake County for governmental purposes. Again, settlers convened and petitioned Congress for territorial status.

Four years of continuing struggle between Mormons and non-Mormons hardened the political lines, and the Comstock rush gave greater population impetus to the arguments for separate status. When the South withdrew from the Union and its representatives left Congress, the major obstacles for the creation of a territory disappeared, and President Buchanan signed the bill on March 2, 1861. The anti-Mormon forces had successfully combined their position with that for home rule to achieve territorial status. The threat of Mormon control was an effective rhetorical tool with which to convince lawmakers to adopt the desired position.

Anti-Mormonism in Idaho was both political and geographic in nature. Mormon settlement in the territory predated its creation. The Salmon River mission of June 18, 1855–March 27, 1858, brought the Mormons to the Idaho Territory (then the Washington Territory). The Mormons founded Franklin in 1860 and moved on to found Paris in Bear Lake County in 1863, in the belief that they were still in the Utah Territory. They had been subjected to

7 Ibid. at 53-55.
some antagonism from the outset in southeastern Idaho, but 1872 marked the beginnings of systematic political activity against them. The organization of political parties in Utah that year spilled over into Idaho, and Mormon affiliation with the Democratic Party shaped political activity against them for the rest of the territorial period. Sectional issues included repeated attempts to divide the territory and carve out the northern area to benefit the Washington Territory. Anti-Mormonism became a tool with which to argue that such a move would jeopardize Gentile interests because Mormon numbers in the southeast might overwhelm faithful Republicans. In southeastern Idaho the Independent Party's anti-Mormon movement dominated regional politics in the 1870s and would become a territorial issue in the 1880s.

By 1882 anti-Mormonism had become a strong territorial issue and a Republican Party initiative. Idaho Republicans used the Mormon menace to elect a territorial delegate, while in Washington national Republicans denied the Utah territorial delegate seat to George Q. Cannon and passed the Edmunds Anti-polygamy Act of 1882. The act effectively disfranchised the Mormons in both territories. With the franchise denied, anti-Mormon forces used territorial legislation to disqualify Mormon legislators from sitting in 1884 or from holding county offices. The device was the test oath, in which the oath taker swore that he did not adhere to the polygamy teaching of the Mormon church. Later, this statutory device would have state constitutional ramifications when Idaho delegates assembled to write fundamental law. By the time of the constitutional convention, the territorial legislature had passed amendments to the test-oath law to exclude Mormons from holding office, from voting, and from performing jury service if they had been Mormons on January 1, 1888. The governor signed the legislation despite constitutional doubts about its retroactivity.

The constitutionality of the Idaho test oath was resolved by the U.S. Supreme Court in *Davis v. Beason*. In April, 1889, Samuel D. Davis was indicted in the Third Judicial District of the Idaho Territory in the county of Oneida for conspiracy to obstruct the administration of the law and unlawfully attempting to register to vote. Davis's attorneys argued that Idaho could not

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11 Ibid. at 561-62.

12 Ibid. at 604.

refuse registration based solely upon church membership because membership had not been declared a crime. Further, they argued that the statute was unconstitutional because it prohibited the free exercise of religion. For this proposition they cited Reynolds v. United States\textsuperscript{14} and Dred Scott v. Sandford.\textsuperscript{15} The statute also violated the Fourteenth Amendment as well as the Sixth Article of the Constitution. The latter specifically stated that "no religious test shall ever be required as a qualification to any office or public trust under the United States." Finally, the lawyers urged that the Edmunds Act had preempted the field and that the Idaho Territorial Legislature was without authority to legislate on the same subject matter. Justice Stephen J. Field wrote the opinion for a unanimous court, rebutting every claim.

Field confined his opinion to jurisdictional issues, but used the case to condemn polygamy openly. The issue that required legal attention was the jurisdiction of the territorial court. Polygamy and bigamy were clearly criminal: "They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man," Field maintained. Further, "Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment." Finally, "To extend exemption from punishment for such crimes would be to shock the moral judgment of the community."\textsuperscript{16} To dispose of the free-exercise argument, he observed that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."\textsuperscript{17} From this it followed that the territory had the authority to make law and there was no preemption problem because the federal statute had not dealt with teaching, advising, and counseling the practice of bigamy and polygamy, thereby leaving these questions open to regulation by territorial government.

As historical evidence, the opinion contained a footnote demonstrating the long-standing position of the nation as to the extent of religious freedom. The centerpiece of the note was the New York Constitution of 1777, which declared that "liberty of conscience ... shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."\textsuperscript{18} The court listed numerous other examples of state constitutional condemnation of Mormon practices, to make clear to any reader that the constitutional door was shut to church arguments.

\textsuperscript{14} 98 U.S. 145.
\textsuperscript{15} 19 Howard 393.
\textsuperscript{16} 133 U.S. 333, 341.
\textsuperscript{17} 133 U.S. 333, 344.
\textsuperscript{18} 133 U.S. 333, 348.
One victory for the church came the previous year in Nevada. In *State ex rel Whitney v. Findley*, the Nevada Supreme Court struck down the Nevada test-oath statute of 1887.\(^{19}\) That law had stated that "no person shall be allowed to vote at any election in this state ... who is a member of or belongs to the 'Church of Jesus Christ of Latter Day Saints' commonly called the 'Mormon Church.'" The case grew out of a demand by George B. Whitney, who met all the qualifications of the Nevada State Constitution, to register to vote. The court held that it was "not within the power of the legislature to deny, abridge, extend, or change the qualifications of a voter as prescribed by the constitution of the state."\(^{20}\) After finding the statute to have trespassed upon this sacred tenet of constitutional law, the court reminded legislators that "all regulations of the elective franchise ... must be reasonable, uniform, and impartial."\(^{21}\)

Despite the victory in Nevada, the *Davis* case left the Mormon legal staff with little hope of constitutional relief. The end of the legal wars of the region fittingly came in Idaho, in *Toncray v. Budge* (1908).\(^{22}\) The question was again the franchise, and the impact of the test-oath act of 1885 in light of the test-oath provisions of the Idaho Constitution, Article 6, Section 3. The Idaho Supreme Court found that the constitutional section was intended to suppress bigamy and polygamy. The 1885 test-oath statute had to be read with "the public history of the day," the court maintained.\(^{23}\) That history revealed that the constitutional-convention delegates intended "to strike at the organization [the Mormon church] and deprive its members and adherents of the elective franchise."\(^{24}\) Given such intent, the question turned upon what the Mormon church advocated. Based on a Utah Territorial Supreme Court case and Mormon publications, the court found that in 1889 the church adhered to plural marriage. The court also considered the fact that, after *Davis v. Beason*, church President Wilford Woodruff had issued the 1890 manifesto renouncing polygamy. That manifesto was accepted by the government of the United States, and in 1893 President Harrison issued a general amnesty and pardon. The next year Idaho also accepted the declaration. This left the Idaho constitutional article in place, "just as positive to-day as ever against any person who may fall within its prohibitions," but disqualification now required proof of personal violation rather than simply religious.

\(^{19}\) 19 P. 241.

\(^{20}\) Ibid.

\(^{21}\) 19 P. 241, 243.

\(^{22}\) 95 P. 34, 35.

\(^{23}\) 95 P. 34, 35.

\(^{24}\) 95 P. 34, 35.
affiliation. The Woodruff Manifesto had cleared the way for political participation.

The combination of the manifesto of 1890 and the church’s repudiation of bloc voting by the Saints removed anti-Mormon arguments from the public sphere. The Idaho test-oath act of 1885 was repealed in 1895. Except for a flare-up of anti-Mormon politics between 1904 and 1908, the era of Mormon baiting had ended.


Brigham H. Roberts (1857-1933), president of the First Council of the Seventy of the Church of Latter-Day Saints. Roberts was elected a member of the 56th Congress, but was barred from taking his seat because of his plural marriages. [Utah Historical Society]
The issue of suffrage in Utah was not one of religion, but of gender. Historians have suggested that female suffrage at the Utah Constitutional Convention was largely opposed by Gentiles, and that with bipartisan support the convention adopted it easily.\textsuperscript{27} A closer analysis suggests that non-Mormon support for the measure among the 107 delegates was crucial, and that factors other than party affiliation played a significant role in final acceptance. Votes on procedural questions reveal those of David Evans, an Ogden lawyer and a Gentile, to be critical. It was he and the other Gentiles who supported expanded economic rights for women, and who encouraged the delegates to adhere to their party pledges in support of female suffrage.

The Utah Constitutional Convention of 1895 afforded the opportunity to make women's suffrage part of fundamental law. The passage of an enabling act gave the people of Utah an immediate sense of impending statehood and, as Leo Lyman has termed it, "political deliverance." The people entrusted the making of fundamental law to their convention delegates, who saw the opportunity for change as well as the risk of offending a traditionally suspicious Congress. Suffragists pleaded their case with theoretical and historical arguments. Their efforts were successful, but narrowly so. The forces that enabled their victory represented many of the economic, political, and religious constituencies at the convention. The delegates' behavior also portrayed aspects of nineteenth-century constitutionalism. Both territorial law and bloc voting seem to have been significant in determining the outcome of women's suffrage.

The constitutional-convention delegates in Utah voted in party blocs and followed dominant personalities.\textsuperscript{28} The largest bloc was composed of Mormon Democrats, whose spokesman was Franklin S. Richards, a Salt Lake lawyer who advocated an ideological line akin to that of the church hierarchy. Another bloc of Democrats followed William Creer, a Mormon lawyer and state legislator. Evans voted consistently with this bloc. The Creer Democrat bloc considered party affiliation as important as ideology and occupied the moderate position in the convention. Their moderation and high bloc cohesion in proposing and supporting compro-

\textsuperscript{27} For example, see Stanley S. Ivins, "A Constitution for Utah," \textit{Utah Historical Quarterly} 25 (1957) 102-6; Richard Poll, "A State is Born," \textit{Utah Historical Quarterly} 32 (1964) 12. Also see Lyman, \textit{Political Deliverance}, supra note 2 at 261-63.

mise did much to move things along at the convention. The Republicans were ideologically split, especially on the issue of female suffrage, and generally followed personalities. George M. Cannon, cashier of Zion's Savings Bank and Trust Company and the Mormon spokesman, led a Republican bloc to the right of center. John Henry Smith, a Mormon Apostle, led another Republican bloc that generally voted with the Cannon group, but was even further to the right. Franklin Pierce and Dennis Eichnor, both of whom were non-Mormon lawyers, each led separate blocs to the Republican left.

The convention also had its radicals. Joel Ricks and Theodore Brandley advocated a liberal ideology (to the left of Creer) that included “progressive reform” and broader individual access to the levers of social power. To the far right, William F. James led a coalition of Gentile and Mormon miners and capitalists who supported vested interests and conservative schemes.

The Gentiles were split and did not vote as a religious faction. A small group voted with Charles S. Varian, a former U.S. attorney and a leading spokesman. The remainder voted with other blocs.

Utah's territorial experience with women's rights and suffrage had been extensive. Mormon religious doctrine that women were not essentially inferior to men had become part of territorial
Women were allowed to participate in the marketplace and in the political arena. Mormon legislators removed many of the English common-law limitations on married women's commercial rights and extended the franchise in 1870. Women in Utah demonstrated a responsible taste for participation, and were particularly active in advocating suffrage and religious freedom during the territorial period. Congress, in the belief that Mormon men used women to control election results in the Utah Territory, abolished women's suffrage in 1887 as part of its effort to remove church influence from secular affairs. However, the federal statutory assault upon Mormonism of the period did not remove the property rights gained by women or affect the social attitudes that produced them.

The support for women's rights was quite evident in the convention debates. For example, when the delegates discussed the Miscellaneous article, a section on women's separate property came to the floor. Previously, only a homestead section had survived the convention's axe. One proposal after another had been chopped from the article as delegates disposed of special-interest proposals, but not so women's economic rights. Evans immediately rose to the defense. Fearing that the section would be defeated because the delegates did not realize its significance, he explained that it was an abrogation of outdated common law and was "in keeping with all the advance of recent years." Varian supported Evans and reminded his Mormon colleagues that the section did no more than validate their own handiwork, which was already part of territorial law. The convention agreed, and continued "working hard to give women equal rights with men," as William Howard, a Mormon blacksmith, put it.


30 The basic statutes involving women's rights are in Compiled Laws of Utah (1888), II, Section 2528. The Utah Territorial Supreme Court gave judicial sanction to these provisions in Warr v. Honeck (1892), 8 Utah 61. On suffrage, see O'Dea, Mormons, supra note 29 at 249. Also see Gordon M. Bakken, The Development of Law on the Rocky Mountain Frontier, 1850-1912 (Westport, Conn., 1983) 30-32.


32 Proceedings and Debates of the Convention . . . Utah (Salt Lake City, 1898) 1782 (Evans), 1783 (Varian), 1782 (Howard) [hereafter cited as Proceedings . . . Utah]. For biographical information, see Salt Lake City Daily Tribune, March 4, 1895.
Women's suffrage received broad support both in and out of the convention. A majority of delegates already favored the issue before they entered the convention halls, according to the *Salt Lake City Daily Tribune*. Various women's organizations bombarded the delegates with petitions and memorials, and spread their arguments across editorial pages throughout the territory. Mormon women's experience as victims of the statehood movement and participants in it had left them with a progressive interest in the nature of politics that went beyond their personal interest in suffrage. Their arguments in favor of equal rights and against taxation without representation were not new, but their publicity campaign was persuasive. The *Deseret Evening News* reported "tumultuous demonstrations" in and out of the convention, and the debates reflected many of the activities and arguments current in the street.

Female suffrage was not a partisan issue because both parties pledged support for its inclusion in the constitution. The political problem was that the Republican majority split on the issue and Brigham Roberts's Democratic faction joined the opposition. The resulting impasse caused the convention to go through an unanticipated "hell," according to Edward Snow, a Mormon schoolteacher. Roberts led his Democratic colleagues with stirring oratory. Richard Mackintosh, a Salt Lake businessman, led the Republican opposition to the female franchise. One-third of the delegates joined in this opposition coalition.

The delegates favoring female suffrage were eight votes short of a majority. Thirty Democrats and sixteen Republicans in the bloc voted together the entire time on the issue. Evans's key suffragist bloc was composed of four Gentiles, three Republicans, and a

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33 *Salt Lake City Daily Tribune*, March 4, 1895.

34 See ibid., March 4, 12, 15, 19, 20. *Deseret Evening News*, March 7, 25, 28, 29, 30, April 1, 2, 1895. For an example of the petitions received by the convention, see Proceedings ... *Utah*, supra note 32 at 142-43. See also Symmes Cannon, "Politicians," supra note 31 at 173.

35 Proceedings ... *Utah*, supra note 32 at 559. Snow defined hell as "to want to and can't." "They [Republicans] want to oppose the insertion of an equal suffrage plank in the Constitution, and they cannot because they are bound down by a party chain and they are surrounded with flame that has no end, and the worm that dieth not," he said in a flurry.

36 The voting patterns are based on an analysis of seven roll calls. Proceedings ... *Utah*, supra note 32 at 685-86, on a motion to cut debate on women's suffrage (52-93); 703, on a motion to postpone debate (42-51), 732-33, on a motion to recess (44-52); 736-37, on a motion of the previous question (51-39); 765, on a motion to recommit (42-52); 767, on Section 1 containing female suffrage (75-14); 804, on final passage of the suffrage article (75-16). The procedural votes identify the general delegate groupings, while the substantive votes identify ideologues on the issue. The program used was Allan G. Bogue's *Boguetab*, Social Systems Research Institute, University of Wisconsin.
Democrat. The Evans bloc defended the measure against opposition tactics of delay and irresolution.

Opposition leaders used old arguments and longstanding fears, maintaining that women's suffrage would restore a Mormon majority, destroy party balance, encourage Mormon bloc voting, create social chaos, cause business depression, and defeat statehood.\(^{37}\) Roberts lent respectability to these traditional Gentile arguments by supporting them.\(^{38}\) He attacked female suffrage because of its alleged negative effect in Washington, and, citing Wyoming's experience as well as suspicions of a Mormon conspiracy, argued strenuously that the opportunity for statehood was more significant than the passage of a suffrage section. It was Utah's "golden opportunity."\(^{39}\)

The territorial press amplified the anti-suffrage arguments. Editorials warned of dire ramifications in Washington if women got the vote in Zion. Roberts presented letters and petitions against female suffrage.\(^{40}\)

Pro-suffrage leaders replied without obvious cohesion. The rebuttal denied any Mormon conspiracy, questioned the potential for adverse congressional action, and praised the territorial record on women's rights and suffrage.\(^{41}\)

The debate roared on, with both sides going to excess. One delegate introduced Milton's *Paradise Lost* into the debate.\(^{42}\) Some of the delegates became angry by the third day of discourse and thought other issues needed convention attention.\(^{43}\) Some voiced appeals for separate submission to the people and subsequent legislative action as compromises, while others, like Elias Morris, a Salt Lake brick manufacturer, saw the time as ripe for female suffrage and the forum appropriate for the action.\(^{44}\)

The delay hardened suffragist resolution to proceed. Many accused delegates of behaving like legislators while Roberts continued to attack the issue and its adherents.\(^{45}\)

In this context, separate submission became popular. Eichnor offered a proposal to submit Section One of the article separately. Other proposals followed quickly. Suffragists determined that separate submission would not resolve the deadlock, and joined

\(^{37}\) *Proceedings . . . Utah*, supra note 32 at 407.

\(^{38}\) Ibid. at 412.

\(^{39}\) Ibid at 421-29.

\(^{40}\) *Ogden Standard*, March 29, 1895; *Salt Lake Argus*, March 30, 1895; *Salt Lake Tribune*, March 12, April 2, 1895. These editorials were cited by Roberts in a speech on April 2. *Proceedings . . . Utah*, supra note 32 at 592-94.

\(^{41}\) *Proceedings . . . Utah*, supra note 32 at 556, 559, 429-31, 434, 437.

\(^{42}\) Ibid. at 459-73, 582-98, 505-13.

\(^{43}\) Ibid. at 457-8, 553.

\(^{44}\) Ibid. at 535.

\(^{45}\) Ibid. at 561, 564-67, 573-74, 582-98.
to defeat motions to adjourn and recommit in order to force a vote.\textsuperscript{46} The final vote was lopsided, but the procedural maneuvers that enabled any vote succeeded by small margins.\textsuperscript{47} The Evans faction, which had favored separate submission, voted with other suffragists to include women's suffrage in the constitution.

The Utah convention's action on the issue was part of a tendency of nineteenth-century state constitutional conventions to legislate fundamental law. Delegates, distrustful of legislatures, limited their discretion in many constitutions and, where they could, used constitution making for dynamic reforms.\textsuperscript{48} Territorial law also played a role in Rocky Mountain constitutional conventions. Utah drew not only on the experiences of Wyoming and Colorado, but also, and more pervasively, on the territory's own legal experience, which was the bedrock for several constitutional provisions.\textsuperscript{49}

The observation that economic factors were not significant in western women's suffrage cannot be sustained by Utah's record.\textsuperscript{50} Delegates focused precisely upon women's economic rights, which gained rapid acceptance in the region.\textsuperscript{51} Legislators recognized the critical need for women to have both opportunities and protection in the marketplace.\textsuperscript{52}

Alan Grimes suggests that female suffrage was "a politically expedient and efficacious method of bolstering the voting strength, social values, and organization structure" of Mormonism.\textsuperscript{53} If this is true, the question arises as to why the debate was so prolonged when Mormons dominated the convention. Obvi-

\textsuperscript{46} Ibid. at 680, 688-89, 697, 705, 705-9, 711. Evans's momentary departure from the party-line approach to the suffrage issue was more dramatic when his overall voting record is considered. He consistently voted with Democratic party leaders on twenty roll calls analyzed, including the seven on suffrage.

\textsuperscript{47} Proceedings . . . Utah, supra note 32 at 735, 758, 765.

\textsuperscript{48} Richard G. Lambert ably expressed this apprehension in the convention: "I am led to think that in those propositions are too much legislation. We are here to formulate fundamental principles, and the balance should be left for the Legislature to arrange in the future. We are not here to enact the laws that are necessary, but simply to formulate that fundamental principle upon which laws shall be founded." Ibid. at 553.

\textsuperscript{49} See Deseret Evening News, March 7, 1895.


\textsuperscript{53} Grimes, Puritan Ethic, supra note 50 at 46. For a different perspective on women and suffrage in Utah, see Judith Rasmussen Dushku, "Feminists," in Claudia L. Bushman, ed., Mormon Sisters: Women in Early Utah [Salt Lake City, 1976] 177-97. Regarding the grassroots support for female suffrage in Utah, Jean
ously statehood was more precious to some Mormons than women’s suffrage; others saw a chance to act for women and to merge existent economic rights with the franchise. Suffrage for women was not simply a Mormon political tool, but a recognition that a rich territorial history and a progressive political society required action on behalf of women. Further, the fact that without Gentile votes the Mormons seemed unable to pass a women’s-suffrage article compels a contrary interpretation. Despite the tactics of attrition, parliamentary maneuvering, and frequent recourse to personal rhetorical attack, Utah’s delegates were able to grasp the golden opportunity for the people of Utah.

The interconnectedness of suffrage and Mormonism was a late-nineteenth-century phenomenon, but the test oath was linked to the founding and the Civil War. In 1776 Congress passed a series of resolves defining treason and allegiance, and encouraging the states to act. This they did, passing statutes establishing test oaths that were designed to crush internal dissent.⁵⁴ States disenfranchised Revolutionary War loyalists who refused to take oaths. “Loyalists and others considered this legislation a prime example of their contention that the patriots were not democratic unless it was in their interest to be so,” according to Chilton Williamson.⁵⁵ In 1862 Congress again entered the loyalty-oath business with an “iron-clad” oath for civilian and military officers that they had never voluntarily borne arms against the United States, given aid or encouragement to persons in armed hostility thereto, or held office in the Confederacy.⁵⁶ This “effectively barred former rebels from national office.” The Confiscation Act of July 17, 1862, says Michael Benedict, “made the prohibition explicit but was less effective than the law requiring the oath because its disqualification provision referred only to those

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convicted of treasonable activities.\textsuperscript{57} In 1865 Congress extended the oath to persons seeking admission to the bar of any federal court or appearing there by reason of previous admission.\textsuperscript{58} Two years later, in \textit{Ex Parte Garland}, the U.S. Supreme Court struck down the statute as well as a Missouri law requiring a priest to take a test oath.\textsuperscript{59}

The federal use of test oaths had its state counterparts in the era of the Civil War. Maryland, Missouri, West Virginia, and Tennessee used test-oath and registration laws to restrict the franchise.\textsuperscript{60} Missouri's test oath was particularly broad, extending to state and local officers, voters, jurors, corporate officers, teachers, lawyers, and clergymen. In 1867 the Supreme Court struck it down by a narrow 5-4 majority, with Justice Stephen J. Field writing for the majority. The Constitution forebade the passage of a bill of attainder or an ex-post-facto law. Missouri had violated this aspect of the Constitution, and, as Field wrote, the Constitution "deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."\textsuperscript{61} The state supreme courts of Tennessee and Missouri resisted the implications of the federal court's decision and persisted in sustaining state restrictions by test oath upon the franchise.\textsuperscript{62}

On the federal level, the Civil War test oaths lingered for decades. The 1862 test oath survived because \textit{Ex Parte Garland} applied only to the 1865 statute relating to lawyers. In 1868 Congress passed a statute allowing former Confederates relieved of disability by Congress to take a prospective oath and assume federal office. An 1871 statute addressed certain other Confederates caught in an 1862 statutory requirement by accident of timing and allowed the taking of the prospective oath. In 1884 Congress repealed the "iron-clad" oath and retained the prospective oath, which Justice L.Q.C. Lamar took in 1884 as the first former Confederate on the U.S. Supreme Court bench.\textsuperscript{63}


\textsuperscript{59}4 Wall. 333 (1867).


\textsuperscript{61}4 Wall. 277 (1867).

\textsuperscript{62}Fairman, \textit{Reconstruction}, supra note 58 at 242.

\textsuperscript{63}Ibid. at 612-14, 732.
The test-oath statutes were time-tested cudgels in the hands of territorial politicians, disfranchising Mormons and restricting their ability to affect policy through legislation. Removing Mormon control of courts and juries increased federal control, as did the confiscation of church property. In Idaho and Nevada the test oath was used to punish perceived deviants and to ensure Republican Party dominance. Fortunately, the final chapter of the franchise story in the three states was the expansion of suffrage to women, with all the progressive hopes that went with this most cherished right of citizens in a republic.

Despite the national effort to crush slavery and polygamy, and the unfortunate linkage of polygamy and suffrage in Idaho and Utah, the work of the Utah Constitutional Convention was liberating for women. It is clear that all struggled to obtain statehood and women's suffrage, but it is also clear that for a majority it was more important that women vote than that Utah become a state. The value of liberty was higher than the political latitude afforded by escaping bonds of territorial vassalage.

The element of racism in western constitutional conventions can best be illustrated by the conventions in California in 1849 and 1878. California itself became a national issue, as did the extension of slavery in the territories because of the American victory in the Mexican War.

In 1849 the California Constitutional Convention delegates assembled in Monterey to consider the treaty ending that war and the institution of slavery. They also pondered other demons lurking in the social and economic fabric of the nation: some thought that banks were the cause of most current ills, while others found that lotteries and gambling were tearing at the family and the morals of a people. Dueling was only one symptom of the depravity into which America was sinking. Notwithstanding all these ills, the delegates of 1849 reserved their greatest animosity for African-Americans. Racism was clearly part of the consideration of rights. At California’s second constitutional convention, the issue was again prominent in the debates, and was directed against the Chinese. Economic depression had given rise to criticism from the Workingmen's Party, whose members identified the Chinese immigrants as a cause of society's woes.

At the 1849 convention, rights were not easily won and were sometimes lost. On September 19, Gen. M.M. McCarver introduced a section requiring the legislature to pass laws prohibiting the migration of free blacks into the state, prohibiting their settlement in the state, and prohibiting slaveholders from bringing slaves into the state with the intent to emancipate them.
On this proposition for constitutional inclusion, the delegates launched a racist debate of monumental proportions. Blacks and other members of minority groups caught their rhetorical barbs. McCarver had previously introduced a similar proposition in the Bill of Rights debate, but had withdrawn it in favor of including the language in the legislative article. The question of constitutional positioning thus joined with issues of public policy. The general accompanied his introduction of the section with an explanatory speech that set the tone for the debate. First, California's unique situation made immediate action necessary. The state was in a "dangerous position" because of "the inducements existing here for slaveholders to bring their slaves to California and set them free." Second, it was a self-evident truth that the state had "a right to protect itself against an evil so enormous as this." Third, the evil was real since free blacks were "injurious to the prosperity of the community" because they were "idle in their habits, difficult to be governed by the laws, thriftless, and uneducated."64

McCarver asserted that constitutional provisions would be "more effectual" if left to legislation alone. Further, he trotted out state constitutional history to show public support for the end as well as for the means of action. When given a chance at the polls, Illinois voters had put such a provision in their constitution. All the present convention need do was to institutionalize the ban on free blacks.

There were other important reasons for acting, according to McCarver. Miners would not allow blacks to compete in the mines, as evidenced by their actions against miners from Chile. The efforts to keep blacks out of the labor pool would result in "collisions," or violence in the mines. The government had a duty to prevent such violence against persons. Robert Semple, a fellow Kentucky native and president of the convention, agreed, citing popular support as well as economic justification. Free blacks would take away white jobs in the mines, and when work ran out the miners would all be impoverished and a public expense. "The whole country would be filled with emancipated slaves—the worst species of population—prepared to do nothing but steal, or live upon our means as paupers," he concluded.65 Moreover, the danger to labor was a threat to the tax base.

William E. Shannon, a Columbia lawyer, opposed the section "decidedly." He contended that "free men of color have just as good a right, and ought to have, to emigrate here as white men." Further, he stated, it was an economic mistake to exclude immigration by blacks, because their labor as household servants

65 Ibid. at 138.
would be needed for "the comfort and convenience of domestic life." Whether rights or labor considerations were paramount became a matter of debate for the opposition.

O.M. Wozencraft, a doctor from San Francisco, thought the delegates should protect labor "against the monopolies of capitalists who would bring their negroes here." Further, "We should protect [white workers] against a class of society that would degrade labor, and thereby arrest the progress of enterprise and greatly impair the prosperity of the State." The greatest danger was to labor, and any danger to labor was danger to all.

Kimball H. Dimmick, a former member of the New York Bar, responded. He pointed out that the Bill of Rights of the very constitution they were writing provided for equal rights for foreigners, while McCarver's proposition would deny rights to "Americans born in the United States—their forefathers born there for many generations." The provisions were inconsistent, he said. Further, the section's practical impact would be minimal because slaveholders were unlikely to flock to California to free blacks, despite what others foresaw. It was important for the delegates to recognize their solemn duty. They occupied "a peculiar position. We are forming a Constitution for the first State of the American Union on the shores of the Pacific. The eyes of the world are turned toward us." They should "set the example of an enlightened policy to the nations of the Pacific, and the constitution should be "a model instrument of liberal and enlightened principles." If the danger that some envisioned ever materialized, Dimmick wanted the legislature rather than the convention to deal with it.

Lansford W. Hastings, a lawyer from Sutter, was equally annoyed by the inconsistency, but his position was markedly antiblack. He feared that blacks might assume that the California Bill of Rights, declaring that all men are "free and entitled to certain rights, privileges, and immunities," applied to them. The consequences could be great: "If this ever reaches the ears of the African race, it occurs to me that they will conceive this country to be a very favorable asylum for the oppressed; especially when they find that upon that broad principle we have added another, that neither slavery nor involuntary servitude shall ever be allowed in this State." With the "thousands" Hastings could see on their way, he wondered how best to behave. "Let us not receive them at all; but if we do, let us receive them as slaves."

66 Ibid. at 139.
67 Ibid. at 140.
68 Ibid.
69 Ibid.
70 Ibid. at 142.
John McDougal, a merchant from the same town, put Hastings’s sentiments into the form of a substitute motion to require the legislature to exclude all blacks, whether slave or free.

Shannon returned to the attack upon racism. The issues were clear. “Upon the broad principle which we have adopted, of admitting all freemen of all nations, we cannot consistently exclude any race,” he admonished. Further, many free blacks in free states were “most respectable citizens,” and “men of wealth, intelligence, and business capacity.” Of constitutional significance was that these men had “all the rights and privileges of citizens of that State.” Nevertheless, Shannon’s assault had its limits. As Illinois had adopted such a provision by separate submission to the people, so, too, should California. “If the people of the State of California choose to adopt a similar measure, very well,” Shannon announced, and suggested that the delegates leave “all these doubtful measures of policy to the people—placing no restrictions upon them beyond the broad general principles of a liberal and enlightened Constitution.” Clearly, principles of privilege and immunity of citizens under an enlightened constitution could not stand in the way of democracy, regardless of the racism of a transient people. Popular sovereignty was also a weapon in the hands of those restricting rights and limiting comity.

Henry A. Tefft, a New York-born Wisconsin emigrant practicing law in Nipomo, San Luis Obispo County, rebutted Shannon’s factual assertions regarding the status of free blacks. The problem was competition with white labor, he maintained. Black labor degraded white labor in competition, he said; further, black people were “troublesome and unprofitable” as well as “most ignorant, wretched, and depraved.” Regardless of their personal character, Tefft opined, the greatest evil of allowing the free immigration of blacks to California was the impact upon white labor.

Seeing no emergency, Dimmick nonetheless agreed with Tefft. Rather the delegates should leave the matter to the first legislature than put something in the constitution that would cause trouble in Congress. He would not address the “propriety or impropriety of the principles involved in this question; but [objected] to any provision . . . which would . . . encumber the Constitution and deprive the Legislature of its legitimate powers of legislation.” Leaving it to the legislature would, of course, mean that the delegates could avoid the issue entirely.

Semple supported the exclusion of all blacks, based on the authority of the will of the people expressed at the polls. There

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71 Ibid. at 143.
72 Ibid. at 144.
73 Ibid. at 146.
was an exception: "Those who came on the last steamer, and others who came previously, are free by the adoption of our Constitution. They are here, and it is not right or just to drive them out of the country." The reason for their exemption, according to Semple, was that "they came without any possibility of notice." Notice was part of due process when a person was to be deprived of a property interest. Even blacks, as undesirable as they were to Semple, were entitled to simple due process.

The strongest constitutional objection to the provisions was raised by Edward Gilbert, a San Francisco printer. "If you insert in your Constitution such a provision or anything like it, you will be guilty of great injustice—you will do a great wrong, sir—a wrong to the principles of liberal and enlightened freedom," he declared. The provisions were contrary to the Bill of Rights, contrary to the principles of liberty. Why were the delegates doing the unconscionable? "It is simply because he is black," Gilbert retorted. He urged the delegates to go beyond the wishes of transient constituencies, because this constitution would go before the Congress and the entire nation, and pointed out that "it is an immunity and privilege of a citizen of one State to remove from that State to another—to remove also his goods and chattles and effects; and no law that we can pass can prevent him from doing it." The delegates were "treading upon the United States' Constitution itself." They were inconsistent in singling out blacks; to be consistent, they should include "the miserable natives that come from the Sandwich Islands and other Islands of the Pacific... the degraded wretches that come from Sydney, New South Wales... [and] the refuse of population from Chili [sic], Peru, Mexico, and other parts of the world." It was not the impact of slaves or free blacks that mattered, but their color, Gilbert charged. Were the delegates willing to commit a violation of the U.S. Constitution to institutionalize their racism?

J.D. Hoppe, a San Jose merchant, rejected Gilbert's assertions, based on a set of limited facts. Looking at the race riots of Cincinnati and Illinois, he concluded that the races could not mix without violence. It was better to prevent the confrontation from ever occurring with a constitutional provision.

And so it was. The McCarver proposition passed on September 19, 1849. The fact of passing in the Committee of the Whole left the matter for subsequent consideration in convention.

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74 Ibid. at 148. Robert Semple had read law. He published the first Spanish-American newspaper in California and was the Bear Flag Republic's secretary. Barbara R. Warner Collection, August 28, 1884, Huntington Library.

75 Browne, Debates, supra note 64 at 149-50.

76 Ibid. at 152.
On October 3, 1849, McCarver proposed an amended version of his section, to deal with previous criticisms. To avoid the charge that the clause excluding free black immigration was unconstitutional, based upon the experience with Missouri's admission, the amended section established the intent not to violate the privileges and immunities clause of Article Four of the U.S. Constitution. McCarver had borrowed from the Missouri Constitution to give legitimacy to his proposal, regardless of the broader issues of congressional consent to admission and human rights. He urged passage of the section, because legislators might "vacillate upon the subject." He thought the matter of such significance that it must be fundamental law, and that convention delegates were somehow more representative of the people of the state in dealing with an issue their constituencies demanded.

Support for his scheme came from expected quarters. Semple reiterated the argument that the state had a right to protect itself from "an evil [such] as that class of population." Further, "If we are to be restricted in this right, or any rights that naturally belong to us, then Congress might just as well say that those negroes shall come to our ballot boxes. It would be quite as constitutional," he predicted. Maintaining that "the other States, either in their individual or confederate capacity, have no rights over the local affairs of this State," he declared he would "prefer being kept out of the Union to all eternity, rather than acknowledge such a power on the part of Congress, or admit these herds of free negroes." And, to maintain the state's right of self-defense, he said, "take my rifle and defend that right as freely as I did the flag of the United States."

James McHall Jones, a San Francisco lawyer, used a constitutional argument to support the convention's authority to act in the matter: "There is no provision in the Constitution of the United States prohibiting it [the McCarver section]. It would be absurd; it cannot be. Every State has the right to determine the qualifications of its own citizens." The fact that New York could

77 Ibid. at 331. Also see Woodrow James Hansen, The Search for Authority in California (Oakland, 1960) 152 [hereafter cited as Hansen, Search for Authority]. When Missouri requested admission as a state, its constitution excluded free Negroes from the state. In the Missouri Compromise debates, Northerners had argued that this violated the privileges and immunities clause in that it denied rights to black state citizens who were entitled to federal protection. Part of the Missouri Compromise of 1820 was admission conditioned on a constitution not to be interpreted as authorizing any statute excluding citizens of any state from enjoying constitutionally guaranteed privileges and immunities. See Thomas D. Morris, Free All Men (Baltimore, 1974); Paul Finkelman, An Imperfect Union (Chapel Hill, 1981); Don E. Fehrenbacher, The Dred Scott Case (New York, 1978) 100-13; Glover Moore, The Missouri Controversy, 1819-1821 (Lexington, 1953).

78 Browne, Debates, supra note 64 at 331.

79 Ibid.
James McHall Jones, constitutional convention delegate and first judge of the U.S. District Court, Southern District of California. (The Bancroft Library)

grant citizenship rights to free blacks did not require California to do so: "That construction would lead to the most absurd of absurdities." No state, he pointed out, had granted free blacks citizenship rights at the time of the U.S. Constitution's ratification, and, anticipating the arguments of the Dred Scott case, he stated that "the article in the Constitution of the United States was designed to protect the citizens of each State in the enjoyment of those fundamental and inherent rights which it guarantees to all citizens of the Union. It was not designed to interfere with the local political regulations of the States." To maintain such a position "would destroy our entire system of State sovereignty." Politics in Congress, however, dictated that the delegates submit the section directly to the people rather than putting it in the body of the state constitution.80

80Ibid. at 332.
Supporting the McCarver proposal, Francis J. Lippitt, a San Francisco lawyer, added to the constitutional interpretation, looking to "the object of the Federal Constitution" and finding an intent "to prevent war between [the states]." To illustrate, he argued that New York could not constitutionally provide that Virginia's citizens were barred from entering the state. On the other hand, if "a religious sect, or a sect under the color of religion, carrying on licentious practices" were barred by legislation, a court would uphold that action as constitutional. The action was not against a state but against an evil in conflict with the "peace or comfort or happiness of . . . citizens." Despite the constitutionality of McCarver's section, he, too, recommended alternative action. He wanted to leave it to the legislature and thereby avoid congressional scrutiny and the risk of losing statehood.81

Favoring deferred action, W.M. Steuart, another San Francisco lawyer, argued that such matters should not be put into constitutions but should be handled by the legislature. "We are going on continually adding to this instrument when we ought to be cutting it down," he charged. Rather "let us imitate the Constitution of the United States. We are here bringing in every thing that we can possibly force into the Constitution as an organic law of the State," he noted, and the delegates should omit "every thing that is not indispensably necessary."82 Steuart combined the lofty concept of the constitution's stature with the delegates' growing tendency to avoid deciding the issue. His argument was also a conservative way of avoiding confrontation with a Congress that was itself anxious about questions that divided the nation, North and South.

Charles T. Botts, a lawyer who was also the naval storekeeper at Monterey, joined the chorus of delegates in opposition to the McCarver section and advocated leaving the issue to the legislature. A.J. Ellis, a San Francisco merchant, spoke out against the section, based on his constituents' horror at the idea of such a section in the state's organic law.83 With the delegates stampeding into inaction, they voted down the McCarver section. Its substitutes lost one after another. Delegate racism was temporarily overcome by constituent pressure, constitutional doubt, and the preeminent goal of statehood.

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RACE, SUFFRAGE, AND THE FEDERAL TREATY POWER

The question of color and the constitution presented itself again in the debates over the right to vote, in which the focus was

81 Ibid. at 333-4.
82 Ibid. at 336-7.
83 Ibid. at 338.
on Mexicans and Indians. The suffrage committee of the convention reported an article that limited the franchise to white males, 21 years of age, resident in the state six months and in the county twenty days. Edward Gilbert offered an amendment to include Mexican citizens opting to become American citizens under the Treaty of Guadalupe Hidalgo, and read sections of the treaty to the delegates to establish the amendment’s authority. Charles Botts immediately rose to insert the word “white” before “male citizens of Mexico.” He made clear that his intent was to make sure that “no citizens of the United States should be admitted to the elective franchise but white citizens.” To Botts, nonwhites were “the inferior races of mankind.”

The treaty’s legal effect was a matter of concern, given Botts’s amendment. Gilbert asserted that the treaty did not make distinctions of color, but of citizenship. Mexicans who followed the treaty procedures to become American citizens could vote as Americans. In that the treaty was superior to the state constitution, its terms must control. The only remaining question was a matter of Mexican law.

The interpretation of Mexican law called for special expertise, and William Gwin asked for someone to address the issue. Pablo Noriego de la Guerra, the former collector of customs of Santa Barbara and Alcalde, rose to the occasion. He questioned Botts on his understanding that Indians could vote under Mexican law. Botts replied that he believed they could, and had offered the amendment to prevent such a horrible result in California. De la Guerra then informed the convention that under Mexican law no race was excluded from voting. Further, Indians were citizens of Mexico. Stephen C. Foster, a Los Angeles farmer, added that although few Indians voted in Mexico because of property qualifications, they were nonetheless considered full Mexican citizens. Lansford Hastings grasped the point and declared that, if persons were allowed to vote under Mexican law, the treaty preserved that right in California. There was nothing the delegates could do about it because the treaty overrode the state constitu-

86 Ibid. at 63.
87 Ibid. The Mexican Constitution of 1836 had limited the franchise to persons with an income of at least 100 pesos. In 1842 the limit was increased to 200 pesos. Hansen, *Search for Authority*, supra note 77 at 121. Subsequently, courts found that both Mexicans and Indians in California were covered by the treaty provisions. *People v. Naglee*, 52 Am. Dec. 312, 326-28 (Cal., 1850); *United States v. Ritchie*, 17 Howard 525, 539 (1854). See James H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill, 1978), 253. The legal
Regardless of the treaty provisions, Hastings expressed his horror at candidates' marching "hundreds up to the polls." Kimball Dimmick and Henry Tefft wanted to look at Mexican law carefully and proceed with caution. Gwin interjected a section from the Texas Constitution that excluded Indians not taxed, Africans, and descendants of Africans. Botts accepted the concept that his amendment inserting the word "white" would be subject to criticism, and adopted Gwin's suggestion. Indians and blacks must be excluded.

Gilbert challenged Botts on his assumptions of authority and his disregard for the treaty. He read the second section of Article Six of the U.S. Constitution, which established that "this treaty is therefore the supreme law of the land." Refusing to make "invidious distinctions as to color," he insisted on abiding "by the treaty of peace and the Constitution of the United States." Hastings observed that if California did not accept the treaty a state of war could still exist and, on a more serious note, that it was only on the basis of the treaty that California was now in American hands. "If we violate the stipulations of this treaty, we violate the Constitution," he asserted, and accused Botts of wanting to "declare that no man shall vote unless he have black hair and black eyes." This was going too far: "This is a principle of State rights that cannot be maintained in the present case. We must include every citizen of Mexico which the treaty of peace admits to the right of citizenship," he continued. In conclusion, he painted with a broad constitutional brush: "We dare not exclude one human being who was a citizen at the time of the adoption of that treaty. Every man who was a citizen then, is a citizen now, and will be while he lives in California, unless he declares his intention to remain a citizen of Mexico. Our Constitution must, therefore, conform to the treaty, or it is null and void." This was a classic statement of the constitutional supremacy of the treaty, and a confirmation of the federal treaty power and its preemption of state action.

Botts fired back a constitutional salvo of his own, making a significant distinction. Calling the opposition's doctrines "novel," he said he had "heard many federal doctrines, but never any like these," and accused the opposition of being political in its asser-

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88 Browne, Debates, supra note 64 at 63.
89 Ibid. at 64.
90 Ibid. at 65.
91 Ibid.

Knowledge among the delegates not educated in law is manifest in these debates. Foster had been an interpreter for the Mormon Battalion and knew Mexican history; de la Guerra was experienced in the law though without the benefit of formal training.
tions rather than legal. "A new party had come up," he declared, a party that contended there was "a power in the Executive of the United States to make a treaty contrary to the provisions of the Constitution." The treaty was binding, he argued, because it did not contradict the Constitution, but was nonspecific regarding the franchise, albeit specific on the matter of citizenship. Even if Indians were citizens of Mexico, "the question is still open whether they shall be voters." Gwin agreed, citing Virginia's experience and the historical fact of property and literacy tests for the franchise. Limits in the law were already upon the books.

Focusing on the plain meaning of the treaty language, Gilbert thought it clear that all Mexican citizens "should be admitted to all the rights and privileges of free citizens of the United States." J.D. Hoppe agreed. The treaty was the supreme law of the land; if the convention did not abide by it, surely the Congress would reject the constitution and statehood would be lost.

Dimmick acknowledged that the treaty was superior to any state constitution, and that it accorded to Mexicans who became U.S. citizens all the privileges and immunities under the U.S. Constitution. But did those privileges and immunities include the rights of suffrage? He argued that they did not. It was clear from law and history that all men did not have the right of suffrage, and as clear that it would be foolish to give "wild Indians" the right to vote. The issue was whether citizens were "capable of understanding our institutions and . . . [were] responsible and orderly citizens." Citizenship and suffrage were separable in history and in law.

James McHall Jones agreed with the distinction and the constitutional conclusions. He noted that the treaty had given Mexican citizens the right of American citizenship unless they declared that they wished to continue their Mexican citizenship. The right to vote was another matter: "You do not admit citizens into the Union, and make them citizens of States by treaty," he declared. "This is a Union, not of men, but of States." The Constitution gave "the States the right to determine who shall be voters." McCarver agreed. O.M. Wozencraft wanted to exclude all Indians. Botts's amendment passed. Even a provision to allow Indians who paid taxes to vote was erased from the section by a vote of 25 to 15.

With Indians, Africans, and the descendants of Africans now barred from the ballot box, it was time to consider the section as amended. The issue of race and treaty provisions still occupied the delegates. The final vote was a tie, 20 to 20, with Dimmick,

92 Ibid. at 66.
93 Ibid.
94 Ibid. at 67.
95 Ibid. at 69-70.
the chairman, casting the deciding vote in favor of the Gilbert amendment as amended. The date was September 12, 1849.

On September 29, delegates returned to the handiwork of the Committee of the Whole and unearthed all the prior arguments. Henry W. Halleck questioned the section as being in conflict with the treaty. De la Guerra, speaking through an interpreter, entered a plea for California's Indians, particularly those owning property and paying taxes. Dimmick was moved to amend the section to exclude only Indians not taxed. Halleck offered another amendment; Steuart offered a substitute section. Votes followed, and amendments fell to the convention roll calls. On October 3 the delegates took up the issue. After furious debate and numerous votes, they supported the Vermule amendment, to allow the legislature to give Indians the vote, but only with a two-thirds concurrent vote.96

Racism had triumphed, excepting only those Indians who paid taxes. But for the efforts of Hastings and the Hispanic delegates, Indians would have been entirely excluded from any chance at the franchise. The debates indicate that prejudice against blacks was equally felt by the same delegates against Indians. Many wanted California's franchise to be for white males only, despite the fact of Hispanic prominence, black migration into the gold fields, and an indigenous Indian population.

Race, the Treaty Power, and State Authority

The Civil War and the Reconstruction amendments to the U.S. Constitution would wipe out some of the constitutional damage done to minority groups, but when California's delegates next assembled in 1878 to write a new constitution, times seemed to have changed little. This time the Chinese were the target.

The 1878 convention was called to stem the tide of the radical left in the Workingmen's Party. Congress would not have oversight authority of the language. Only the U.S. Constitution and the developing law of the land stood in the way of those who would limit rights in the name of jobs or race. Again, as in 1849, a federal treaty would be questioned in the debates over the rights of a minority.

Despite the rabid politics that sent delegates to Sacramento in 1878, the men who assembled articulated concepts both of the document and of their duty to the people. Some thought the constitution a code, others a set of fundamental principles. Most knew that it would endure for some time and not be subject to the vagaries of politics, that it enabled legislative action as well as barring it. Whether the will of the people embodied in the docu-

96Ibid. at 305-8, 330-41.
ment could set aside fundamental principles was a matter of concern for those who valued the rule of law. But what was the content of the rule of law? What power did the delegates have from the people? Was public policy best made in a constitution or in a legislature? Those questions animated the debate.

The delegates agreed that a constitution must contain fundamental principles, but disagreed about the content and origins of those principles. Despite all the high-flown rhetoric that the constitution's foundation must "be laid in the eternal principles of right and justice, that it shall be laid in view of the contingencies and circumstances that surround the State and commonwealth," as John P. West of Los Angeles put it, the search for order in 1878 became rooted in the particular without regard for the great general principles of timeless writ.97

The delegates understood that the constitution would be of long duration, and that, as G.A. Johnson of Sonoma observed, they were there "not as a mere legislative body; not for a day; not to enact ephemeral laws, but to frame a Constitution, which, if adopted, is to govern the people of California to-day and their descendents."98 John S. Hager argued that the convention should therefore "engraft in the Constitution every provision that [the delegates thought] necessary for the protection of the people, rather than to leave it to the Legislature."99 While durability to some meant caution lest a gross error of judgment be made, to others it was an incentive to limit legislative power and decide current issues with clarity and permanency.

Besides having longevity and authority, constitutions avoided the introspection of legislatures and courts. Hager noted that statutes "are sometimes repealed. Statutes are sometimes declared unconstitutional, while Constitutions are permanent, and cannot be declared unconstitutional."100 William P. Grace of San Francisco recognized that the people had sent their delegates to Sacramento "to amend this Constitution in such a way as would forever prohibit these corporations from robbing the hard-fisted toilers of the country out of their honest money." The delegates must "put it into the Constitution, and fix it so that [the corporations] cannot change it like they do the Code every Legislature."101 While the other delegates thought courts could always find ways to question the convention's handiwork, they used language they hoped would withstand judicial scrutiny and


98 Ibid. at 125.

99 Ibid. at 440.

100 Ibid. at 448.

101 Ibid. at 471.
legislative caprice. Like their fellow member Morris M. Estee, they realized that “language represents ideas, and when language fails to represent some great idea, then language is a failure.”

All hoped to give greatness to language and eternity to words expressing policy.

Alphonse Vacquerel of San Francisco best expressed the undercurrent of dissent from the policy of putting legislation in the constitution: “I deny the right of any man on this floor to legislate forever. . . . What suits us to-day, might not suit the people fifty years from now. . . . Let us legislate for the present generation, and not until the resurrection.”

According to this philosophy, the constitution was a place for legislation, but the reach of that legislation was to be of the moment, for the moment. The critical distinction made repeatedly during the debates was that the function of the convention was to “adopt such fundamental principles as are demanded by our peculiar situation and condition.” This position denied Vacquerel’s premise that legislation was appropriate in the document.

A broader perspective focused on the rule of law, and the issue that sparked the most discussion was that of Chinese immigration. Horace C. Rolfe, a district judge in San Bernardino, took the rule of the law seriously. “I am as much opposed to Chinese immigration as any man on this floor,” he professed, “but my conscience tells me that this is an open violation of the Constitution of the United States, which I have taken on oath to support, and I will not vote for any such provision.”

The delegates lacked the authority to place in their state constitution a provision contrary to the federal document, but Clitus Barbour perceived a greater authority than did Rolfe: “The State is clothed with this sovereignty in regard to the regulation of its internal affairs,” he announced. “As a proposition of law this cannot be controverted. I endeavored to obtain . . . a declaration that they [the delegates] were in favor of going to the very verge of constitutional law.” He would use the state constitution to challenge the interpretation by the federal courts of the reach of the treaty powers.

The delegates pushed their document to that verge over the issue of Chinese exclusion and the federal treaty power. It is clear from their words, particularly those of the Workingmen’s Party delegates, that racism was endemic in California by the 1870s. “The Chinese must go” was the San Francisco rallying cry that had given birth to the second constitutional convention. Racism

102 Ibid. at 598.
103 Ibid. at 1393.
104 Ibid. at 233, 404, 556.
105 Ibid. at 708.
106 Ibid. at 706.
collided with the rule of law because lawyers on both sides of the Chinese issue realized the gravity of enacting a state constitutional provision in direct contravention of a federal treaty. The Burlingame Treaty of 1868 contained language implying the encouragement of Chinese immigration to the United States. Ten years later, forces in the U.S. Congress were trying to limit to fifteen the number of passengers on vessels landing from China. President Hayes vetoed the bill.107 At the 1878 convention, Barbour, who was an attorney for the Workingmen’s Party, fostered the confrontation.108 His chief intellectual ally, Charles J. Beerstecher, another lawyer, framed his constitutional arguments for state action effectively to exclude the Chinese from California on the “reserve power inherent in the State.” For this position he cited Story’s Commentaries on the Constitution, as well as specific decisions of the U.S. Supreme Court.109

Arguments over constitutional law were juxtaposed with explicit racist rhetoric in the convention debates. One example from Charles R. Kleine, a San Francisco bootmaker and Baptist minister, is illustrative. The “Burlingame treaty [was] a fraud from the beginning,” he declared, and a product of a conspiracy “between capital and the churches.” The “churches, both Protestant and Catholic—Protestants more than Catholics, I am sorry to say—they tell you that we will bring the Chinese coolies to this Pacific Coast and convert them.” The results were the problem, he continued. “What have these long-faced preachers done? They have driven our poor white men, our white boys, and white girls into hoodlumism. They have made our poor white girls what? Prostitutes!” It was time to act, for “The Chinese curse will never be cured except the people rise in a mass; and


109 Debates and Proceedings, California, supra note 97 at 646-47.
you know self-preservation is the first law of nature, and also the first law of nations.”110

The appeal to race may have been tied to law, but certainly not to justice. Why, then, enact a questionable article in a state constitution? Barbour answered in political terms: “We shall not be left helpless and stranded after the Supreme Court of the United States has declared that these provisions conflict with the Constitution of the United States.” Rather, the very fact of constitutional confrontation was the goal: “Congress must be awakened, the great American people must be aroused. . . . What,” he asked, “will be the consequences?”111 What, indeed?

The logic was compelling as James J. Ayres continued the assault on the rule of law. A forty-niner, Ayres was editor of the San Francisco Morning Call. He knew how to get a message to the people. “Do you think that there is anything that could shock the sensibilities of the East on this subject more than to adopt a section in the Constitution declaring the power of exclusion to exist in the State?” he asked. Why not go further? He proposed that the Chinese be deprived of their standing to sue; that any lawyer representing a Chinese person forfeit his license; that the Chinese be denied business licenses, public employment, and fishing privileges; that cities be authorized to remove them from the city limits, and that anyone employing them be disenfranchised.112 If all else failed, at least such tactics would be good politics at home and possibly in Washington.

The voices supporting the rule of law were not silent. Rolfe would not break his oath to uphold the U.S. Constitution by voting for a section that his “judgment” told him violated that Constitution.113 James McMillan Shafter, a California state senator, launched a lengthy and pointed attack upon the forces of racism. He observed:

“It has come down simply to this: if a large body in this Convention, and apparently a majority of it, correctly represent the people, these crude, unreasonable, and absurd claims must be allowed, and be by us carried, not into effect, but into this Constitution. An open revolution against all government is to be the effect. To give force to the argument we are distinctly told by one gentleman, and the idea is reiterated by others, that if this convention does not yield obedience to these demands the streets will run with blood. . . .

110 Ibid. at 647-48
111 Ibid. at 651.
112 Ibid. at 651-53.
113 Ibid. at 656.
"When constitutional law has no longer any force in this State and country, when ignorance and violence shall undertake to rule us, it will become necessary to possess our souls in patience to endure the consequent disorder, or to provide those sharp remedies by which order and civilization vindicate at last the supremacy of their right."\(^\text{114}\)

With many other members of the bar, he followed with support from case law and treatises. To them, it was clear that the convention was without the authority to make provisions contravening a U.S. treaty. However, appeal to "the blind fervor of race prejudice" eventually won the day and the votes of a majority.\(^\text{115}\) The Chinese exclusion and discrimination sections prevailed because people caught up in the racism of their day could not see that the rule of law had greater value to society.

**CONCLUSION**

From this brief excursion into the history of state constitutional conventions in the West, it is obvious that we must be careful to use text as well as context. Some of the context, particularly the open and obvious racism of the states' founding fathers, gives us more than pause. It is also evident from the paucity of scholarly material on the subject that a great deal needs to be done. We need to study the rule of law in time and place, always mindful of the centrality of the concept in our legal system. The words of E.P. Thompson come to mind:

I am insisting only upon the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions on power and the defense of the citizen from power's all-intrusive claims, seems to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction.\(^\text{116}\)

\(^\text{114}\)Ibid. at 673.

\(^\text{115}\)Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention, 1878-1879* (Claremont, 1930) 92.

The American Indian Religious Freedom Act, passed by Congress in 1978, codified the policy of the federal government "to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian." Today, the law might seem unnecessary—after all, the First Amendment to the United States Constitution specifically prohibits the government from interfering with the free exercise of religion. The government is also prohibited from passing any "law respecting an establishment of religion." However, the government's policy toward Native Americans and their religion was not always so clear.

Throughout the late nineteenth and early twentieth centuries the federal government treated American Indians as wards—children who needed the strong hand of the federal bureaucracy to mold their lives. As parents choose their child's religious upbringing, so, too, the federal government decided how American Indians should be educated—in the principles of industry and Christianity. Governmental policies, imposed on the American Indians, generally took no heed of their own religions or desires for religion. These policies are of questionable constitutionality. Does imposing a religion "establish" that religion? Does prohibiting American Indian rites and religion "interfere with the free exercise" of religion? While children have First Amendment rights, the First Amendment prohibits only action by the govern-
ment. But as the government in this situation was also the parent, what was the line between the prohibition of government involvement in religion and the parents' right to raise their children as they saw fit? Can the government in its role as parent violate the First Amendment rights of its children? In 1978 the American Indian Religious Freedom Act emancipated those children after more than 200 years of the guardian-to-ward relationship.

EARLY POLICY

In 1776 the Committee on Indian Affairs of the Continental Congress reported to the Congress on the benefit of commerce with the Indians. Its members found "that a friendly commerce between the people of the United Colonies and the Indians, and the propagation of the Gospel and the cultivation of the civil arts among the latter, might produce many and inestimable advantages."4

The report suggested that missionaries and teachers be sent among the Indians, and the federal government subsequently continued this policy. For example, an 1803 treaty between the United States and the Kaskaskia tribe of Illinois Indians found that a majority of the tribe's members had been baptized Catholic and provided that the government pay $100 for seven years for the support of a Catholic priest.5

In the nineteenth century federal policy toward the American Indians changed several times. In the early part of the century, the government moved the Indians to land where there were no white settlers. If the Indians were removed, the government would not have to deal with them. Smaller tribes could be "civilized" and "Christianized" through the work of missionaries and school teachers. The government appropriated small sums for schooling, but no mechanism was in place for expenditure of those funds. When the Appropriation Act was passed in 1819, the government sent a letter to several missionary societies requesting their advice on how to spend the money.6 Between 1819 and 1842, the government made appropriations of $214,500 to missionary societies for the education of American Indians.7

5 Ibid. at LXXVIII.
6 Laurence F. Schmeckebier, The Office of Indian Affairs, Its History, Activities and Organization, prepared for the Institute for Government Research (Baltimore, 1927) 40 [hereafter cited as Schmeckebier, Office of Indian Affairs].
7 Ibid.
The policy of removal and relocation changed after the Civil War. As the westward movement of white settlers grew, there was no place farther west in which to settle the Indians. Fighting them did not solve the problem. In 1869 a delegation of Quakers spoke to President Grant about an Indian policy based on peace and Christianity. Grant accepted their advice and created his Peace Policy, which represented a conscious governmental decision to involve religious groups in administering and formulating policy. In a letter to the Quaker delegation, Ely S. Parker, Grant's commissioner of Indian Affairs (himself a Seneca Indian), stated that "any attempt which may or can be made by your Society, for the improvement, education, Christianization of the Indians, under such Agencies, will receive... all the encouragement and protection which the laws of the United States will warrant him [Grant] in giving."

The president not only asked the Quakers for assistance, but turned to all Christian missionary societies for nominations of persons to be civilian Indian agents, in place of military ones. In addition, a presidential advisory board of religious leaders was established to advise Grant on Indian policy. The Board of Indian Commissioners would make annual reports to the commissioner of Indian Affairs, suggesting ways to implement policy, and Christianize and civilize the Indians. The commissioner of Indian Affairs praised this Peace Policy as an altruistic endeavor by the president:

Not therefore, as a dernier resort to save a dying race, but from the highest moral conviction of Christian humanity, the President wisely determined to invoke the cooperation of the entire religious element of the country, to help by their labors and counsels, to bring about and produce the expenditure of the munificent annual appropriation of money by Congress, for the civilization and Christianization of the Indian race."

The missionary societies responded enthusiastically. Congress was able to pass a law prohibiting the employment of army

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Ibid.

*Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1870* [Washington, 1870] 10 [hereafter cited as *Annual Report, 1870*].
officers in a civil capacity on Indian reservations. The roles of Indian agents and superintendents were filled by Christian missionaries. It was hoped that the new influences on the Indians would enable them to be assimilated into white society.

Most treaties with the Indians required that the government provide a schoolhouse and teacher. Civilian teachers were sent to the agencies and schools were established, but the government also contracted with mission societies to run schools. Many of these “contract schools” had been begun by the missions before the government’s involvement. By using such schools, the government was able to educate more Indians at less government cost. The government made appropriations to the missions for each child in its educational care.

The Citizens Committee wrote to the commissioner of Indian Affairs in 1869 to encourage the use of missionary teachers:

The teachers employed should be nominated by some religious body having a mission nearest to the location of the school. The establishment of Christian missions should be encouraged, and their schools fostered. ... The religion of our Blessed Saviour is believed to be the most effective agent for the civilization of any people.

The new religious agents were enthusiastic about their mission. Supported partly by the government, and partly by the church, these missionaries believed that every convert was a saved soul. Agent John Smith in the Oregon Territory submitted a glowing report to the superintendent of Indian Affairs in 1869:

I am pleased to report that my efforts to convert the Indians to Christianity have at last been crowned with success. They now have preachers among them, and about fifty Indians have professed their desire to lead a Christian’s life. During the present year the great work goes nobly on and every Sabbath day brings more to repentance. A new era in the life of these poor beings is dawning, and they are gradually rising from the dark abode of guilt and ignorance, and will soon rear their heads in proud consciousness of being the equal of the greatest.

James Wilbur, an Indian agent in the Washington Territory, reported with pride that “the most marked improvement is seen

11 Ibid.
12 Report of the Commissioner of Indian Affairs Made to the Secretary of the Interior for the Year 1869 (Washington, 1870) 50.
13 Ibid. at 160.
in their being made new creatures in Christ Jesus. About three hundred of them gave good evidence of being born from above. These are the leading men and women of the nation, and give character and stability to all around."\(^\text{14}\)

Most of the missionaries were from the main Christian denominations—the Society of Friends, the Methodists, the Baptists, the Congregationalists, and the Presbyterians. The Catholics also sent missionaries, who were received cautiously by the government.

The superintendent of Indian Affairs in the Colorado Territory wrote to the commissioner of Indian Affairs about setting up Catholic and Episcopalian missions after the bishops from both churches had visited his agency:

"I have declined to give my assent to the establishment of either Roman Catholic or Episcopal missions there without your approval, but I would respectfully recommend that all religious denominations in the world be permitted to establish, and encouraged to maintain, missions among the Indians. Contact with Christian gentlemen will improve their morals, and I think these soldiers of the Cross can do more toward civilizing and humanizing the savages than the soldiers of the United States and all the Government officials combined."\(^\text{15}\)

Both churches were permitted to set up missions on the reservations. Competition between the different denominations became fierce at times, until the government resolved the problem by assigning agencies to each denomination.\(^\text{16}\) Each was allowed to establish its religion at its agencies, without competition from other sects, by setting up churches and schools.

However, the contract-school system came under attack in the 1880s and 1890s. Superintendent of Indian Schools John H. Oberly, in his 1885 report to the commissioner of Indian Affairs, recommended that education and religious proselytizing be

\(^{14}\) Ibid. at 139.

\(^{15}\) Annual Report, 1870, supra note 10 at 168.

\(^{16}\) A survey in 1872 revealed that "The Hicksite Friends had in their charge six agencies, with 6,598 Indians; Orthodox Friends, ten agencies, with 17,724 Indians; Baptists, five agencies, with 40,800 Indians; Presbyterians, nine agencies, with 38,069 Indians; Christians, two agencies with 8,287 Indians; Methodists, fourteen agencies, with 54,473 Indians; Catholics, seven agencies, with 17,856 Indians; Reformed Dutch, five agencies with 8,118 Indians; Congregationalists, three agencies, with 14,476 Indians; Episcopalians, eight agencies, with 26,929 Indians; the American Board of Commissioners for Foreign Missions, one agency, with 1,496 Indians; Unitarians, two agencies with 3,800 Indians; Lutherans, one agency, with 273 Indians." Schmeckebier, Office of Indian Affairs, supra note 6 at 55, fn 92.
separated in the schools. He recognized the great effort that the religious societies had made, and encouraged them to continue their religious work. But

the Government should enter into no entangling alliance with any religious denomination or educational society. It should not permit any religious society to make its proselyters or its missionaries, as such, teachers of Government schools. In other words, it should not permit any teacher to be appointed and paid by the Government as a Presbyterian or Catholic or Episcopalian or Baptist Government-school teacher, and it should not, in its liberality, say to either the Catholic or Presbyterian or Baptist or Episcopalian Church: "Here are school-buildings, which have been erected by the use of an appropriation made by Congress for the purpose of establishing a Government school for Indians. You may take them free of rent and supply the school with teachers who are of your church, and make it an Indian school of your denomination, and the Government will pay you so much per capita per annum for every Indian child you may induce or the Government may compel to attend the school."{17}

Congress acted on the superintendent's recommendations in 1893. Commissioner of Indian Affairs Thomas J. Morgan wanted to discontinue all contracts with sectarian schools immediately.{18} Congress decided to maintain the status quo in appropriations, and not to increase the amount for sectarian schools. The amount for appropriations to sectarian schools was reduced during the next two years. In 1897 it became "the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school."{19} This decision did not arise from any strong constitutional awareness of the establishment of a religion, but, rather, from "a growing interest in a public school system, and increased antagonism of the traditionally Protestant-minded Americans toward the Roman Catholics, who got by far the largest part of the funds granted to contract schools."{20}

While religion was not being barred from public schools, religion taught by religious teachers was. The government wanted to have control over the religious aspects of education

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{17} Annual Report, 1885, supra note 4 at CXXV.
{18} Schmeckebier, Office of Indian Affairs, supra note 6 at 85.
{20} Prucha, American Indian Policy, supra note 8 at 291.
in its schools. Concern about Catholic missionaries remained. The commissioner of Indian Affairs reported in 1893,

I have little sympathy with the complaint that "religious exercises take too much time in the contract schools," and that in the Roman Catholic schools "about all the children learn are prayers, the catechism, and a little fancy work." I have heard this charge ad nauseam. In a few cases, the charge has been justified by the facts; but in almost all cases, if I may accept the statements made to me, but little time in-school hours is occupied with such exercises, particularly with the catechism.21

The commissioner felt that religious exercises were useful in teaching English, and elevated the morals of the Indians.

The issue of government appropriations for sectarian education was raised in the U.S. Supreme Court in the 1908 case of Quick Bear v. Leupp.22 Sioux Indians on the Rosebud Agency sued the commissioner of Indian Affairs and the secretaries of the Interior and Treasury. The commissioner had made a contract with the Bureau of Catholic Indian Missions for a sectarian school on the agency to be paid out of the Sioux Treaty Fund. The Sioux did not want treaty funds expended for Catholic education, and argued that this violated the First Amendment. The Supreme Court found differently. The statute prohibiting appropriations to sectarian schools only applied to "gratuitous appropriations of public moneys,"23 not treaty funds, which were paid by the government to fulfill treaty stipulations. The court viewed treaty funds as belonging to the Indians and administered for them by the government.24 The court stated, "We cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the Government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof."25

While Indians were asking the court not to allow the money for sectarian education, the court was allowing the government to spend the Indians' money on Christian education. The prohibition against expending governmental money for sectarian education applied only to the government's actions as government. When

22 Quick Bear v. Leupp, 210 U.S. 50, 52 L.E. 954, 28 S. Ct. 690 [1908] [hereafter cited as Quick Bear].
23 Ibid. at 81.
24 Ibid. at 77.
25 Ibid. at 80-81.
the government stepped into its role as parent or guardian, it had the right to determine the best way to spend the Indians' money—even though the expense was one it was prohibited from incurring in its role as government.

The government did not want the religious societies off the reservations, and continued to welcome the establishment of missions and churches. Often through treaty, and then in 1910 through direct legislation, the government set aside land on the reservations for the missions, not to exceed 160 acres. It was also customary for the missions to use stone or timber from the reservations in erecting buildings.

**Government Establishment of Religion?**

The government and the religious societies were intertwined in their efforts to civilize and Christianize the Indians throughout the nineteenth century. The government supported missionaries with funds, assigned agencies to religious societies, and provided land for the building of churches. The question is whether this intermingling constituted an establishment of religion.

The First Amendment did not prohibit missionaries from setting up churches and proselytizing Indians, but it did prohibit the government from making any laws “respecting an establishment of religion.” In his book *The Establishment Clause,* Leonard Levy discusses what that phrase meant to the framers, in eighteenth-century America: “The uniqueness of the American experience justifies defining an establishment of religion as any support, especially financial support, of religion by government, whether the support be to religion in general, to all churches, some churches, or one church.” Any government support of religion would be prohibited. Under this definition, the government did establish a religion by endorsing and supporting Christianity among the Indians. But nineteenth-century Americans did not view it that way. The moral and religious fervor of the time was not to be dampened by laws. No one challenged the government's peace policy as an establishment of religion; the Indians themselves generally lacked the necessary social or political status to do so. The groups who befriended the Indians and pushed the government to treat them fairly in other regards were,


27 *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1894* (Washington, 1895) 39 [hereafter cited as *Annual Report, 1894*].

28 U.S. Constitution, Amendment I (1791).

for the most part, religious groups, like the Quakers, and Friends of the Indians. These groups encouraged and supported the Christianization of the Indians. Christianization would bring about assimilation, which would benefit the Indians. Thus the Indians' voice in governmental policy, through its white friends, was a religious voice. The moral climate in the country did not find support of missionaries to be wrong, or unconstitutional. The Supreme Court never addressed the issue of whether the government was establishing religion in the nineteenth century, because no one found the laws unconstitutional or sought to challenge them.

The court did not address the issue of the establishment of religion until 1947, in the case of Everson v. Board of Education of the Township of Ewing, when public aid for the transportation of parochial-school students was challenged as an unconstitutional establishment of religion.\(^\text{30}\) The court found it constitutional, because the aid was provided as part of a general program for all school pupils. The court defined what the establishment clause prohibited:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.\(^\text{31}\)

The court further defined establishment in the 1970 case of Walz v. Tax Commission of the City of New York.\(^\text{32}\) New York City had granted property-tax exemptions to religious organizations for religious properties used solely for religious worship. The court found that this was not a religious establishment, and


\(^{31}\) Ibid. at 15-16.

looked to the degree of entanglement the law involved between church and state. The tax exemption did not require the government to be continuously involved. However, "obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."33

The following year, the Supreme Court decided the case of Lemon v. Kurtzman, which set out the current three-pronged test a statute must pass to survive a constitutional challenge.34 "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion,' Walz, Supra at 674."35 In Lemon, the court considered the constitutionality of three statutes that authorized state money to be given to parochial schools for teacher salaries and secular textbooks, and found such laws unconstitutional: "The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. . . . Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation."36

The government's actions in setting up contract schools would constitute excessive entanglement with religion. The government paid the religious societies to teach Christianity to the Indians. Teachers were required to file yearly reports with the superintendent of Indian schools, a government employee, setting forth the progress that had been made with the students' civilization. These reports often included the number of students who had converted to Christianity.

The Board of Indian Commissioners, made up of men appointed by the religious societies, certainly participated in governmental affairs. Tax money was used to fund the mission schools. And Indians were forcefully encouraged to profess a disbelief of their own religions.

The government's actions in seeking assistance from the missions, and then assigning them to different agencies, advanced the Christian religion. The denomination appointed to a given agency had exclusive control over the Indians' religion. Though education was the missions' stated function, the government was essentially using religious means to serve secular ends, when

33 Ibid. at 675.
36 Ibid. at 618.
secular means could have been, and eventually were, used. If the government had been more willing to appropriate enough money for educational purposes, the religious societies would not have been needed for schooling. Under late-twentieth-century constitutional interpretation, the government's policies toward the Native Americans would be found to be unconstitutional, as establishing religions—all denominations of Christianity—among them.

LIMITING INDIAN RELIGIOUS RITES

The second of the religion clauses in the First Amendment prohibits the government from preventing the free exercise of religion. Today religion is defined as "the service and worship of God or the supernatural," but religion to the nineteenth-century government officials who worked with the Indians was synonymous with Christianity. There was a complete disregard by the missionaries and the government of the religious views of the Indians themselves. As the Indians were viewed as uncivilized, their ideas of religion were viewed as pagan. Many governmental officials didn't even consider Indian ceremonies and rites as religious. The heathen and pagan Indians could not be religious, and their ceremonies only pointed out how uncivilized they were. Indian ceremonies, viewed by the Indians as religious, were seen by the government as a barrier to civilization and assimilation. As the term "civilized" included the term "Christianized," and vice versa, the government specifically prohibited certain non-Christian religious rites of the Indians.

Most government agents and missionaries saw nothing worth preserving in Indian culture. Total assimilation into white culture was the only way to deal with the Indians. When whites spoke of the free exercise of religion for Indians, they meant the ability to choose among the Christian sects. In his 1870 report to the commissioner of Indian Affairs, the superintendent of the Washington Territory expressed concern that the Indians could not practice Catholicism:

The late agent, J. H. Wilbur, not only forbade Catholic priests to come upon the reservation, threatening them with arrest and confinement, but adopted stringent measures to prevent the Indians from attending worship at the mission chapel of that sect just beyond its boundaries. This restraint of their religious liberty was always the occasion of great discontent among the Indians, and

37 Webster's Seventh New Collegiate Dictionary.
a direct violation of one of the most cherished ideas of the American people.\textsuperscript{38}

The superintendent of the Oregon Territory wrote to the commissioner about “a serious drawback” to civilization of the Indians—“the existence among the Indians of Oregon of a peculiar religion, called ‘Smokeller’ or Dreamers, the chief doctrine of which is, that the ‘red man is again to rule this country.’”\textsuperscript{39} If Indians were limited in their freedom to exercise the Christian faith, it was considered an abuse of liberty. But limiting the Indians in their own religious beliefs was looked on as a benefit to themselves.

The Indian agent on the Colorado River Reservation in the Arizona Territory reported in 1870 on the Mohave Indians’ religion. He saw nothing in the following description that was “anything like a religion”:

They say an old Indian has made everything, and call him Mathowelia. He has a son who appeared in the light of Neptune. His name is Mastamho. He has made the water, and lets the river overflow. He has planted the trees, and given mesquite beans to the Indian. Besides these two, there is an evil spirit, Newathie. The Mohave Indians use these names, but they do not venerate them. They saw that Mathowelia takes all Indians after they are dead to the White Mountain, where they have plenty to eat. If an Indian is not good, that is, if he has killed another Indian, Newathie punishes him four days. He changes him into a rat, and puts him in a rat-hole; but, after four days, Mathowelia carries him also to the happy hunting-grounds, and he has expiated his sins.\textsuperscript{40}

In 1883 the commissioner of Indian Affairs took a formal stand against Indian ceremonial and religious rites by prohibiting the sun dance, the scalp dance, and the war dance.\textsuperscript{41} He stated, “There is no good reason why an Indian should be permitted to indulge in practices which are alike repugnant to the common decency and morality; and the preservation of good order on the reservations demands that some active measures should be taken to discourage and, if possible, put a stop to the demoralizing influence of heathenish rites.”\textsuperscript{42}

\textsuperscript{38} Annual Report, 1870, 21.

\textsuperscript{39} Ibid. at 50.

\textsuperscript{40} Ibid. at 129.

\textsuperscript{41} Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1883 (Washington, 1883) XIV-XV.

\textsuperscript{42} Ibid. at XV.
The Indians did not want to give up their religious practices. The Indian agent at the Sac and Fox Agency in the Indian Territory wrote in his annual report about the reception his announcement received, "All except the Pottawatomies seemed to be very reluctant about adopting them, or any other laws, fearing that it might interfere with some of their ancient customs and traditions."43

The agent at the Cheyenne River Agency in Dakota wrote that the sun dance was not held that year. "I explained to them that their 'Great Father' was very much opposed to the 'sundance' and would be displeased with them if they persisted in holding it. I further told them that I would not permit it and that in case they attempted it I would punish the leaders." He continued, "They seemed perfectly satisfied, and abandoned their purpose entirely."44

The directive prohibiting the dances also set forth rules governing a court of Indian offenses, which were to be enforced by the agents and the Indian police. The commissioner of Indian Affairs was aware that these rules and prohibitions were interfering with

O-KEE-PA, By George Catlin, 1867, Plate 10. Catlin depicted the O-KEE-PA, a religious ceremony of the Mandan tribe, which included self-mutilation. (Yale Collection of Western Americana, Beinecke Rare Book & Manuscript Library)

43 Ibid. at 86.
44 Ibid. at 22.
Indian religious practices. In his 1884 report to the secretary of the Interior, he commented on the effectiveness of the Indian police in carrying out the directive:

When it is borne in mind that a great majority of the cases upon which they are called to act are offenses committed by their own race against laws made by a race with which they have not heretofore been in sympathy; ... and that many of the regulations established forbid practices which almost form a part of the very existence of the Indians, practices and customs which are to them a religion, and which, if neglected, they believe will result in disaster and death, the impartiality with which the police have performed their duties devolving upon them is creditable in the highest degree.45

Rather than being concerned that the directive was prohibiting the free exercise of religion, the commissioner was pleased that Indians would enforce such laws.

The government continued to believe that the laws would ultimately benefit the Indians. In the *Annual Report* of 1885, the commissioner wrote:

It was found that the longer continuance of certain old heathen and barbarous customs, such as the sundance, scalp-dance, war-dance, polygamy, etc., were operating as a serious hindrance to the efforts of the Government for the civilization of the Indians. It was believed that in all the tribes many Indians would be found who could be relied upon to aid the Government in its efforts to abolish rites and customs so injurious and so contrary to civilization.46

The 1883 directive to prohibit dancing was never fully implemented. Ten years later, Indian agents were still commenting in their reports to the commissioner about the problems of dancing. The agent at the Otoe Subagency in Oklahoma wrote, "The greatest evil we have had to contend with at Otoe is the insatiable desire of nearly every member of the tribe for dancing."47 The agent at the Blackfeet Agency removed two sun-dance structures in 1894, and reported that "sun dances, Indian mourning, Indian

45 *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1884* (Washington, 1884) XVI-XVII.

46 *Annual Report, 1885*, supra note 4 at 21.

47 *Annual Report, 1894*, supra note 27 at 250.
medicine, beating on the tom-tom, gambling, wearing of Indian costumes... have been prohibited."\(^{48}\) The Santee Agency in Nebraska had dancing in 1894. The agent reported, "I induced them to give it up, which they did for a time, but a large band of Winnebagos came to visit and that started the dance.... These dances are not civilizing, but a step backward."\(^{49}\)

Thirty years later, the commissioner of Indian Affairs was still trying to get the Indians to stop dancing. Commissioner Charles H. Burke sent a letter "To All Indians," on February 24, 1923.\(^{50}\)

The concern was twofold. The dances interfered with the Indians' everyday lives, causing them to neglect their livestock and crops for days. Furthermore, the dances were "grossly immoral and indecent, utterly unfit for any occasion, race or people."\(^{51}\) The commissioner tried to make it clear that he did not wish to interfere with religious practices, "and nothing is farther from the thoughts of those who are the guardians of the Indians than to interfere with any dance that has a religious significance, or those given for pleasure and entertainment, which are not degrading. It is commendable of the Indians to desire to cherish the customs and traditions of their forefathers."\(^{52}\) He gave the Indians one year to relinquish their dances, after which "some other course will have to be taken."\(^{53}\)

The Indians rejected the plea. Various tribes raised their voices, in newspapers and through their white friends. John Collier, then-secretary of the American Indian Defense Association, wrote a strongly worded letter to the editor of the *Sacramento Bee*: "The Indian religions are being persecuted by the Indian bureau. The evidence of this statement has been published all over the United States. The evidence consists of regulations and orders by the Indian bureau."\(^{54}\) He tried to explain the ancient Pueblo Indian religions, noting that they were more than 10,000 years old, and comparing destruction of the religions to that of the records of the Mayan civilization, or the ruining of the Alexandrian Library. He also pointed out the unconstitutionality of such actions.

The Pueblo Indians in New Mexico responded through a council of their chiefs and tribal leaders, adamant in their refusal

\(^{48}\)Ibid. at 159.

\(^{49}\)Ibid. at 192.

\(^{50}\)John Collier Papers, Reel 9, 270[0241], Yale University Library [hereafter cited as Collier Papers].


\(^{52}\)Collier Papers, supra note 50 at Reel 9, 270 [0246].

\(^{53}\)Ibid. at [0241].

\(^{54}\)Collier Papers, supra note 50 at Reel 9, 269 [0218].
to follow the orders: "If you persist in your order we declare war. We are too weak for physical battle. We know that our arrows and tomahawks are futile against your machine guns and cannon. But we will go to war with you in the courts and fight you to the end."55 They also pointed out the unconstitutionality of the government's action, under the free-exercise clause.

By then the government was well aware that the issue of religious freedom had been joined. However, it still did not see itself as regulating religion, but simply as prohibiting antisocial acts. The Board of Indian Commissioners noted the Indian protests in its 1923 Annual Report: "The protesters insist that an Indian should be entirely free to live his tribal life, maintain his tribal religion, to dance his tribal dances and to carry on his tribal ceremonies without any hindrances from the authorities."56 But the board believed that certain of the religious practices were immoral. The Indians had to follow the same laws as whites, and if tribal customs violated moral, civilized standards, then they must be banned.

During the 1920s, the Bureau of Indian Affairs published a pamphlet entitled "Peyote: An Abridged Compilation from the Files of the Bureau of Indian Affairs,"57 and a bulletin, also on the subject of peyote, the narcotic that various Indian tribes used as part of their religious ceremonies.58 The bulletin gave detailed scientific and historical information about peyote. It noted that the ceremonial use of peyote was first made public by a member of the Bureau of American Ethnology in 1891, who had found that "these Indians attribute divine powers to the drug, and the ceremony attending its use is of the nature of a religious rite."59 However, the bulletin ridiculed the Indians' claims of peyote's religious significance, saying that peyote was only incidental to some of the dances, and was not really part of the ceremony itself. "Such 'religious' significance, however," it insisted, "is hardly to be placed in the same category as a genuine religious faith, as the word religion is rather improperly used to describe what is simply a custom or habit of a people."60

The Indians responded by establishing a church whose religion expressly included peyote rituals. The Native American Church was chartered in Oklahoma, but spread to other states. The

55Ibid. at (0219).
56 Annual Report, 1923, supra note 51 at 6.
57 Robert E.L. Newberne, Peyote: An Abridged Compilation from the Files of the Bureau of Indian Affairs, 3rd ed. [Lawrence, Kansas, 1925], Collier Papers, supra note 50 at Reel 8, 246 (0270).
58 Department of the Interior, Office of Indian Affairs, Bulletin 21 [1929], Collier Papers, supra note 50 at Reel 8, 246 (0290).
59 Ibid. at (0271).
60 Ibid. at (0292).
government tried to suppress peyote use by tying it to appropriations, but the Senate voted down such an attempt at the urging of an Oklahoma senator, who insisted that the Indians used it only for religious ceremonies.61

Editorial cartoon from the New York Tribune, June 1, 1926.

The U.S. Supreme Court addressed the issue of the free exercise of religion in the 1870 case of Reynolds v. United States. Reynolds, who was charged with the crime of polygamy, argued that the practice was an accepted doctrine of his Mormon religion, and that the statute interfered with his free exercise of religion. The court disagreed. Practices so abhorrent to societal values could not be allowed to occur under the blanket of religion. The court distinguished between religious beliefs and religious practices:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? ... To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

In 1890 the court reiterated its position in two cases dealing with the Mormons, Davis v. Beason and The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States. The court set forth in stronger terms the position that one could not disobey the law because of religious beliefs. The First Amendment, the court said, was never intended to be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal

62 Reynolds v. United States, 98 U.S. 145 [8 Otto 145] [1878].
63 Ibid. at 166-67.
64 Davis v. Beason, 133 U.S. 333, 33 L.E. 637, 10 S. Ct. 299 [1890] [hereafter cited as Davis]; The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 34 L.E. 304, 10 S. Ct. 972 [1890] [hereafter cited as Church of Jesus Christ of Latter-Day Saints].
laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation.65

If the court was so adverse toward a religious practice of white men, who professed belief in Christian doctrine and who had a written book of their prophet, how would it decide issues dealing with pagan "red men," who worshipped unknown gods and had no written Bible? The court was not called upon to answer that question, but reading its words leaves no doubt. Many of the Indian dances had aspects that whites frowned upon. Allegations of wife trading, gift giving, self-mutilation, and open fornication were made by missionaries and Indian agents. Use of drugs such as peyote was admitted. Congress could pass laws prohibiting antisocial activities. If these activities were part of Indian religious rites, the effect would not burden the First Amendment, because the intent was to limit antisocial acts, not religious acts. And such legislation did not purport to affect the religious beliefs of Indians, only their practices.

A nineteenth-century Supreme Court would not have found the government's prohibitions a constitutional violation, but would have applauded the government for its attempt to civilize the Indians. The court, referring to polygamy, called it a "return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."66 The nineteenth-century Supreme Court used Christianity as the religious touchstone to determine society's standards. "Antisocial" acts were those acts that were repugnant to, or different from, Christian doctrine.

The court attempted to distinguish "religions" from "cults," but did not adequately do so. "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter."67 The court would conveniently find any religion not Christian to be a cult, which would therefore not be protected by the First Amendment.

In 1972 the Supreme Court decided the case of Wisconsin v. Yoder, in which the Amish raised a free-exercise claim in opposing compulsory education in public high school.68 The court articu-
lated a two-part balancing test to apply to free-exercise claims. A significant burden on religion must first be shown, which is then balanced against the importance of the state's interest. The court stated, "Only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."\(^6^9\) The court found that the burden on the Amish religion and way of life was greater than the state's interest in compulsory education, and upheld the free-exercise claim. The twentieth-century court's recognition of a "minority" religion seemed to bode well for Native Americans.

## Changes in Government Policy

It was not until the New Deal that the government began slowly to recognize Indian religions as protected ones. In 1933 President Franklin D. Roosevelt appointed John Collier, former secretary of the American Indian Defense Association, as commissioner of Indian Affairs. It was Collier who had earlier argued for religious freedom for Indians, and had been particularly vocal on behalf of the Pueblo Indians and their use of peyote in religious services.\(^7^0\) In a controversial move, he issued Circular No. 2970, titled "Indian Religious Freedom and Indian Culture."\(^7^1\) This stated flatly, "No interference with Indian religious life or ceremonial expression will hereafter be tolerated. The cultural liberty of Indians is in all respects to be considered equal to that of any non-Indian group." In addition, it encouraged all Indian agents to recognize and appreciate Indian cultural values. Many Indian agents as well as missionaries viewed this directive as an attack. They felt that their efforts were being belittled, and believed that the Indians would return to paganism.\(^7^2\)

Collier issued another directive, which dealt with religious services at government schools. While it still permitted the use of schools for church services if the Indians wanted a particular denomination, it expanded the rule to allow native religious leaders the same rights as Christian missionaries.\(^7^3\)

Collier recognized that Indian religions were entitled to protection under the First Amendment. He did not try to advance Indian religions, but attempted to place them on equal footing with Christian denominations. This would allow the Indians to decide for themselves which religion to follow.

\(^6^9\) Ibid. at 215.

\(^7^0\) Collier Papers, supra note 50 at Reel 9, 269 [0218]. Collier to the Sacramento Bee, August 23, 1924.

\(^7^1\) Prucha, The Great Father, supra note 61 at 951.

\(^7^2\) Ibid. at 952.

\(^7^3\) Ibid. at 951.
The New Deal marked a change in Indian policy, and Collier's efforts were indicative of this change. The Indian Reorganization Act, passed in 1934, recognized the tribal structure and established self-government for the Indians, allowing them to make their own decisions, including those on religious worship. The government generally stopped trying to promote Christianity among the Indians. Missionaries still worked on the reservations, but there was no official policy concerning religion. Even so, the government continued to interfere with the free exercise of native religions.

In 1978 the House of Representatives recognized the interference in free exercise when it reported on the bill that became the American Indian Religious Freedom Act. The report identified three remaining areas of interference: denial of access to certain sacred religious sites, restrictions on the use of substances, and actual interference with religious events. The report continued,

Lack of knowledge, unawareness, insensitivity, and neglect are the keynotes of the Federal Government's interaction with traditional Indian religions and cultures. This state of affairs is enhanced by the perception of many non-Indian officials that because Indian religious practices are different than their own they somehow do not have the same status as a "real" religion. Yet, the effect on the individual whose religious customs are violated or infringed upon is as onerous as if he had been Protestant, Catholic, or Jewish.

The federal government finally recognized its neglect of Indian religions and its intrusion upon them. The purpose of the act was to ensure that federal sources complied with the free-exercise clause. The passage of the American Indian Religious Freedom Act in 1978 finally guaranteed Native Americans the right to worship as they chose, without interference from the government.

Since passage of the American Indian Religious Freedom Act in 1978, the Supreme Court has decided cases of importance to Native Americans. In three of them, Employment Division v.

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75 95th Cong., 2d sess., H. Rept. 95-1308, June 19, 1978, 2. See also 95th Cong., 2d sess., S. Rept. 95-709.
76 Ibid. at 4.
Smith,78 Lyng v. Northwest Indian Cemetery Protective Association,79 and Bowen v. Roy,80 the court denied the Native Americans’ claims under the free-exercise clause and validated governmental policy. The balancing test in Yoder was not helpful to Native Americans.

The Smith case raised the issue of peyote use. Alfred Smith was a member of the Native American Church who ingested peyote during a religious ceremony. Peyote use is prohibited under Oregon’s controlled-substance law, and Smith was fired from his job. His application for unemployment benefits was denied and he appealed, arguing that the state’s prohibition of peyote violated the free-exercise clause of the First Amendment. The Supreme Court disagreed, holding that the clause permitted the state to prohibit sacramental peyote use. The court again distinguished between prohibiting belief and prohibiting actions, citing the 1879 case of Reynolds.81 "The right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’"82 Oregon’s law prohibiting the use of controlled substances was not specifically directed at Smith’s religious practice, and was concededly constitutional as to those who used the drug for other reasons.83 The court refused to apply the Yoder test balancing Smith’s First Amendment rights against Oregon’s compelling interest in regulating drug use: "The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’"84

The court distinguished Yoder as a hybrid case involving not only a free-exercise claim, but the constitutionally protected claim of the rights of parents to direct the education of their children.85

78Employment Division, Department of Human Resources of Oregon v. Smith, 58 U.S. L. W. 4433 [April 17, 1990] [hereafter cited as Employment Division].
80Bowen v. Roy, 476 U.S. 693, 106 S. Ct. 2147, 90 L. Ed. 2d 735 [1985] [hereafter cited as Bowen].
81See note 62 supra.
82Employment Division, 4435, citing United States v. Lee, 455 U.S. 252, 63, n. 3 [1982] [Stevens, J., concurring in judgment].
83Ibid. at 4435.
84Ibid. at 4437, citing Lyng, supra note 79 at 451.
85Ibid. at 4436.
In the *Lyng* case, Native Americans in California argued that the government’s decision to build a road across sacred Indian land interfered with their free exercise of religion. The religious practices of the respondents were “intimately and inextricably bound up with the unique features of the Chimney Rock area,” through which the road would go, and no other site would have the same religious meaning. The court agreed that “the threat to the efficacy of at least some religious practices is extremely grave,” but still found that the free-exercise clause would not be violated by building the road and that the government did not need to show a compelling interest for its action. “Incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs do . . . [not] . . . require the government to bring forth a compelling justification for its otherwise lawful actions.” The road-building program was not prohibiting Native Americans from exercising their religion, or coercing them to behave contrary to their religious beliefs. “The First Amendment must apply to all citizens alike, and it can give none of them a veto over public programs that do not prohibit the free exercise of religion.”

The court also considered whether the American Indian Religious Freedom Act required a ban on building the road. The court referred to the legislative history, and found that “nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.” The purpose of the act was to ensure that Congress considered the religious practices of Native Americans when making decisions. In this case, the Forest Service had made a comprehensive study of the effects of the project on the religious value of Chimney Rock and still believed the road was necessary. The court believed that this complied with the intent of the American Indian Religious Freedom Act. The bill did not guarantee Indians any greater rights than others.

In *Bowen v. Roy*, Roy contended that obtaining a Social Security number for his daughter to receive welfare benefits would violate his Native American religious beliefs by robbing his daughter’s spirit. The lower court enjoined the government from using a Social Security number, but the Supreme Court reversed the directive.

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86 *Lyng*, supra note 79 at 451.
87 Ibid.
88 Ibid. at 450-51.
89 Ibid. at 452.
90 Ibid. at 455.
The court again distinguished between religious belief, which is absolute, and religious conduct, which can be limited. It determined that the Yoder balancing test did not apply, and that a compelling governmental interest was not necessary. "Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest." The requirement for a Social Security number promoted a legitimate governmental interest, and the court upheld the regulation. The court also considered whether the American Indian Religious Freedom Act provided any additional guidance to the courts or rights to the Native Americans. It found that the law "accurately identifie[d] the mission of the Free Exercise Clause itself," and required nothing extra of the court.

Native Americans are bound by the way the court interprets the free-exercise clause. These recent cases have moved away from the balancing test of Yoder to a less strict test, in which governmental interests have seemed heavily weighed. While there have been vocal dissents to the court's opinions, in recent years the Supreme Court has been less protective of the free-exercise rights of Native Americans.

**CONCLUSION**

More than a century ago, a former commissioner of Indian Affairs wrote: "The United States will be judged at the bar of history according to what they shall have done in two respects,—by their disposition of Negro slavery, and by their treatment of the Indians." The question arises whether the United States should be judged by current, late-twentieth-century standards, or by the standards that existed when actions were taken. Based upon twentieth-century case law and societal values, the government plainly violated the First Amendment freedom-of-religion clauses in its dealings with Native Americans. In trying to establish Christianity among them, governmental policy was intertwined with religious doctrine in an excessive entanglement. The government prohibited the free exercise of Native Americans' religions by refusing to recognize anything of value in their culture, and by failing to protect unorthodox religions.

91 Bowen, supra note 80 at 707-8.
92 Bowen, 100.
93 Francis A. Walker, *The Indian Question* (Boston, 1874), 146.
Recent twentieth-century case law recognizes the Native American religion as protected. However, the protections given do not recognize many of the unique features of Indian religion. Justice William Brennan, in his dissent in *Lyng*, pointed out that "any attempt to isolate the religious aspects of Indian life 'is in reality an exercise which forces Indian concepts into non-Indian categories.'" 94

During the 19th century, no one inside or outside government saw a problem in forcing Indian concepts into non-Indian categories. The goal was assimilation and the sooner the Indians abandoned their "odd" cultural mores the better off all would be. No one protested the government's actions because no one disagreed with them. This does not make the government's actions morally right. But the government's actions were based on misfeasance, not malfeasance. The government was following the Constitution as it was interpreted at that time.

The First Amendment freedom of religion clauses have been interpreted by different Supreme Courts over the centuries. The interpretation of the religion clauses has changed over the past century, as societal values change and as citizens recognize that governmental involvement is not always beneficial. Issues involving American Indians are being raised and considered by the Court. The results are not always as one would hope. But the 20th century cases raise different concerns. While recognizing Indian religions and acknowledging differences in Indian religions, the Court is still hesitant to recognize that the differences require protection.

The Bill of Rights is a protection for the individual against governmental action, but it is only as perfect as the persons challenging, upholding, and interpreting it.

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94 *Lyng*, supra note 79 at 459, citing App. 110.
Cowboy. [Oregon Historical Society]
American politics and the American legal system have always been committed to individualism. Given the priority accorded to the ideal of individualism in this country, it is surprising that the express recognition of a constitutional right to privacy is relatively recent. On its face, the right to privacy seems intrinsic to individuality, conferring as it does the right to create a space around the self that is impervious to others, within which the individual can exercise his or her own moral choices. A privacy right that limits the access of others to the self is deemed essential to the establishment of autonomy, which in turn is essential to selfhood.

To grasp the connection between legal concepts of privacy and individualism, however, it is necessary to understand that there are at least two dominant images of individualism in American thought, both of which are wholly masculine. The first turns on the vision of the self-made economic man of liberal and Puritan discourse, striving to get ahead in a fiercely competitive world. Privacy is important to this person for the economic freedom it confers: the absence of governmental intervention in the "natural" forces of the marketplace, for example, allows him to engage in unlimited economic activity, and to feel that he controls (at least) his material destiny. He is grounded in the existing social order, and is dependent upon a social and political culture that rewards his acquisitive instincts.

However, a competing image stands this materialist image on its head. This second image centers on the individualist who turns away from society altogether—who rejects the majority's definition of the good life and seeks his own physical and moral
space outside the stifling bounds of social convention. This person takes shape in the archetype of the cowboy, physically and emotionally detached from the state and the community and thoroughly nonmaterialist, traveling through life with no more than the barest essentials. For this man, privacy is not simply a condition necessary to achieve other goals, but a critical component of the very identity it promotes. It is this image of individualism that finds expression in the current legal formulations of privacy as an autonomy right.¹

While the first individualist takes his bearings from the interplay of the various political, religious, and economic doctrines prevalent in this country during the late eighteenth and nineteenth centuries, the second seems to have been molded out of the American landscape itself, particularly the scrubbed and spare geography of the American West. He gives physical form to what Michael Rogin has identified as the second face of nature in American politics and culture, in which the wilderness is not there for consumption by the individual trying to realize Jefferson's vision of a nation of small farmers (an image of nature that fits neatly into the rational political and economic discourse of American culture), but is a part of the romantic and literary tradition in which the actor faces himself in an atmosphere of wilderness apocalypse.

This article explores the connections between the legal concept of privacy and the political and ideological construct of individualism in American thought. It suggests that, to the extent that privacy has been articulated as an autonomy right in contemporary constitutional doctrine, it reflects in large measure the ideal of individualism associated with the cowboy, encompassing the right to construct physical and emotional boundaries around the self.

While this image has always appealed to the collective American mind, it has only recently surfaced in the demand for privacy as the pace of modern life has increased and the technologies of surveillance have become more pervasive. Privacy has become an issue as it has become a scarce commodity. For most of white America's history, the frontier created a space, both physically

¹ The "maleness" of privacy as an autonomy right may explain, in part, why the assertion of a privacy right is threatening when made by women. While the two images of individualism discussed here differ sharply from each other, both are equally sharply opposed to traditional cultural images of women, which view women as inherently connected to others, in the roles of wife, daughter or mother; the suggestion that a woman could be autonomous in either traditional view of individualism flies in the face of those images of womanhood. An interesting discussion of this point was presented by Carol Sanger in "Self and Separation," paper presented at the Law and Society Association meeting, June 1, 1990, Berkeley.
and emotionally, within which the individual could enjoy both isolation and anonymity. The disappearance of that frontier transformed a national romance with western individualism into a keenly felt demand for privacy as a fundamental right. Since privacy was first expressly recognized under the U.S. Constitution in *Griswold v. Connecticut,* several western states have added explicit provisions guaranteeing the right to privacy under their state constitutions. This confirms the idea that the current demand for privacy as an autonomy right stems from an attachment to western individualism; the circumstances surrounding the adoption of those provisions and the case law interpreting them also reflect that concern.

Just as the express establishment of a right to privacy has struck a chord in the American psyche, it has created an enormous furor: in regard to abortion, the scope and meaning of the right has become, as Justice William Brennan pointed out in the *Webster* decision, "the most divisive domestic political issue of our time." While the explanation for this is complex, at bottom the controversy reflects the deep-seated tension in American society over defining the appropriate boundaries between individual action and state authority. The right to privacy forms the borders of selfhood, and implies a space around the self that is inaccessible to others. The creation of that space is antithetical to living in society. For this reason, privacy is a difficult concept to approach legally: courts are the institutions that directly police *privacy and anonymity are certainly possible within social settings, as in the modern city, but within such social contexts "private" behavior, which limits the access of others to the self, is often viewed as antisocial rather than heroic. On the frontier, the wilderness forces the individual to "learn[] to inhabit distance" (William Kittredge, "Who Won the West?" *Harper's* [July 1987]) and come to terms with the self, while the empty space absorbs the negative consequences of a lack of contact with others. While the loneliness can be destructive, socially aberrant behavior may be viewed as nothing more than quirkiness, as in the story of a sheepherder who conquered loneliness "by teaching a flock of magpies to talk and carrying on long and improving conversations with them. He had to wring their necks finally for siding against him in a political discussion" (H. L. Davis, *The Winds of Morning* [New York, 1952]) [hereafter cited as Davis, *Winds of Morning*]. However, exercise of perfect privacy by the wilderness hero is threatening when undertaken within a social setting, where privacy assumes its classical meaning of deprivation or loss (Steven Lukes, *Individualism* [New York, 1973]) [hereafter cited as Lukes, *Individualism*]).
the boundary between the individual and the state, and their task more often determines what is not encompassed by a privacy right than what is included in its embrace.

Horatio Alger's Great American Dream

Individualism has long been considered a driving force in explaining the development of American society, both at home and abroad. It acquired its distinctively American twist in the nineteenth century, when it became "a symbolic catchword of immense ideological significance, expressing all that ha[d] at various times been implied in the philosophy of natural rights, the belief in free enterprise, and the American dream."

This standard account describes the individualist mentioned above who, through self-determination and hard work, was sure to make his mark on the world. This image had its roots in the political, economic, and religious doctrines upon which the American republic was grounded: liberalism, capitalism, and Puritanism were the guiding discourses.

The liberal political theory of John Locke looked to the individual as the central actor in the drama of power and politics: civil society and the state existed only through the cooperation of, and for, the benefit of its individual members. Lockean political theory was committed to a concept of the natural rights of man and envisioned a state whose powers, conferred by the consent of the governed, were limited to acting as a neutral arbiter with the sole function of mediating among competing individual interests.

In American political thought, liberalism played neatly into the laissez-faire economic doctrine dominating American thought associated with Adam Smith's Wealth of Nations. That theory started from the central premise [similar to the premises of liberal theory] that all participants were equal in the market as in other capacities, and that success depended on the resourcefulness and creativity of the individual himself.

These political and economic doctrines espousing individualism were supplemented in turn by the emphasis upon individual responsibility in Puritan thought. Despite its early focus on the community and the power it accorded the clergy, Puritanism's

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6 Lukes, Individualism, supra note 2 at 26.
7 Louis Hartz has noted that Americans embraced a "peculiar" brand of liberalism. Looking to Locke's discussions of limits to state authority, Americans came to view the state as a necessary evil, forgetting that a doctrine that explicitly limits the state must implicitly defend the state [Hartz, The Liberal Tradition in America [New York, 1955] 59-63] [hereafter cited as Hartz, Liberal Tradition].
credo of the individual's unmediated relationship with God and its dominant ideal of self-sufficiency had evolved, by the middle of the nineteenth century, into the spiritual foundation for American individualism. According to Bercovitch, Puritan doctrine became

[the figural correlative to the theory of democratic capitalism. It gave the nation a past and future in sacred history, rendered its political and legal outlook a fulfillment of prophecy, elevated its "true inhabitants," the enterprising European Protestants who had immigrated within the past century or so, to the status of God's chosen, and declared the vast territories around them to be their chosen country. ... [It] transformed self-reliance into a function not only of the common good but of the redemption of mankind.]

From these doctrines, the Horatio Alger figure emerged: religious, hard-working and self-reliant in a Darwinian sense, bent on attaining material wealth. As de Tocqueville noted, he was attractive to a society in which status was measured only through economic success, and his appeal only increased with the massive social disruptions caused by the advent of the Industrial Revolution. By the late nineteenth century, Americanism was synonymous with Algerism; there was, wrote Louis Hartz, "literally no escape ... from the frightful psychic impact of bourgeois competition."

While this figure was self-reliant in the sense that he cared little for any intervention by the state or third parties in what he perceived as his self-interest, he was nonetheless tied to society itself. He depended on—indeed, was instrumental in creating—a set of social norms that defined success itself and allowed or aided the continued amassing of material goods. The law was important for erecting the framework within which individual greed could run rampant: certainty and continuity in economic transactions could be ensured only by the development of a strong body of contract law; property laws guaranteed that what was appropriated was secure.

As the nation expanded westward, this breed of individualist influenced the pattern of development. The laws governing settlement reflected a commitment to the values of democratic individualism. Homestead laws gave those who were willing the chance to attain the title to their land by working it for a specified number of years, and western water laws, critical to development,

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9 Hartz, *Liberal Tradition*, supra note 7 at 211.
vested title to water in those who first put it to beneficial use. Westward expansion was an exercise in American Darwinism: fortunes were amassed by the exploitation of resources and of people "less fit" to conquer the wilderness. Consistently, the measure was that of material success; the western frontier simply provided particularly fertile ground in which the acquisitive individualist could flourish.

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**THE COWBOY**

The West offered a range of opportunities not only to the individualist of the Horatio Alger type. While such men were creating their personal economic empires—acquiring immense interests in the lands and resources of the West through governmental largesse, legitimate purchase, or fraudulent homestead entries—another kind of individualist was operating on the frontier by a different set of imperatives.

For this person, who lived entirely outside the existing social boundaries, the privacy offered by the frontier was essential. Such an individualist was first depicted in the wilderness adventurer of the Leatherstocking stories, and culminated in the archetype of the cowboy. He grew not so much out of the array of doctrines noted above, but from the landscape itself.¹⁰ The American West created an individual in its own image. The vast and indifferent frontier formed a morally ambiguous backdrop against which the individual stood out in stark relief, promoting an ethic of tremendous physical and emotional distance between people.

This geographic condition imparted new meaning to the term "self-reliance": autonomy meant independence in an anarchic world, requiring above all isolation from the corrupting influences of society. Competition was with nature and the self rather than with others; the test was to cope with the utter aloneness of the frontier experience. Loneliness was transformed into a virtue, with no hint of self-consciousness: "Cowboys are just like a pile

¹⁰ The suggestion that the settlement of the West uniquely affected the American outlook is an old one, having been articulated late in the nineteenth century by the historian Frederick Jackson Turner [The Frontier in American History [New York, 1920]]. His "frontier thesis"—that the West provided a safety valve to release social tensions and cultural anxieties—was widely debated, and relatively soundly refuted, but is still worth considering. Like others who have talked about American individualism and the frontier spirit, however, Turner paid little attention to the competing images of individualism that were played out on the frontier, as the acquisitive individualist was promised riches beyond imagining and the self-reliant one a place of utter solitude where he could experience spiritual rebirth. For a contemporary analysis of the impact of wilderness on American politics and culture, see Michael Rogin, "Nature as Politics and Nature as Romance in America," *Political Theory* 5 [1977] 5-30.
of rocks—everything happens to them. They get climbed on, kicked, rained and snowed on, scuffed up by the wind. Their job is just to take it," as Gretel Ehrlich notes.11

While the cowboy may have been buffeted by his environment, he exercised considerable control over his destiny, but he did so by virtue of his isolation from society, not just his independence. The cowboy of the American imagination was a being both physically and emotionally celibate, always standing outside society and faintly contemptuous of it. He was puzzled by the materialism of others, a feeling well expressed in The Winds of Morning, a novel about the vanishing cowboy life in Oregon during the 1930s. Of an acquaintance who has settled into a successful small-town life, the cowboy notes:

> It was pitiful to think that he had spent so much of his life hoping for [the esteem of others] that amounted to so little... He should have known better... A place in town, standing permanence, neighbors, a fence to string flowers on... One life squandered on such an empty ambition was enough.12

If this individualist found a model in political thought, it was not the genteel individualism of Lockean liberalism, but the image propounded by Rousseau of an individual tainted by society itself, and therefore needing to stand away from it to recover moral purity. In his first Discourse, Rousseau argued that civilization by its nature corrupts the souls of its members "in proportion to the advancement of our sciences and arts toward perfection."13 In society, according to Rousseau,

> [o]ne no longer asks if a man is upright, but rather if he is talented; nor of a book if it is useful, but if it is well written. Rewards are showered on the witty and virtue is left without honors. There are a thousand prizes for noble discourses, none for noble actions.14

A large part of our image of the cowboy turns upon the idea that the cowboy sets his own moral code, adhering to truths higher than those articulated by social convention. This adherence defines the nature of the cowboy's connection to the com-


12 Davis, Winds of Morning, supra note 2 at 226.


14 Ibid at 58.
munity, which is a critical component of his identity. The cowboy exists as an outsider, and this fact allows him to intervene when other social mechanisms of control fail and the machinery of the state itself is corrupt. It is Shane, the mysterious stranger, not the good-hearted folks around town, who can right the wrongs of frontier society. He can do so only by virtue of his status as an outsider and the secrets he keeps, and to keep those secrets he must perforce ride into the sunset when the task is done. Individualism in this image is autonomy in its most extreme form, implying all that can be captured in the sense of moral independence. The cowboy is completely inaccessible to others, and thus wholly private: while the individualists of the Horatio Alger type have names like Carnegie, Rockefeller, and Harriman, the cowboy is entirely anonymous.

The cowboy is admired for his self-reliance and (presumably) self-knowledge, and those traits give him the authority to define his moral code. They also allow him to forego passing judgment on others. Again, the attitude reflects Rousseau:

Let us leave to others the care of informing peoples of their duties, and limit ourselves to fulfilling well our own. We do not need to know more than this... O virtue! sublime science of simple souls, are so many difficulties and preparations needed to know you? Are not your principles engraved in all hearts, and is it not enough in order to learn your laws to commune with oneself and listen to the voice of one's conscience in the silence of the passions? That is true philosophy, let us know how to be satisfied with it.15

Ehrlich echoes Rousseau's theme in an essay about westerners, in a passage that draws the connection between the geography of the West and the moral outlook it promotes: "In all this open space, values crystallize quickly.... Perhaps because the West is historically new, conventional morality is still felt to be less important than rock-bottom truths."16

This image of the cowboy as self-contained and self-aware, living with his own distinct moral code, continues to fire the West of the national imagination, and to exert tremendous emotional power. In Coming into the Country, John McPhee's chronicle of Alaska, the liberating energy of the wilderness is clearly apparent. Describing one couple in a small settlement on this last American frontier, McPhee notes that "they were

15 Ibid. at 64.
16 Ehrlich, Open Spaces, supra note 10 at 11.
exploring in more ways than the geographical. They were looking for a milieu—and a manner of developing their lives. . . . What he and Lilly sought was terrain where the individual spirit might be confined only by the metes and bounds and rules of nature."

The appeal of individualism has endured and perhaps even increased as the wilderness has largely disappeared, personified by the inscrutable Marlboro man, alone and unburdened by the day-to-day worries of car payments, crying children, or the corporate bottom line. The image has been used most notably to persuade consumers that their purchases will enable them to be this solitary figure of their imaginings, where it is called upon to sell products from cigarettes to automobiles and the latest fashions. We are presented with images of freedom and solitude possible only in the wide-open spaces of the West. Today's urban counterpart to the cowboy, as noted by Robert Bellah and his co-authors in Habits of the Heart, is the hard-boiled detective, unattached and working out of an office furnished with no more than a desk and two chairs.

While cowboy films have seen their day, the cowboy remains in spirit, indifferent to established authority and out to do justice on his own terms. The real hero of the Star Wars trilogy is not Luke Skywalker, earnestly and somewhat naively dedicated to the cause of fighting the Evil Empire, but the suggestively named Han Solo, whose reluctant intervention at the last moment secures victory for the forces of truth and good.

Privacy, Individualism, and Autonomy

The Horatio Alger form of individualism and the legal doctrine it engendered were harsh and unsympathetic, taking little account of the inequalities of life. The assumption of risk doctrine in tort law, for example, which gained ascendancy in the early years of the Industrial Revolution, was consistently used to protect defendants from claims by people injured in industrial accidents, based on the fiction that workers voluntarily assumed the risk of serious injury by working in the occupations they chose. Likewise, the doctrine of caveat emptor in property and commercial law, which limited the duty of one party to a transac-

18 It is interesting to note how the two images of individualism intersect in this respect: the western image has been commodified by the entrepreneurial individualist and is used to sell conformity—one can only be an individualist if, like one's neighbors, one buys the right products.
19 Robert Bellah et al., Habits of the Heart (Berkeley, 1985).
20 I am indebted to Professor Kramnick for this observation.
tion to disclose negative facts about the transaction to another, frequently imposed the burden of unfair dealings upon the purchaser. As these doctrines were discarded over the last three-quarters of a century, the courts referred to them as "emanat[ing] from a philosophy of frontier individualism that is incompatible with modern living." The "privacy" that allowed these rules to develop—to set the terms of one's transactions with no regard for the social consequences—was suspended by the courts and legislatures as "the common-law solicitude for rugged individualism [gave] way . . . to social legislation."

The nature of the privacy right currently recognized in constitutional doctrine, however, is not the privacy associated with Horatio Alger, but the privacy grounded in the image of individualism as autonomy. Jeffrey Reiman suggests that "privacy is necessary to the creation of selves out of human beings, since a self is at least in part a human being who regards his [sic] existence—his thoughts, his body, his actions—as his own." As an autonomy right, according to Ruth Gavison, privacy prohibits others from gaining access to the self, at both a physical and an emotional level, while Ferdinand Schoeman maintains that privacy as an autonomy right grants the individual a space around the self, thereby promoting intellectual and creative development.

Lawrence Tribe claims that a right of privacy has both inward- and outward-looking aspects, thereby protecting "those attributes of an individual which are irreducible in his [sic] selfhood."

In constitutional doctrine, the express articulation of privacy as an autonomy right is relatively recent, appearing in 1965 in Griswold v. Connecticut, when the Supreme Court held that a state could not prohibit the dissemination of contraceptive information to married couples. However, the right framed was one that attached to a relationship—specifically, the marital relationship—rather than to the individuals within that relationship.

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21 Floresta, Inc. v. City Council of San Leandro, California Reporter 12 (1961) 190-91 [affirming the right of a municipality to enact a zoning ordinance].


Seven years later, the constitutional doctrine shifted to encompass a right that protected individual autonomy as a liberty interest. In *Eisenstadt v. Baird*, the court was asked to consider whether a single person's interest in obtaining contraceptives was protected by the same right of privacy as that of married couples. The court held that it did, characterizing the shift as follows: "It is true that in *Griswold* the right of privacy . . . inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." This characterization of privacy as a right of personal choice in *Eisenstadt* then formed the basis for the court's subsequent recognition of privacy as a right to make personal choices in *Roe v. Wade* the following year.

The fact that privacy as an autonomy right under the U.S. Constitution is so recent does not mean that the idea of privacy as an aspect of personal liberty had no precedent. As Tribe points out, privacy concerns surfaced in a variety of earlier doctrines before a specific right to privacy was recognized. The search-and-seizure provisions of the Fourth Amendment, the prohibitions against quartering soldiers in private homes in the Third Amendment, the takings provisions of the Fifth and Fourteenth amendments, and a variety of cases addressing an individual's rights of association or rights to choose a particular way of life or livelihood have significant privacy dimensions. Tort actions for invasions of privacy, which generally protected an interest in freedom from unwarranted surveillance by others, were accepted as a cause of action in most American courts by the turn of the century.

Several scholars have argued persuasively that a right of privacy has always been implicit in federal constitutional doctrine, under both the doctrines noted above and the Ninth Amendment's reserve clause providing that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage any others."
others retained by the people." As Stephen Rohde points out, a constitution that delegates limited power to the state and reserves all remaining rights to the people expresses the essence of privacy, decreeing that the state may intervene in only limited areas of personal life.\(^{30}\)

However, the express articulation of a federal right to privacy is less than three decades old. The timing of its emergence and the manner in which it has surfaced as an autonomy right is testimony to its connection with the nineteenth century’s romantic image of frontier individualism and autonomy. Since a privacy right was first articulated under the Constitution, it has been picked up with particular force in the West. Several Western states have amended their state constitutions since 1972 to include specific privacy guarantees, and the discussions surrounding the adoption of these amendments reveal that the values at issue have been those most closely associated with the image of the cowboy: the right to be left in solitude and to escape the surveillance of society.

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**PRIVACY AND THE FRONTIER**

That privacy rights reveal a longing to retreat from the complexities and confusion of modern life is apparent in the manner in which western states have reacted to the federal constitutional right to privacy. Although, as noted earlier, most states recognized tort actions for privacy, and one state—Florida—had an express privacy provision in its state constitution, only Wyoming among the western states had a constitutional provision that might have been construed as a privacy guarantee independent of its search-and-seizure provisions. Article 1, Section 7 of the Wyoming Constitution provides that "[a]bsolute, arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Alaska’s constitution provides that "[t]he right of the people to privacy is recognized and shall not be infringed," while California’s declares that "[a]ll people are by nature free and independent and have inalienable rights . . . [including] pursuing and obtaining safety, happiness and privacy."\(^{31}\) The Montana provision is particularly strong: "the right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest," and Hawaii has followed suit with a provision declaring that "the right of the

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\(^{31}\)Alaska Const., Article 1, section 22; Calif. Const., art 1, sec. 1.
people to privacy . . . shall not be infringed without the showing of a compelling state interest."32 In addition, the courts of both Arizona and Washington have found an express guarantee of privacy in their identical provisions, contained in their constitutional prohibitions against unlawful search and seizure, that "[n]o person shall be disturbed in his private affairs."33

Where available, the legislative histories describing the adoption of these constitutional provisions indicate the degree to which these clauses are grounded in a concern for individual autonomy of the type that was available—at least theoretically—only on the frontier. The debates from the Montana Constitutional Convention are illustrative. At the convention, delegate Campbell opened debate on the privacy provision with the observation that

"The times have changed sufficiently that this important right [of privacy] should now be recognized. . . . In our early history, of course, there was no need to expressly state that an individual should have a right of privacy. . . . In that type of a society of course, the neighbor was maybe 3 to 4 miles away. There was no real infringement upon the individual and his right of privacy. However, today we have observed an increasingly complex society and we know that our area of privacy has decreased, decreased and decreased."34

Another Montana delegate suggested that the right to privacy had always existed—"The reason we organize in a free society is to make sure we have dignity, that we have privacy, that our private affairs are not open to public scrutiny"35—and that the effect of the amendment was simply to codify an extant understanding of individual rights that had been a very real part of the frontier experience. The California Constitutional Revision Commission echoed this sentiment when it asserted that the privacy provision was being added "to preserve and enhance the existing provisions."36

In Hawaii, similar concerns that the pace of modern life was encroaching upon a preexisting privacy right appeared to lie in the enactment of a privacy provision: "Public awareness of [the

32 Mont. Const., art. 2, sec. 10; Ha. Const., art. 1, sec. 5.
33 Ariz. Const., art. 2, sec. 8; Wash. Const., art 1, sec. 7.
34 Montana Constitutional Convention, verbatim transcript, March 7, 1972, 1680-1681.
35 Ibid. at 1673.
advent of the computer and the pervasiveness and totality of our information gathering systems] has led to serious discussion of what can be done to protect privacy in this age of technological advance." Privacy as being free from governmental surveillance and intrusion into private affairs, avoiding disclosure of personal matters, and insuring the freedom to be independent in making intimate decisions was characterized as part of the "increasing recognition of an individual's wish for privacy as a legitimate social interest."37

These discussions suggest a deep-rooted concern with privacy as an autonomy right—a right to define, at least at some levels, a personal moral code and to maintain authority over personal actions. Prompted by a clear distrust of the authority of the state or third parties, the constitutional provisions enacted by these states take privacy as an autonomy right for granted, recognizing it as being inseparable from individualism and the development of the self. Moreover, they reflect an attachment to the kind of individualism—isolated and anonymous—made possible on the frontier.

PRIVACY AND THE LIMITS OF LAW

While western legislatures enacted their privacy provisions with relatively little debate, the contours of those rights have proved no less difficult for state courts than federal courts to define. The explanation for this is complex, and can be sketched only briefly here.

Defining the legal right to privacy places courts at the center of the debate over the values involved in defining individual liberty. By its nature, privacy creates a refuge for the individual from the social rules that courts, as institutions of state power, are bound to articulate and interpret. Privacy as an autonomy right is threatening, like the cowboy himself, because it suggests a space within which the law does not operate and within which normal social rules do not apply. To grant such a space requires reposing trust in the individual's capacity to make moral choices, and a willingness to tolerate some degree of deviance from accepted conventions.

Paradoxically, this individualism is not the kind endorsed by mainstream American culture. As many observers of American society have noted, individualism of the Horatio Alger stripe promotes conformity: de Tocqueville once observed that there is no country in which "there is less independence of mind and true

37 Hawaii Constitutional Convention Studies: Article I: Bill of Rights (University of Hawaii, Legislative Reference Bureau, July 1968) 74.
freedom of discussion than in America... where the majority has enclosed thought within a formidable fence.”38 Success in such a highly competitive arena, which (fictitiously) assumes that all are on equal footing, means that, to achieve status, the individual must conform to the expectations of the majority to rise within the group.

This explains in part why the nature and scope of the right to privacy has been such an explosive issue in American society. Privacy as an autonomy right turns upon the image of the individual as someone who is, or ought to be, able to cut off all ties to others; it protects the right of the individual to go against the crowd. A right of privacy protecting autonomy—which actually endorses an individual’s right to make moral judgments that may contradict majoritarian values—flies directly in the face of the first ideal of individualism, although the articulation of the right as an autonomy interest is directly in keeping with the second. This suggests why defining the scope of a privacy right is so difficult.39

At a less abstract level, the scope of a right to privacy is problematic because of the manner in which courts operate to interpret the law. Courts are institutions of the state, and as such are charged with policing the boundary between governmental authority and individual autonomy. They protect social order by mandating compliance with social rules implicitly and explicitly embodied in the law, and do not cope well with issues like privacy that require defining the acceptability of behavior beyond the law. Questions about the scope of a privacy right are most likely to present themselves when individual action has been perceived to be harmful to others, so that courts are more often involved in defining the limits to autonomy rather than making sweeping statements about its general scope.

For these reasons, despite being armed with explicit constitutional provisions, state courts to date have not interpreted privacy rights under their state constitutions in a manner that deviates wildly from the interpretations that federal courts have issued. Although most of the courts—including those of Alaska, Arizona, California, and Hawaii—have declared that the rights of privacy under their state constitutions are broader than those guaranteed under the federal Constitution,40 the decisions have generally

39 See note 1 supra.
followed the contours of federal doctrine, meaning that the assertion of a right of privacy will likely fail in the face of a compelling or substantial public interest. It may be too early to draw conclusions about whether state courts will begin to interpret their state constitutions broadly as the federal judiciary assumes a more conservative stance; the reliance upon state rather than federal constitutional provisions to protect individual rights is a recent phenomenon, and it is difficult to project the extent to which state constitutions will be called into action.\textsuperscript{41}

\textsuperscript{41} In \textit{Rasmussen v. Mitchell v. Fleming}, 741 P.2d 674 (Ariz. 1987) \textit{aff'd in part, rev'd on other grounds}, the Arizona Supreme Court recognized a broad right to refuse medical treatment grounded in Arizona's state constitutional right to privacy, which appears to recognize a more extensive privacy "right to die" than that recognized in the U.S. Supreme Court's recent holding in \textit{Cruzan v. Missouri Department of Health}, — U.S. —, 58 U.S.L.W. 4916 (June, 1990).
The place of property and economic liberty in Americans' litany of fundamental rights is the subject of much historical and contemporary controversy. Opinions on the constitutional meaning of "property" often diverge widely as to the nature of the state and the individual within the political community, and may involve radically opposed ideas about the extent to which property's constitutional protections are qualified. Though the Fifth Amendment of the Bill of Rights prohibits the deprivation of life, liberty, and property without due process and bars the taking of property for public use without just compensation, the constitutional text itself offers little guidance in setting precise limits on property rights. In the same way, legislative intervention in economic affairs and the direct regulation of private property has proceeded in American history without stable constitutional guidelines.

Historical analysis of evolving societal and constitutional notions about state power, individual rights, and the ever-elusive "public interest" helps show how constitutional meaning has

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been given to property and economic liberty. The late nineteenth
century is especially significant in this analysis.

Following a relatively cooperative era between the public and
private sectors and a generously distributive political climate
generated by rapid economic and institutional growth, legislative
activity in the 1870s shifted significantly from promoting eco-
nomic development toward emphasizing its regulation. The
change reflected the increasing social tension arising from the
nation’s industrial transformation, and created a difficult task for
the courts: namely, the demarcation of governmental regulatory
action, which was justified in the name of the public interest, but
which also set the acceptable limits of governmental intrusion
upon private-property rights. The period witnessed a virtual
constitutional revolution in government-business relations.

Central to this process was the ratification of the Fourteenth
Amendment in 1868. Having adopted verbatim the Fifth Amend-
ment’s phrases regarding due-process protections of life, liberty,
and property against governmental action, the Fourteenth
Amendment became the vehicle by which businesses fought
expanding governmental involvement in their commercial
affairs. The legal battles over the constitutionality of regulatory
legislation that ensued under Fourteenth Amendment claims
were as tumultuous as the era. In less than twenty years—from
the Slaughterhouse cases of 1873 to Chicago, Milwaukee & St. Paul
Railway Co. v. Minnesota in 1890—the Supreme Court
moved from deference toward state regulation, even in the case
of obvious legislative corruption, to the substantive due-process

2 Charles W. McCurdy, “Justice Field and the Jurisprudence of Government-
Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-
1897,” in Lawrence M. Friedman and Harry N. Scheiber, eds., American Law
and the Constitutional Order (Cambridge, Mass., 1978) 246 [hereafter cited as
McCurdy, “Justice Field”]; James Willard Hurst, Law and the Conditions of
Freedom in the Nineteenth Century United States [Madison, 1956] [hereafter
cited as Hurst, Law and the Conditions of Freedom]; Harry N. Scheiber, “Public
Rights and the Rule of Law in American Legal History,” California Law Review
Constitutional Development (New York, 1982).

3 For a discussion of social and political changes in the United States in the late
nineteenth century, see Robert Wiebe, The Search for Order: 1877-1920 (New
York, 1967); Hurst, Law and the Conditions of Freedom, supra note 2; Stephen
Skowronek, Building a New State: The Expansion of National Administrative
Capacities, 1877-1920 (Cambridge, Mass., 1982); on state police power and
private property, McCurdy, “Justice Field,” supra note 2 at 247; Morton Keller,
Affairs of State: Public Life in Nineteenth-Century America (Cambridge, Mass.,
1977). Police power is defined as “the general power of a government to legislate
for the comfort, safety, health, morals, or welfare of the citizenry or the
prosperity and good order of the community.” Dennis J. Mahoney, “Police
Power,” in Leonard Levy, ed., Encyclopedia of the American Constitution, 4

rulings of the *Lochner* era, which removed that deference in economic matters and which broadly reformulated rights of property and "liberty of contract" as fundamental.

This article focuses on a series of court cases fought between the City of San Francisco and the Spring Valley Water Works, which controlled the city's water supply. Since the cases were heard in the state and federal courts between 1867 and 1890, they illustrate the problems common to courts, legislatures, and corporations at the time. At the state level, they involved judicial attempts to define the reach of the police power, including San Francisco's municipal police power, and the litigants' contractual rights and obligations. At the U.S. Supreme Court level, the dispute fell within a series of Fourteenth Amendment cases that supported legislative discretion in the regulation of business affecting the public interest. However, the last case analyzed here was of a significantly different cast from those preceding it. In 1890 the California Supreme Court abandoned its position of deference regarding legislative regulatory action and ruled substantively on the reasonableness of water rates set by the San Francisco Board of Supervisors. A more comprehensive judicial movement in interpreting the Fourteenth Amendment's due-process clause ensued.

While nationwide developments provide the context of the courts' delineation of San Francisco's regulatory power through the Spring Valley cases, local events and popular sentiment in San Francisco were equally important in this litigation and its ramifications for water policy in California. A radical reform movement was under way in California during the 1870s, characterized by hostility toward concentrated power, and by bitter criticism of corrupt legislative practices. The campaign culminated in the state's adoption of a new constitution in 1879, which gave explicit attention to the "water question." The San Francisco-


6 The problem of providing an adequate water supply to the state's growing urban areas was distinct from the problems facing irrigators. California's cyclical rainfall patterns created much indebtedness among farmers, who were especially vocal regarding the taxation of mortgages at the state's 1879 constitutional convention. Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention, 1878-1879* [Claremont, 1930] 8 [hereafter cited as Swisher, *Motivation and Political Technique*].
Facing page: map of the Spring Valley Water Works, 1876. (San Francisco Municipal Reports, 1876-77)

Left: the Spring Valley Storage Reservoirs, surveyed in 1875 by City Engineer Thomas Scowden. (San Francisco Municipal Reports, 1874-75)
Spring Valley litigation and control of the state’s water resources emerged as hotly debated issues at the constitutional convention. The compromise solution was Article 14 of the 1879 constitution, which defined water distribution as a “public use,” though it was a far from radical conclusion, given the development of public-rights doctrine to that point. The provision grew directly out of the San Francisco-Spring Valley conflict, however, and held important consequences for future water development in the state.

**Municipal Expansion and Early Regulatory Control**

The growth of San Francisco after California’s statehood in 1849 was spectacularly rapid, a fact of vital importance to the shaping of the Spring Valley litigation. According to historians William Issel and Robert Cherny, “For thirty years after the discovery of gold, San Francisco stood virtually unchallenged as the economic capital of the Pacific slope.” The city quickly came to control trade and financial operations in the West. Between 1860 and 1880, San Francisco’s population grew from approximately 57,000 to 234,000. Generally, “The city had more manufacturing establishments, more employees in workshops, greater capitalization, larger value of materials, and higher value of products than all the other twenty-four western cities combined.” By the end of the Civil War, San Francisco had securely established its commercial position in the West and in the nation’s economy.

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10 Issel and Cherny, *San Francisco*, supra note 8 at 23.
To ensure its continued prosperity and growth, the city required an efficient water-distribution system. When the San Francisco City Water Works started business in 1857, the city's Board of Supervisors offered it generous inducements to insure the rapid construction of its operations. Among these were the terms of its municipal charter, known as Order No. 46, which stipulated that rates for the first five years after the introduction of water should yield a gross revenue of 24 percent per annum upon the actual cash capital invested, and 20 percent per annum thereafter. The order was ratified by the state legislature, as required by California's 1849 constitution. Even for that time in the state, the rates of return were extremely high.11

The state relied upon bountiful charter provisions as a means of promoting investment and thus enhancing economic development.12 At the same time, Order 46 contained strong regulatory language that reflected the norm in charters issued in other states.13 Section 6 of the order, for example, reserved the city's right to purchase the entire San Francisco City Water Works operation after two years, with only thirty days' notice to the company.14 Section 4 also provided a pivotal regulatory provision, reserving for the city the right to the "free use of water . . . for the purpose of extinguishing fires . . . and for all the public purposes of said city and county, except for sprinkling of streets."15

Shortly after approving the order, the state legislature defined corporate power more clearly in the 1858 Act for Incorporation of Water Companies. This offers another illustration of the interaction between distributive and regulatory concerns. The act granted eminent-domain privileges to any company supplying water to a city, county, or town in the state. Concomitant with these privileges were a number of duties: for example, the act demanded that corporations formed under it should provide the people they served with "fresh water . . . at reasonable rates,"16 and the cities they served with water free of charge "to the extent of their means, . . . in case of fire or other great necessity."17 The act also established that rates should be set by a board of commis-

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11 Act of March 18, 1858, ch. 95, 1858 California Statutes, Sec. 5 at 76 [hereafter cited as Act of March 18, 1858].
14 Act of March 18, 1858, supra note 11, Sec. 6 at 77.
15 Ibid., Sec. 4 at 76.
16 Act of April 22, 1858, ch. 262, 1858 California Statutes, Sec. 4 at 219 [hereafter cited as Act of April 22, 1858].
17 Ibid.
sioners, with two representatives from the city or town authorities and two from the company, and a fifth chosen by the other four members. This rate-setting procedure was important, for it allowed property owners an equal voice with those of elected authorities in determining the water’s selling price.

Popular distrust of concentrated power was directed toward legislatures as well as private corporations. The fear of legislative-corporate collusion had shown itself in the state’s original 1849 constitution. Article 4, Section 31, prohibited the creation of corporations other than municipalities under special act, and reserved for the state the right to alter or repeal all laws, including those involving incorporation. Despite this restriction, the state legislature granted a franchise called the Ensign Act, only one day after its passage of the 1858 General Water Incorporation Act. Nominally, the franchise authorized entrepreneur George Ensign to lay water pipes in San Francisco’s streets. Sections 3 and 4 of the act, however, delineated the city’s right to tap Ensign’s water pipes and set rates for any water he sold. In other words, the act opened the door for Ensign’s company, the Spring Valley Water Works, to distribute (or sell) water under terms different from the state’s general water-incorporation act.

The Spring Valley Water Works developed rapidly, rivaling the San Francisco City Water Works. In 1864, when three employees of the latter were charged with grand larceny for tapping Spring Valley’s pipes and diverting almost a million gallons of water a day for several months, the affair was settled out of court and resulted in Spring Valley’s taking over San Francisco City Water Works’ assets and properties.

Spring Valley’s original pipe-laying franchise thus evolved into a monopoly franchise for water distribution in San Francisco. Its legal status was complicated because technically it operated under two charters: Order 46, and the Ensign Act. These differed primarily in the treatment of the public claim to free water use. Order 46 provided for the city’s free use of water for fires and all public purposes, while the Ensign Act contained more ambiguous language. Section 3 stated that, in a fire, San Francisco’s fire chief could freely tap the Spring Valley Company’s pipes “up to and until such time” as another company or person introduced water into the city. If water were brought in by someone else, the act

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18 Ibid.
19 Act of April 23, 1858, ch. 288, 1858 California Statutes 254 [hereafter cited as Act of April 23, 1858].
21 Act of April 23, 1858, supra note 19 at 255.
required that Spring Valley furnish an unspecified quota of its water for "fire and other municipal purposes."22

For two years Spring Valley operated under the San Francisco City Water Works charter, providing San Francisco with free municipal water. Naturally, the cost of that obligation increased as the city's population grew. In 1867 the company attempted to relieve itself of this responsibility by repudiating the charter and turning instead to the Ensign Act. Interpreting Section 3 as requiring free water only in case of fire, Spring Valley notified San Francisco that unless it made payments and back payments for all water use, the company would refuse to supply the city with water for general municipal purposes. In effect, Spring Valley maintained that its charter contained no regulatory provision requiring it to provide free municipal water beyond fire extinguishment, and that San Francisco should pay like any other customer. The city countersued, claiming that the company was bound to continue its supply of free municipal water.

The ambiguity of Spring Valley's incorporation and the question of the city's entitlement to free water resulted in extensive litigation in the state courts. Common-law tradition and a long line of American state court cases supported municipal regulatory power, especially the legitimacy of corporate obligations such as free water provision for governmental purposes.23 However,
corporate charters also set the limits of state and municipal police powers within the terms of constitutional law. At issue were three clusters of basic issues in law: private-property rights, reasonable expectations in government-business relations, and obligations of contract. The nature of the particular "property" here was crucial. San Francisco, an expanding city in an arid region, was absolutely dependent upon Spring Valley for its water, a "necessity of life." Besides simply clarifying the terms of Spring Valley's charter, the courts' interpretation of the statutes' language would serve to draw boundary lines between legitimate municipal regulation and the effective confiscation of the company's water.

Four cases argued before the California Supreme Court reveal the difficulties involved. The court moved back and forth between rulings supportive of the city's regulatory authority and rulings protective of Spring Valley's private-property rights in its water. In the first case, in 1870, the court denied San Francisco's demand for an injunction against Spring Valley's proposed shutoff of city water.24 In the second, in 1873, the court held that the Ensign Act required that Spring Valley provide San Francisco with free water for municipal purposes.25 The third case was decided a year later, when the court invalidated the Ensign Act altogether under Article 4, Section 31, of the state's 1849 constitution, which prohibited the creation of "special franchises."26 The court held that Spring Valley should have been organized under the 1858 General Incorporation Act for water companies, the terms of which required that water companies furnish the city or town they served with water "in case of fire or other great necessity, free of charge."27 The court decided that the phrase "in case of fire or other great necessity" meant that Spring Valley was required only to furnish free water to San Francisco in case of fire, and for no other purpose.28

In the fourth case, in 1877, the court offered a new interpretation of the phrase "other great necessity," ruling that it extended beyond fire extinguishment. Justice McKinstry held that Spring Valley's duty included supplying free water to San Francisco for fire and any other activity in which water was "incidental to the discharge" of the supervisors' duties as local legislators.29 This, he wrote, must be done for "the benefit of the public."30 Thus, after

27 Act of April 22, 1858, supra note 16, Sec. 3 at 219.
28 San Francisco v. Spring Valley Water Works, 48 Cal. 515 (1874).
29 Spring Valley Water Works v. San Francisco, 52 Cal. 121-22 (1877).
30 Ibid.
seven years of confused litigation with contradictory results, the
court finally settled on an interpretation of Spring Valley's charter
that forced the company's property-rights claims to yield to the
public's interest in water.

SOCIAL DISCONTENT AND THE 1879 CONSTITUTION

Over the course of the litigation from 1867 to 1877, national
political and social conditions had a bearing on the Spring Valley
cases and the development of judicial doctrine surrounding state
police power. The year 1877 marked the beginning of economic
depression throughout the country, and California was hard hit.
San Francisco's unemployment rate approached 15 percent.31
Diverse socioeconomic groups expressed intense and sometimes
violent criticism of corporate power and a notoriously corrupt
state legislature, demanding fundamental changes in the political
process. Elected delegates finally convened for a constitutional
convention in 1878.32

The San Francisco-Spring Valley litigation had an effect on
the constitutional debates and the new document itself. Spring
Valley, depicted at the convention as an "evil" monopoly which,
through its "old rotten works... has robbed the city for the last
twenty years," was virtually a paradigm for the abusive corporate
power many delegates hoped to constrain.33

San Francisco's Board of Supervisors also epitomized for many
degrees the corrupt political power plaguing the state. The city
was still reeling from a major political scandal involving Spring
Valley's alleged bribery of several supervisors. In 1875 the com-
pany had allegedly offered several thousand dollars' worth of Spring
Valley bonds for the votes of particular supervisors, when a
decision was before the board regarding Spring Valley's offer to
sell its entire operation to the city for $15 million.34 The purchase
price was outrageously inflated. Publicity of the back-room
dealings in San Francisco's Daily Evening Bulletin and the Call
roused public sentiment against the purchase. Popular antipathy
for the company and distrust of the political process reached new
heights, reflected in one editor's view:

31 See Swisher, Motivation and Political Technique, supra note 6.
32 Issel and Cherny, San Francisco, supra note 8 at 125.
33 Debates and Proceedings, supra note 7.
34 "Complaint in Equity, District Court of the Third Judicial District, in and for
the City and County of San Francisco, Theodore Le Roy v. Spring Valley Water
Works, et al., March 17, 1876"; see generally G.K. Fitch MS; both sources,
Bancroft Library.
"The California Water Carrier." Before the San Francisco City Water Works completed the redwood aqueducts to the city in 1858, water was brought by barge from Sausalito and sold from carts. (The Bancroft Library)

The history of the water supply of San Francisco, with the legislation and litigation attendant thereupon, is a record of venality, fraud and corruption, seldom or never equalled in a civilized community, or if attempted, never before allowed to escape its just punishment. If individuals, engaged in private enterprises had adopted such methods, as have been in vogue between city officials and water company employees, some of them would doubtless ere this, have found themselves in the position of convicted criminals, while others would help to swell the population of lunatic asylums, under the order of the tribunals having jurisdiction of the insane.35

At the constitutional convention, delegate J.S. Hager from San Francisco insisted that the Spring Valley Company professed to have a claim on all the water in the state; that no water works would be constructed in San Francisco until Spring Valley sold its

operations, which it would not do for less than twice the price of their actual worth; and that Spring Valley's power was so great that the company always successfully interceded in legislative attempts to curtail its monopoly. He continued: "That which should be open and free to the world has been reduced to private ownership, a thing never heard of in any country in the world except in California, where water, the essential of life, is made the subject of private ownership by individuals and held by them."\textsuperscript{36}

Other San Francisco delegates supported Hager's advocacy of public ownership of the state's waters, largely in response to Spring Valley's monopoly.\textsuperscript{37} However, this was an extreme position at the time. Whereas state and federal courts' expansion of the public-purpose doctrine clearly justified regulation of municipal water supplies, it did not sanction exclusive public ownership of the resource. Delegates from other parts of California countered the San Francisco representatives' position with views protective of private-property rights in water.

While the 1879 constitution's final provisions concerning water use and regulation were neither radically reformist nor conservatively protective of property, they did specify regulatory procedures and public rights. Article 14 declared that the use of "all water now appropriated, or that may hereafter be appropriated for sale, rental, or distribution," was a public use, and was therefore to be subject to the regulation and control of the state. The article provided that the governing body of the city or town served by a private water company should set the rates in a manner prescribed by state law.

Pursuant to the 1879 constitution's provision nullifying all laws inconsistent with the new state organic law, this last section concerning rate setting had important implications for property claims in relation to municipal police power. Under the 1858 General Act for Incorporation of Water Companies, corporations had been allowed equal representation on rate-setting boards, which provided the property owners with some say in the price of the property. By giving full rate-setting discretion to local governments, the new constitution broadened governmental authority over property affecting the public interest. In other words, this provision brought explicitly to the fore and answered affirmatively the central question posed by Justice Field in his dissent in \textit{Munn v. Illinois} (1876): "whether it is within the competency of a State to fix the compensation which an individual may receive

\textsuperscript{36}Debates and Proceedings, supra note 7.

\textsuperscript{37}Ibid. at 1021; see also Mary Catherine Miller, "Riparian Rights and the Control of Water in California, 1879-1928: The Relationship Between an Agricultural Enterprise and Legal Change," \textit{Agricultural History} 59 (1985) 1.
for the use of his own property in his private business, and for his services in connection with it." 38

Article 11 of the 1879 constitution also contained a response to issues raised in the Spring Valley litigation. Section 19 established that in any city where the municipality did not own or control any public water or electric works, any legally incorporated person or company could use the city streets to provide gas, electricity, or water, on condition that the municipality would regulate the charges. As originally proposed during the constitutional debates, this section stipulated that such companies provide the utility to the city free of charge. In explaining the section's original language, delegate James Reynolds stated, "We understand the reason very well—the power of Spring Valley... It is simply to break the power of overshadowing monopolists." 39 However, over the protests of those from San Francisco, the delegates eventually eliminated the free-service requirement. Several delegates, "disposed to the opinion that there is some other spot on this globe besides San Francisco," successfully argued that such a provision would constrain healthy economic competition in towns with no private-utility monopoly. 40

FEDERAL ADJUDICATION AND THE AFFECTATION DOCTRINE

The 1879 constitution's categorization of water distribution as a public use reflected broader judicial developments in the United States concerning state police power vis-a-vis property categorized as private in ownership but public in use. At the federal level, the 1877 Granger cases had clearly articulated the affectation doctrine—that governments could regulate private property affected with a public interest. 41 Indeed, California's constitutional delegates framed Article 14 "in accordance with the decisions of the Supreme Court of the United States in the [Granger] Cases." 42

In a series of cases litigated after adoption of the 1879 constitution, Spring Valley made many of the same arguments that had been unsuccessfully put forth by the railroad and elevator operators in the Granger cases. The company attacked the 1879 constitution's Article 14, which declared water distribution a public use and provided the terms of its regulation, as violating

38 94 U.S. 138 (1877).
39 Debates and Proceedings, supra note 7 at 1072.
40 Ibid. at 1073.
42 Debates and Proceedings, supra note 7 at 1020.
the U.S. Constitution's contract clause, and the due-process and equal-protection clauses of the Fourteenth Amendment. The state courts, and eventually the federal Ninth Circuit and U.S. Supreme Court, responded, in turn, as had Justice Waite in *Munn v. Illinois*, that

> All property which is affected with a public interest ceases to be *juris privati* only, and becomes subject to regulation for public benefit; and property is affected with a public interest whenever it is devoted to such use as to make it of public consequence and to directly affect the community at large.\(^43\)

Nevertheless, the result of the post-1879, post-*Granger*-cases litigation between Spring Valley and San Francisco was not a foregone conclusion. Writing for the majority in the first of these cases heard before the California Supreme Court in 1881, Justice McKee wholeheartedly embraced the affectation doctrine of *Munn*.\(^44\) However, parts of arguments set forth in a dissent

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\(^{44}\) Cal. Const. of 1849, Art. 12, Sec. 31.
written by Justice Ross in that case emerged in arguments of the majority in later cases between the Spring Valley Company and San Francisco. Analogous to Field's dissent in *Munn*, in which Field demanded a clear boundary between public and private spheres for the protection of private-property rights, 45 Ross argued that Spring Valley operated under a contract with San Francisco relating to property rights and to the amount the company should be paid for the property it owned. 46 Spring Valley thus had vested property rights in the water, beyond the reach of any subsequent legislation. 47 Ross made the additional point that if the majority were correct in holding that the new constitution nullified the rate-setting provisions of the charter under which Spring Valley had previously operated, the entire charter should be considered null and void. 48 This would have meant that San Francisco could no longer demand water from the corporation free of charge. 49

Exactly one year later, in 1882, the supreme court reversed itself and ruled in *Spring Valley v. San Francisco* that all water companies that provided free water for municipal purposes were henceforth relieved of that obligation. 50 Adopting Ross's arguments, Justice Morrison wrote that "if the Constitution took from the Water Company the privilege of having a voice in fixing the rates it might charge for water supplied, it also relieved the company of the duty of supplying the water to the city for any purpose free of charge." 51

An interesting ideological shift had thus occurred on the court. All but one of the seven justices elected under the 1879 constitution had run on the Workingmen's and Democratic tickets. The Workingmen's Party had been especially zealous in its reform campaign in blasting concentrated wealth and political corruption. While Article 14's provisions on regulation and governmental rate setting corresponded to the general reformist platform of constraining corporations like the Spring Valley Company, the campaign was also aimed at legislative abuses. Spring Valley had once been the focus of public outrage over its high rates, poor service, and legislative influence, but after the constitution's


46 *Spring Valley v. San Francisco*, 61 Cal. 16 (1881).

47 Ibid. at 17.

48 Ibid. at 15.

49 Ibid.


51 Ibid. at 27.
adoption the San Francisco Board of Supervisors was routinely condemned in discussions on the “water question.” The complaint expressed in local papers was that San Francisco’s long-time insistence on free water for municipal purposes drove consumer rates up and so generated a windfall for large property owners in the city. A flyer circulated in 1880, entitled “An Appeal of the Water-Rate Payers of San Francisco,” assessed the situation as follows:

In no other place in the world is the whole tax of furnishing a city with water imposed solely upon the rate payers, and all other classes and interests allowed to escape. These rate payers pay for all the water used in and about the city, and property contributes not one cent. The wonder is that the people have submitted to this injustice so long. Is there any reason why the rate payer should pay for supplying municipal institutions with so-called free water, or for sprinkling streets and parks, or furnishing the means of putting out fires, that our merchants and capitalists may do business in safety by the purchase of cheap insurance, thereby deriving actual profits from the contributions largely of the poor?52

In contrast to McKinstry’s holding in 1877 that, “for the benefit of the public,” Spring Valley should provide free water for the city, after 1879 the California court pursued much deeper egalitarian objectives while supporting Spring Valley’s qualified property rights. Simply put, it appeared right and fair for consumers of all types to pay for water; what was unfair was that private consumers, rather than property owners, should pay for all water used. In his 1882 opinion, Justice Morrison concluded that it was to “distribute the burden more equally that the new Constitution abolished free water.”53

Though relieved of its burden, Spring Valley nonetheless pursued in federal courts its contention that Article 14 violated the federal contract clause and its Fourteenth Amendment due-process and equal-protection rights. Both the Ninth Circuit Court and the U.S. Supreme Court followed the doctrine of Munn, and affirmed McKee’s 1881 ruling in California. Chief Justice Waite himself wrote the Supreme Court majority opinion in Spring Valley Water Works v. Schottler, decided in 1884. As in Munn, he

52 “An Appeal of the Water-Rate Payers of San Francisco; Opinions of the Press and Citizens Upon the System of Water Rates,” 1880, Bancroft Library.
declared "that it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt." Field wrote in dissent, as he had in Munn, asserting that the majority in this case went beyond "all former adjudications in sanctioning legislation impairing the obligation of contracts made by a State with corporations." The outcome of the federal cases is not surprising in light of Munn and the development of the police-power doctrine as of 1884. However, some of the arguments and opinions presented in these cases foreshadowed a significant change in the way state and federal courts would interpret the due-process clause. The observation made in the Ninth Circuit opinion that "the right [to set water rates] conferred upon the supervisors might, in unscrupulous hands, be abused" is telling. In the Supreme Court, Waite wrote that there "would be time enough" to consider later what constituted reasonable rates set by San Francisco's Board of Supervisors.  

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55 Ibid. at 356.
Toward Substantive Due Process

A California Supreme Court decision involving San Francisco and the Spring Valley Company, issued while the U.S. Supreme Court case between the two litigants was pending, offers a good example of the judicial deference to legislative regulation of business common in the late 1870s and early 1880s. Against Spring Valley's appeal in 1883 for a writ of prohibition restraining the San Francisco Board of Supervisors from setting water rates, the California Supreme Court issued a brief per curiam response: "In our judgment the matter of fixing water rates is not judicial, and for this reason the writ of prohibition cannot be awarded." In January, 1890, however, the court issued an opinion in Spring Valley Water Works v. San Francisco that looked strikingly different from the cases of the same name filed over the years. Waite's cautious statement that enough time existed for the determination of "reasonable" rates thus took on immediate significance. Six years after upholding the San Francisco Board of Supervisors' regulatory authority, the state court was forced to make a substantive analysis of the board's procedures.

In this case Spring Valley claimed that the rates set by the San Francisco Board of Supervisors for use of the company's water were so low that they amounted to confiscation of the company's property without due process, and deprivation of equal protection under the law. Spring Valley appealed to the court for at least a reasonable and just return on its investment. Counsel for San Francisco claimed that the court had no jurisdiction over the matter, since California's 1879 constitution invested the board of supervisors with full discretion to set water rates. The California court thus confronted a question that would plague the legislative-judicial relationship until the mid-1930s: what constituted an appropriate level of judicial scrutiny concerning police-power regulations affecting private property?

The court did not proceed in its review of the rates set by the supervisors unself-consciously. Writing for the court, Justice Works stated:

The constitution does not, in terms, confer upon the courts of this state any power or jurisdiction to control, supervise, or set aside any action of the board in respect to such rates... When the board of supervisors have fairly investigated and exercised their discretion in

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58 Spring Valley Water Works v. Bartlett, 63 Cal. 245 (1883).
59 Spring Valley Water Works v. San Francisco, 82 Cal. 286 (1890).
60 Ibid. at 301.
fixing the rates, the courts have no right to interfere, on the sole ground that in the judgment of the court the rates thus fixed and determined are not reasonable."61

But here the court faced an obvious dilemma:

It seems to us that this complaint presents an entirely different question from this. The whole gist of the complaint is, that the board of supervisors have not exercised their judgment or discretion in the matter, that they have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without reference to the expense to the plaintiff necessary to furnish the water, or to what is a fair and reasonable compensation therefor, that the rates are so fixed as to render it impossible to furnish the water without loss, and so low as to amount to a practical confiscation of the plaintiff's property.62

61 Ibid. at 305.
62 Ibid. at 305-6.
Against San Francisco’s reliance on *Munn v. Illinois* and the *Granger* cases, which clearly established the regulatory powers of the state, the California court countered with Waite’s warning in *Spring Valley v. Schottler*: “What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record.”

The California court invalidated the rates as set, warning that “regulation, as provided for in the constitution, does not mean confiscation, or a taking without just compensation.” The California court issued this decision approximately two months before the U.S. Supreme Court case of *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota* (134 U.S. 418), which virtually overruled *Munn*. In that pivotal case, the majority held that the reasonableness of railway regulations was “eminently a question for judicial determination” and required due process of law for its determination.

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63 Ibid. at 312.
64 Ibid. at 307.
65 134 U.S. 458 (1890); Arnold Paul, “Legal Progressivism, the Courts, and the Crisis of the 1890s,” in Friedman and Scheiber, *American Law and the Constitutional Order*, supra note 2 at 284.
CONCLUSION

After the ratification of the Fourteenth Amendment in 1868, the West emerged as crucial to the development of due-process and equal-protection law. The phrase "Ninth Circuit Jurisprudence" denoted staunch defense of the civil rights of Chinese under Fourteenth Amendment protections. The Ninth Circuit's extension of equal-protection and due-process rights in individuals' defense ensued even while the U.S. Supreme Court allowed the transformation of the amendment from a vehicle for protecting newly freed slaves into law invoked chiefly in the protection of private-property rights, often of corporations.

As illustrated by the various phases of the Spring Valley-San Francisco litigation after 1868, the protection of economic rights under the terms of the Fourteenth Amendment—even the basic jurisprudential issue of how "property" should be defined—proceeded with considerable controversy in the social and economic turmoil of the late nineteenth century. Here again the West emerged as important to jurisprudential innovation. Private claims of economic rights and liberty were played out against state power as national constitutional doctrine developed in counterpart with significant changes in state constitutional interpretations. Determination of the limits of private-property claims and the extent to which the public interest necessitated police-power action was essential in regard to water in the West.

CRIMINAL SYNDICALISM: THE REPRESSION OF RADICAL POLITICAL SPEECH IN CALIFORNIA

BY STEPHEN F. ROHDE

During World War I and soon after it, "red hysteria" and industrial unrest throughout the United States spurred state legislatures to enact statutes punishing the mere advocacy of radical political and industrial change. These laws grew out of a long opposition to unionization, in particular to the activities of the Industrial Workers of the World, or "Wobblies," whose attempts to organize labor included, according to one scholar, "free speech fights, spread of radical propaganda, demonstrations, organizing work, strikes, trials and mob violence," and whose existence provided the impetus for the enactment of criminal-syndicalism legislation across the country.¹

The first such law was passed in Idaho in 1917. It defined "criminal syndicalism" as "the doctrine which advocated crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform."² Minnesota followed suit the same year and five other states did so in 1918. The vast majority of such statutes were enacted in the next two years, California's becoming law on April 30, 1919.³

In Southern California the growing opposition to unionism had long been fomented by the Los Angeles Times, whose publisher, Gen. Harrison Gray Otis, had been an outspoken advocate of the

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²Idaho Acts, 1917, c. 145.
³California Statutes 188 (1919) 281; see Appendix for complete text.
open shop. The bombing of the Times building in 1910, in which twenty people died, had shocked the public and hardened attitudes against organized labor. The Times's primary targets in this crusade were the Wobblies, who had become a significant force in organizing migratory and unskilled workers in lumber camps, on construction sites, and in agriculture. Clearly, they posed a threat. By "assuming the inevitability of the class struggle and the right of the worker to all wealth as the producer thereof," says Woodrow Whitten, they "challenged American labor's traditional acceptance of the capitalist system and looked forward to the ultimate abolition of the wage system and the assumption by the workers of all the machinery of production."

The IWW organized a strike of 23,000 Massachusetts textile workers in 1912, and Americanized the words "sabotage," "direct action," and "syndicalism." The Wobblies also mounted a series of "free-speech" fights throughout California—in 1906 in San Francisco, in 1910 and 1911 in Fresno, and, most importantly, in 1912 in San Diego.

Gov. Hiram Johnson sent Col. Harris Weinstock and Assistant Attorney General Raymond Benjamin (who would later become the architect of California's criminal-syndicalism law) to San Diego to investigate. Ironically, instead of documenting IWW violence, Weinstock reported that many Wobblies and their sympathizers "had been arrested by the city police, either on the streets or in the headquarters of the IWW, and, without being guilty of a violation of the law, had been taken out of the city, either by autos, auto trucks, or railroad trains, for a distance of twenty-two miles and there subjected to an inhumanly brutal beating by a body of men, part of whom were police officers, part constables, and part private citizens."

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7 Whitten, *Criminal Syndicalism*, supra note 1 at 5.
10 Report by Harris Weinstock to Gov. Hiram W. Johnson (Sacramento, 1912) 14 [hereafter cited as Weinstock Report].
However, it mattered little whether the Wobblies were the victims or the perpetrators of violence. Public opinion clamored for law and order. An editorial in the San Diego Union of May 28, 1912, called for new legislation: "The time has come for the republic to protect itself. . . . Sooner or later this country will be compelled in self-defense to resort to sedition laws and to enforce them to the utmost. It is better to act now."

Weinstock had concluded his report to the governor by recommending both state and federal legislation to meet "the new and menacing condition" created by the IWW. Soon the war was to provide opponents of the IWW with the catalyst to link the aggressive tactics of the Wobblies with everything from pro-Germanism, terrorism, and violence to Bolshevism and radicalism.

### California Enacts Its Criminal Syndicalism Bill

California's first Criminal Syndicalism Bill was introduced in the assembly on March 14, 1917, just as the United States was entering the war. It passed, and went to the senate on April 23. Opponents argued that terms such as "sabotage" and "syndicalism" were so vague that all sorts of otherwise lawful labor organizing might be prohibited. The Senate Judiciary Committee first tabled the bill and then reported it to the full senate "without recommendation," but the 1917 legislature took no steps to enact it.

Between the failed attempt to pass the law and its successful enactment two years later, the IWW's militant efforts were directed at wartime industries, thereby attracting even greater antagonism. Seeking an eight-hour day, better working conditions, and higher wages, the IWW and other labor groups did not hesitate to call strikes in the shipping, lumber, coal, copper, and transportation industries. To deflect labor's legitimate demands, employers "raised the issues of radicalism, sabotage, and pro-Germanism and the state and local authorities inaugurated a

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11 Ibid. at 22.
13 California Assembly Journal (1917) 776; Los Angeles Times, April 22, 1917.
14 Among the bill's supporters was Speaker Clement Young, who later, as governor of California, pardoned Charlotte Whitney. Young, The Pardon of Charlotte Anita Whitney (Sacramento, 1927) [hereafter cited as Young, Pardon of Whitney].
15 Los Angeles Times, April 25, 1917.
16 Ibid.
campaign of suppression, arresting innumerable strikers and closing all of the I.W.W. halls."\(^{18}\)

On September 5, 1917, agents of the Department of Justice conducted simultaneous raids on IWW headquarters in cities across the country, from Seattle to Boston. IWW records and literature were seized and 166 Wobblies were indicted under the Federal Espionage Act.\(^{19}\)

On December 17 the same year, a bomb exploded on the back porch of the governor's residence at Sacramento. No one was injured. Outraged by the bombing, the Sacramento Chamber of Commerce resolved that "all criticism of or opposition to war policies 'tend directly to encourage such fiendish acts.'"\(^{20}\) Fifty-three IWW members were charged.\(^{21}\) The trial was held a year later and forty-seven Wobblies were convicted, receiving sentences ranging from ten years to a $100 fine.\(^{22}\)

Immediately afterward, the San Francisco Chronicle called for new laws to punish radicals and others engaged in "direct action."\(^{23}\) Proposals for these laws included one that would make illegal any organization that suggested or incited direct action, and make membership in it a crime; another would provide that, once such membership had been proved, the "defendants should be denied all the opportunities for defense against the accusation of particular crimes, which society grants to others," and denied the defendants all standing as plaintiffs in civil suits.\(^{24}\)

Whatever else they disagreed about, all the gubernatorial candidates in the 1918 campaign, particularly the winner, William D. Stephens, supported the suppression of the IWW.\(^{25}\) In his inaugural address on January 7, 1919, Stephens referred to the organization as the American counterpart of "that anarchistic movement which in Europe is termed 'Bolshevik,'" declared that it "must be suppressed with a determined hand," and recommended the enactment of "such stringent legislation as will aid and assist the officers of the law in more effectively dealing with this law-defying element."\(^{26}\)

\(^{18}\)Whitten, Criminal Syndicalism, supra note 1 at 15-16; Solidarity, July 28, 1917; Perlman and Taft, History of Labor, supra note 5 at 394.

\(^{19}\)Perlman and Taft, History of Labor, supra note 5 at 417-18.

\(^{20}\)Whitten, Criminal Syndicalism, supra note 1 at 19; Sacramento Union, December 19, 1917.

\(^{21}\)Lee Tulin, "Digest of California Criminal Syndicalism Cases" (San Francisco, 1926) 58 (hereafter cited as Tulin, "Digest").

\(^{22}\)Ibid.

\(^{23}\)San Francisco Chronicle, December 20, 25, 27, 1917.

\(^{24}\)Ibid.

\(^{25}\)Tulin, "Digest," supra note 21 at 58-59.

\(^{26}\)California Senate Journal [1919] 3-4.
On January 24, 1919, Sen. William Kehoe of Eureka, a Progressive-Republican, introduced the Criminal Syndicalism Bill at the request of Gov. Stephens.\textsuperscript{27} Consideration of Senate Bill No. 660 coincided with renewed strike activity throughout California and the Northwest, culminating in a major general strike in Seattle. Approximately sixty thousand workers went on strike, effectively shutting down every industry in the city between February 6 and 11.\textsuperscript{28} Secretary of Labor William Wilson called the strike a deliberate attempt "to create a social and political revolution that would establish the Soviet form of government in the United States and put into effect the economic theories of the Bolsheviks of Russia."\textsuperscript{29}

Meanwhile, on March 18, the Criminal Syndicalism Bill received the recommendation of the Senate Judiciary Committee.\textsuperscript{30} On March 24 the senate passed the bill on a unanimous vote of those present, 30-0. The following day, the emergency clause also passed unanimously, 34-0.\textsuperscript{31}

The assembly received the bill on March 26, and referred it to the Committee on Capital and Labor, where several labor representatives proposed amendments, expressing the fear that, as written, the bill could be used to imprison any labor leaders who called for strikes and boycotts.\textsuperscript{32} With amendments introduced to define the punishable offense more clearly, the bill was reported out on April 18, with a recommendation to pass as amended. A minority report opposing the amendments was also issued.\textsuperscript{33}

On the floor of the assembly, Grant R. Bennett, a Republican from Santa Clara County who was chairman of the Committee on Capital and Labor, moved to amend the bill to include the following: "Provided, however, that the lawful purposes and acts of labor organization in conducting strikes or boycotts shall not be construed to be a means of accomplishing a change of industrial ownership or control, or of affecting any political change as those terms are used in this act."\textsuperscript{34} During the ensuing debate, his frustration with his colleagues began to show. "As a matter of fact," he declared, "I don’t think any of you know what syndicalism means," and, when opposition to his amendment mounted,

\textsuperscript{27}Ibid. at 69, 309.
\textsuperscript{28}Los Angeles Times, February 6, 1919.
\textsuperscript{29}Proceedings of the Conference with the President of the United States and the Secretary of Labor of the Governors of the States and Mayors of Cities (Washington, 1919) 33.
\textsuperscript{30}Senate Journal [1919] 584.
\textsuperscript{31}Ibid. at 608, 800, 832.
\textsuperscript{32}Assembly Journal [1919] 946-47.
\textsuperscript{33}Ibid. at 1807, 1849.
\textsuperscript{34}Ibid. at 2017.
he complained, "Instead of curing the evil, you are increasing it."35

His amendment failed 16-53, the emergency clause passed 62-8, and the bill passed 59-9.36 On the same day, April 24, the senate concurred in the House amendments, 33-0. On April 30, the governor signed the law; under the emergency clause, it took effect immediately. 37

The remarks of Assemblyman Maurice B. Brown were typical of the few who had voted against the act:

"I am compelled to vote against this bill, because I believe it may endanger the right of a political party to overthrow the party in power, and I believe it can be used to prevent public ownership of public utilities, because it will prevent propaganda against the existing order of government.

"I yield to no man in my abhorrence of violence, sabotage or I.W.W.-ism, but I cannot vote for any bill that in my judgment threatens any political rights of any citizen or political party."38

Voicing a more historical view, Assemblywoman Grace S. Dorris of Bakersfield said:

"In 1638 my ancestors came to America in order that they might have the right to believe as they chose, to teach as they chose and to speak as they chose. After three centuries there still lives in me the same belief in freedom of speech and thought. I do not believe in destruction or violence of any kind. But neither do I believe that we can rid ourselves of the menace of sabotage by a return to methods that drove our ancestors from their homes into the wilderness of an unknown land.

"I believe that the only cure for I.W.W.-ism is a removal of the cause of I.W.W.-ism. When we have done away with oppression there will be no need for suppression. When we have industrial democracy, I.W.W.-ism will vanish as the dew before the morning sun."39

These were lone dissenting voices. The lopsided vote in favor of the new law reflected the widespread public demand for strict

36 Ibid.
37 California Statutes 188 (1919) 281.
39 Ibid.
measures to restore law and order. With the wartime activities and trial of the IWW, the fever of patriotism throughout the country, the news of the Russian Revolution, the bombings and rumors, the Sacramento trial, the Seattle general strike, the strikes in agricultural districts, and the constant stories of IWW violence by the press and public officials, the general atmosphere smothered opposition and automatically ensured the passage in the 1919 legislature of any measure labeled anti-IWW.

**ARRESTS AND CONVICTIONS**

The criminal-syndicalism law made it a felony, punishable by imprisonment for not less than one and not more than fourteen years, to advocate criminal syndicalism. The immense sweep of the law cannot be appreciated without examining its labyrinthian provisions.

The law began by defining criminal syndicalism as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or affecting any political change."[40]

It proceeded to define five categories of criminal activity:

1. It is made it a crime for any person who by "spoken or written words or personal conduct advocates, teaches, or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control."

2. It is made it a crime for any person who "Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate, or further the doctrine of criminal syndicalism."

3. It is made it a crime for any person who "Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching or aid
and abetment of, or advising, criminal syndicalism.”

4. It is made it a crime for any person who “Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage or persons organized or assembled to advocate, teach or aid and abet criminal syndicalism.”

5. It is made it a crime for any person who “Wilfully by personal act or conduct, practices or commits any act advised, or advocated, taught or aided or abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change.”

Such an elastic statute invited subjective prosecutions and the use of the law to suffocate dissent. It also placed insurmountable obstacles in the way of anyone committed to any “change in industrial ownership or control” or to “effecting any political change,” even by otherwise lawful means.

It rapidly became apparent that the law would serve as the necessary pretext to arrest and charge anyone deemed by the authorities to be spreading dangerous ideas, without any serious deliberation over whether the technical prerequisites of the law itself had been met. The Oakland Tribune's editorial of June 6, 1919, was quite candid: “There will have to be a summary policy adopted toward dynamiters, Bolshevists, I.W.W. and the whole brood of anarchists. It should be enough to know of their general tendency and sentiments without having to fasten specific crimes upon them.”

In the end, of the 531 persons charged with violating California's criminal-syndicalism law, 264 were tried. Thirty-one were acquitted, 164 were convicted, and 69 had hung juries. Of the convictions that were appealed, 52 were reversed by the Court of Appeal and 2 by the California Supreme Court.

Only one case reached the U.S. Supreme Court, that of Whitney v. California. It would become pivotal in American constitutional law.

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**THE TRIAL OF CHARLOTTE ANITA WHITNEY**

It came to be known as “the most widely heralded of all of the criminal syndicalism cases.” Its central figure was an unlikely martyr to the cause of First Amendment freedoms.
By 1919 Anita Whitney was a prominent radical, committed to drastic social change. Given her ancestry, few would have predicted such a role for her. Five of her forebears had crossed the Atlantic on the Mayflower. One had served as colonial governor of Massachusetts; others fought in the Revolutionary War. Whitney's mother, Mary Lewis Swearington, was descended from a Dutch family who first settled in Maryland in 1640. Her father, George Erwin Whitney, was a lawyer and state senator from Alameda who had left Maine and migrated to California in the 1860s. Anita Whitney, who was born in Oakland in 1867, spent several girlhood summers in Washington visiting her uncle, Justice Stephen J. Field, who served on the U.S. Supreme Court from 1863 to 1897.44

Whitney obtained a teaching credential from San Jose State Normal School, but at her father's urging she attended Wellesley, graduating in 1889. There she encountered women who were committed to public service and social reform, including Jane Addams, who opened Hull House in Chicago's Italian ghetto, and Lillian Wald, of the Henry Street Settlement.45

After her graduation, Whitney spent six months working with the poor at the College Settlement on New York's lower East Side. "Here certainly some cog in our social system had slipped," she wrote. "I wanted to know about it, I wanted to help change it."46 When her father died in 1901, she returned to Oakland and became secretary of the Associated Charities of Alameda County. She developed into a tireless social worker, lobbyist, and administrator, and two years later was appointed the first juvenile probation officer of the county, serving without pay. Between 1913 and 1914, as president of the California Civic League, she lobbied for laws allowing women to serve on juries, for the establishment of an industrial farm for delinquent women, and for a law making physical education compulsory for boys and girls in elementary and secondary schools. She was also a charter member of the National Association for the Advancement of Colored People.47

By 1914 Whitney had realized that the problems of poverty, hunger and illness would never be solved within the existing

44Lisa Rubens, "The Patrician Radical, Charlotte Anita Whitney," California History (September 1986) 158 [hereafter cited as Rubens, "Charlotte Whitney"]). Rubens's colorful biographical account of Whitney's life provided most of the personal background for this article. Whitten, Criminal Syndicalism, supra note 1 at 40.

45Rubens, "Charlotte Whitney," supra note 44 at 160.

46Ibid., quoting from Al Richmond, Native Daughter, The Story of Anita Whitney [San Francisco, 1942] [hereafter cited as Richmond, Anita Whitney]. According to Rubens, "Richmond interviewed Whitney on three different occasions and had access to her well kept scrapbook and extensive clipping file."

political structure. Shocked by the brutal repression of the IWW, she helped raise money for their legal defense. In 1914 she joined the Socialist Party, as a member of which she opposed the United States’ entry into the war and protested wartime violations of civil liberties.48

In November 1919 Whitney’s local of the California Socialist Party became affiliated with the newly formed Communist Labor Party. Her selection as a delegate to the party’s state convention was to set the stage for her challenge to the Criminal Syndicalism Act. Whitney served on the Credentials and Resolutions committees and was elected alternate on the State Executive Committee.49 She urged the convention to achieve its goals through the electoral process, but was outvoted. The local adopted the national Communist Labor Party’s platform pledging both electoral activity and support “of the propaganda and example of the I.W.W.”50

On November 28 Whitney was scheduled to speak before the California Civic League on “The Negro Problem of the United States,” despite objections from several quarters, calling her a woman of “known political tendencies.” An inspector from the Oakland Police Department told the group that she was a member of the “I.W.W. Defense Committee,” and claimed that he had “direct proof that Miss Whitney has carried food and radical literature to prisoners on Alcatraz Island . . . Can any of you say that she is not an I.W.W.?” However, after taking a vote, the audience decided to let her speak.51 According to Lisa Rubens,

Whitney condemned the wave of lynchings which had followed the war—some of the victims had been black veterans who had fought in segregated units—and the history of racism in this country. “It is not alone for the Negro man and woman,” she argued, “but for the fair name of America that this terrible blot on our national escutcheon be wiped away. Not our country right or wrong, but our country, may she be right, because we, her children will it so.” She concluded with a plea for an anti-lynching law and an active electorate.52

49 Ibid.; Whitten, Criminal Syndicalism, supra note 1 at 40, n. 109; Richmond, Anita Whitney, supra note 46 at 64-78.
51 Whitten, Criminal Syndicalism, supra note 1 at 41.
52 Rubens, “Charlotte Whitney,” supra note 44 at 164.
At the conclusion of her talk, Whitney was promptly arrested on charges of violating the criminal-syndicalism law. She was taken to the city prison and released on bail a few hours later.

The new decade dawned with the Palmer Raids, in which twenty-five hundred radicals and Communists in thirty-three cities were arrested and three thousand deportation warrants were served. In this atmosphere, Whitney's trial began on January 27 before Superior Court Judge James G. Quinn.

Deputy district attorneys John U. Calkins and Myron Harris were in charge of the prosecution. Whitney had been represented throughout the preliminary stages by J.E. Pemberton. On the first day of the trial, Thomas H. O'Connor, a well known and experienced defense lawyer from San Francisco, entered the case. He requested a brief continuance, both to prepare himself better and because of his daughter's influenza, but the continuance was denied.

In his opening statement, prosecutor Harris mapped out his strategy of guilt by association: "We will show that although [Whitney] herself, in expressions of opinion, may have said that she was for changes by political action . . . that her every attitude and everything that she has done showed her to be a radical, and not of the conservative Socialist Party, but a member of the Communist Labor Party, which is in violation of this law."

The defense argued to no avail that Whitney's personal intent and conduct were on trial, and that no evidence should be received unless it directly and immediately related to her or the Communist Labor Party of California, but not the national party, the Third International at Moscow, or the IWW, of which she was not a member. Judge Quinn rebuffed all these moves.

On the second day of the trial, O'Connor himself was stricken with influenza. His request for a continuance was again denied. When his temperature rose on the third day, he pleaded with the court, but Quinn insisted that the trial proceed since the jury was locked up, at considerable expense to the county.

When the trial resumed on Monday, February 2, O'Connor was at home in bed, in a semi-delirious state. A female juror was also out sick and a continuance was granted until Wednesday. On February 4, Quinn swore in an alternate juror and ordered Pemberton to proceed in O'Connor's absence. Pemberton advised the court that Whitney had never considered him as her trial counsel,
and that he had planned to withdraw. Quinn denied his request for a withdrawal, or for a delay to permit O'Connor to recuperate, or for Whitney to select other counsel. The trial was delayed for two days in any case because an 83-year-old juror also became ill.

On Saturday, February 7, O'Connor died. It was a fatal blow to Whitney's defense. One scholar later cited his death as being significant to Whitney's conviction, and Gov. C.C. Young, in pardoning Whitney, contended that if O'Connor had lived Whitney might not have lost. Attorney Nathan C. Coghlan, whom O'Connor had insisted on retaining but in whom Whitney lacked full confidence, took over the defense.

The prosecution had already succeeded in getting into evidence the Manifest of the Third International at Moscow, contending that it was endorsed by the Communist Labor Party of the United States of America and, indirectly, by the California Communist Labor Party (which generally subscribed to the program and platform of the national party), of which Whitney was a founding member.

With O'Connor out of the way, the prosecution lost no time in amassing a mountain of evidence about anything and everything "radical," regardless of its connection to Whitney. The prosecution succeeded in getting IWW propaganda and evidence of its acts before the jury simply upon the showing of a brief endorsement of the IWW in a "Special Report on Labor Organization in the Communist Labor Party of the United States of America."

In any mention of revolutionary industrial unionism in this country, there must be recognition of the immense effect upon the American labor movement of the Industrial Workers of the World, whose long and valiant struggles and heroic sacrifices in the class-war have earned the respect and affection of all workers everywhere. We greet the revolutionary industrial proletariat of America and pledge them our wholehearted support


59 Zechariah Chafee, Jr., Freedom of Speech (Cambridge, Mass., 1941) 119. Quinn himself acknowledged the impact to Whitney of O'Connor's death when he stated publicly, "He was an able counselor—he had that keenness of observation and that quickness in grasping new situations, and a wide range of knowledge, that made him a man of almost superhuman ability in the profession of law." Transcript, supra note 55 at 551-53.

60 Young, Pardon of Whitney, supra note 14 at 7-8.

61 Richmond, Anita Whitney, supra note 46 at 109.

62 Whitten, Criminal Syndicalism, supra note 1 at 45.
and cooperation in their struggles against the capitalist class.63

On the basis of this single paragraph, the prosecution was free to introduce endless evidence of a whole range of allegedly criminal acts committed by the IWW, on the theory that Whitney was criminally responsible solely because of her membership in the Communist Labor Party.

Whitney testified briefly on February 19. She readily admitted her membership in the Communist Labor Party, but stated that it was not her intention that the party be an instrument of terrorism or violence, and that it was not her purpose or that of the state convention to violate any known law.64

The jury heard the closing arguments the next day. For Whitney, Coghlan spent two hours arguing that the evidence utterly failed to prove that his client had advocated the commission of any crime to achieve a political or industrial revolution.65

The prosecution ended its case where it had begun. Calkins and Harris shamelessly sought to link Whitney to every crime the IWW had committed or was accused of committing. "The Communist Labor Party of America is but a political adjunct of the I.W.W.," said Calkins. "It is bound with chains of brass to the I.W.W. and forms for them a political unit through which they hope to seize the political as well as the industrial control of this country." Harris called upon the jurors "to uphold the sacred tenets of Americanism and place with their verdict the seal of disapproval on the activities of the Communist Labor Party and its blood brother, the I.W.W." Finally, "It is not only Anita Whitney on trial," he claimed, "but the dark doctrines of envy, murder and terror also facing your verdict, ladies and gentlemen."66

After deliberating for almost six hours, the jury returned a guilty verdict on only the first count of organizing and joining an organization formed for the purpose of advocating criminal syndicalism, but could not agree on the remaining four counts, involving aiding and abetting criminal syndicalism by Whitney's own conduct and circulating prohibited literature, and advocating criminal syndicalism by written or spoken words.67

A motion for bail was denied, and Whitney was sentenced to

63 Transcript, supra note 55 at 568.
64 Ibid. at 913-15.
65 Oakland Tribune, February 20, 1920. (The closing arguments are not transcribed in the Transcript.)
66 Ibid.
67 Transcript, supra note 55 at 987-93.
imprisonment in San Quentin of from one to fourteen years.68 As she entered the courtroom to receive her sentence, she was honored by nearly three hundred people, many of whom were active in social-welfare work throughout California, who rose and remained standing as her sentence was pronounced.69

Although the *Oakland Tribune* applauded the verdict as a warning to "Parlor Bolshevists," a broad spectrum of influential people and organizations came to her defense.70 Miriam Michelson, author, suffragette, and civic leader, in an article entitled "Patriotic Citizens Deplore Martyrdom of Gentle Woman," declared, "The time will come when we shall look back upon this un-American program on political dissenters as we do today upon the hysteria of witchcraft denunciations."71

Petitions to Judge Quinn urging him to admit Whitney to bail pending her appeal were submitted by numerous prominent men and women, including the Most Reverend Edward J. Hanna, archbishop of San Francisco; U.S. Sen. James D. Phelan; state Sen. William Kehoe, nominal sponsor of the criminal-syndicalism law; Rudolph Spreckels, banker; the Reverend Edward L. Parsons, bishop coadjutor of the Episcopalian Diocese; Dean Gresham of Grace Cathedral; Rabbi Martin A. Meyer of Temple Emanu-El; and Jessica Peixotto, professor of social economy, and Orrin K. McMurray, professor of jurisprudence, at the University of California.72

After three physicians testified that Whitney's continued incarceration, which had already lasted eleven days, would impair her health, bail was set at $10,000. It was posted by Dr. Susan J. Fenton and B.H. Pendleton—in Liberty Bonds.73

**WHITNEY APPEALS HER CONVICTION**

John Francis Neylan, a San Francisco lawyer, volunteered to represent Anita Whitney on her appeal. He did so for seven years without fee.74

On April 25, 1922, the Court of Appeal for the First Appellate District affirmed Whitney's conviction, primarily by reference to

69 *San Francisco Call and Post*, February 26, 1920.
71 *San Francisco Call and Post*, February 27, 1920.
72 Whitten, *Criminal Syndicalism*, supra note 1 at 48.
73 Ibid.
74 Ibid. at 49.
the earlier decision in *People v. Taylor*, which the court suggested had disposed of similar points.75

On June 5 Neylan and Coghlan filed a petition for rehearing of the evidence with the California Supreme Court. The petition pointed out that inasmuch as Whitney was not a member of the IWW, while Taylor was, the Court of Appeal had erred in relying on the *Taylor* decision. Furthermore, the petition challenged whether mere membership in a political party such as the Communist Labor Party, which Whitney had joined to help the poor, constituted a crime within the meaning of the criminal-syndicalism law.76

The state supreme court denied the petition on June 24, 1922, with Justices William P. Lawlor and Thomas J. Lennan dissenting.77

On July 13, a petition for a writ of error and permission to appeal to the U.S. Supreme Court was filed with the California Court of Appeal. It contended, among other things, that “the Criminal Syndicalism Law was repugnant to the Constitution of the United States and in particular to the Fourteenth Amendment to the said Constitution.”78 The petition was promptly granted.

More than three years passed before the hearing by the Supreme Court materialized.

They were years of increasing industrial prosperity and subsidence of leftist and radical groups. The heightened emotionalism of the postwar period was a thing of the past, and reaction, although still a force with which to contend, was somewhat tempered. In California, where hysteria lingered longest, two years had gone by since the peak of the criminal-syndicalism prosecutions, and for over a year no arrest under that law had been recorded. Many of the friends and supporters of Anita Whitney and opponents of the state’s criminal-syndicalism law, aware of the changed conditions of the times, were plainly optimistic concerning the Supreme Court ruling.79

Their optimism was short-lived. On October 19, 1925, in a one-sentence memorandum, the Supreme Court dismissed the appeal

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76 *San Francisco Examiner*, June 6, 1922.
77207 Pac. 698.
78 *People v. Whitney*, Reporter’s Transcript on Appeal, 11-13.
79 Whitten, *Criminal Syndicalism*, supra note 1 at 50.
for "want of jurisdiction." On highly technical grounds, the court ruled that since two of the ten points raised on appeal involved infringements of Whitney's constitutional rights, as opposed to claims of the unconstitutionality of a statute itself, the appeal could be reviewed only by certiorari, not writ of error, as Whitney had done.

Whitney's only hope of avoiding San Quentin was executive clemency, but she persistently refused to seek a pardon since it would admit her guilt. A blue-ribbon committee was formed to urge Gov. Friend Richardson to issue a pardon. Public opinion supported executive mercy. "How ridiculous California will appear if Governor Richardson permits Charlotte Anita Whitney to become a martyr for the sake of free speech and unshackled political opinion," urged the St. Louis Post Dispatch. But Richardson refused to grant a pardon.

When all seemed lost, Whitney's counsel filed a last-ditch petition with the U.S. Supreme Court seeking reconsideration. Surprisingly, it was granted, on December 14, 1925. The case was finally heard on its merits before the Supreme Court on March 15, 1926. Whitney was represented by Walter H. Pollak, a leading constitutional lawyer from New York.

On May 16, 1927, the Supreme Court unanimously affirmed Whitney's conviction and upheld the constitutionality of the Criminal Syndicalism Act.

In an opinion by Justice Edward Sanford, the court held that the act did not violate the "due process and equal protection clauses of the Fourteenth Amendment." The opinion, tracing the "undisputed evidence," found that after a split in the Socialist Party, Whitney sided with the "radical" faction and helped form the Communist Labor Party of America. As part of its constitution, the party declared that it was in full harmony with "the revolutionary working class parties of all countries," and adhered to the Manifesto of the Third International at Moscow. The opinion went on at some length to describe the goals of the Communist Labor Party.

Inevitably, the strident language of the party's own demands for "the dictatorship of the proletariat" played into the court's hands. The majority opinion spoke of the party's commitment to "a revolutionary class struggle to conquer the capitalist state" and to the "overthrow of capitalist rule, the conquest of political power and the establishment of a working class government." To

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80 46 Sup. Ct. 20.
82 46 Sup. Ct. 120. Zechariah Chafee, Jr., The Inquiring Mind (New York, 1928) 117.
83 Whitney v. California, 274 U.S. 356, and for all ensuing quotations from this opinion.
achieve these goals, the court stated, the party's "most important means" were "the action of the masses proceeding from the shops and factories" and the "organization of the workers into 'revolutionary industrial unions,'" with "the use of the political machinery of the capitalist state being only secondary."

The court referred to the party's "propaganda pointing out their revolutionary nature and possibilities; and great industrial battles showing the value of the strike as a political weapon." The court stated that the party had "commended the propaganda and example of the Industrial Workers of the World and their struggles and sacrifices in the class war" and had "pledged support and cooperation to 'the revolutionary industrial proletariat of America' in their struggles against the capitalist class." The court also reported the party's recommendation "that strikes of national importance be supported and given a political character, and that propagandists and organizers be mobilized 'who cannot only teach, but actually help to put in practice, the principles of revolutionary industrial unionism and Communism.'"

The opinion stated that Whitney had taken out a temporary membership in the Communist Labor Party and attended the Oakland convention in November, 1919. As a member of the Resolutions Committee, she had signed the following resolution:

The C.L.P. of California fully recognizes the value of political action as a means of spreading communist propaganda; it insists that in proportion to the development of the economic strength of the working class, it, the working class, must also develop its political power. The C.L.P. of California proclaims and insists that the capture of political power, locally or nationally by the revolutionary working class can be of tremendous assistance to the workers in their struggle of emancipation. Therefore, we again urge the workers who are possessed of the right of franchise to cast their votes for the party which represents their immediate and final interest—the C.L.P.—at all elections, being fully convinced of the utter futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class.

The resolution was subsequently defeated by the convention, which accepted the national program of the Communist Party in its place. The court noted that after this action Whitney, "without, so far as appears, making any protest, remained in the convention until it adjourned." The court observed that at the trial Whitney stated that she was a member of the Communist Labor Party and also testified that "it was not her intention that the Communist Labor Party of California should be an instru-
ment of terrorism or violence, and that it was not her purpose or that of the convention to violate any known law."

The opinion then proceeded to dispose of Whitney's four contentions "that the Syndicalism Act and its application in this case is repugnant to the due process and equal protection clauses of the 14th Amendment."

First, Whitney had argued that she had been deprived of her liberty without due process in that there was no showing of a specific intent on her part to join in any forbidden purpose by reason of her mere presence at the convention and by her mere membership in the party, especially in light of her role in sponsoring a resolution which, if adopted, "would have committed the new organization to a legitimate policy of political reform by the use of the ballot."

The court characterized Whitney's constitutional argument as "nothing more than an effort to review the weight of the evidence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose." Having recast her point, the court found that it was "foreclosed by the verdict of the jury," since the question was "one of fact merely which is not open to review in this court, involving as it does no constitutional question whatever." Uneasy with its peremptory treatment of her opening argument, the court hastened to add that Whitney "had previously taken out a membership card in the national party; that the resolution which she supported did not advocate the use of the ballot to the exclusion of violent and unlawful means of bringing about the desired changes in industrial and political conditions; and that, after the constitution of the California party had been adopted, and this resolution had been voted down and the national program accepted, she... subsequently manifested her acquiescence by attending as an alternate member of the state executive committee and continuing as a member of the Communist Labor Party."

Next, the court considered Whitney's argument that the Syndicalism Act violated due process by reason of vagueness and uncertainty of definition. Finding the language of the act "clear" and the definition of criminal syndicalism "specific," the court readily concluded that the act was "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties," and was couched in terms not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

Citing a case having nothing to do with the exercise of free speech or association (but instead the "grazing of sheep"), the court relied on its prior holding that "Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expres-
CITIZENS OF CALIFORNIA!
ESPECIALLY OF THE BAY CITIES

Do you wish to be known as approving the arrest and conviction of such an eminent and public-spirited citizen as

MISS CHARLOTTE ANITA WHITNEY

on the absurd charge of
CRIMINAL SYNDICALISM?

Read the facts, and do not allow, through ignorance, such a stigma to be put on the fair name of our State and Cities

REMEMBER: "Silence gives consent," therefore this is a time to make your voice heard.

SECOND EDITION

Broadsheide urging citizens of California to action on behalf of Charlotte Anita Whitney following her conviction. (California State Library)
sions are common in the criminal statutes of other states. This statute presents no greater uncertainty of difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court.”

The court also rejected Whitney's equal-protection challenge in which she had argued that the act arbitrarily discriminated between those persons who advocated a resort to violence and unlawful methods as a means of changing industrial and political conditions, and those who advocated such a resort as a means of maintaining such conditions.

The court held that repeated decisions found that the equal-protection clause did not prevent a state from making reasonable classifications in the adoption of police laws, and that the burden was on one who assailed a classification to show that it did not rest upon a reasonable basis, but was essentially arbitrary. A state might "direct its legislation against what it deems an existing evil without covering the whole field of possible abuses."

Remarkably, the court found that the "Syndicalism Act is not class legislation; it affects all alike, no matter what their business associations or callings, who come within its terms and do the things prohibited." Given the indisputable history behind the adoption of the act and the express intent of the legislature to target the IWW and other radical labor organizations, it is hard to take seriously the court's view that the act was even-handed. Ignoring volumes of historical evidence to the contrary, the court observed that it knew of nothing to indicate that those who desired to maintain, rather than change, existing industrial and political conditions did, or would, advocate the resort to violence or unlawful means. It is difficult to imagine a more classic example of a priori logic, blind to the record of the brutally violent methods used by strike-breakers, vigilantes, and lawless law-enforcement officials to destroy organized labor.

The court concluded this portion of its opinion with the argument that the California Criminal Syndicalism Act was proper because of "the adoption of similar statutes in several other states." That all such laws might be equally unconstitutional did not appear to strike the court as a possibility.

Addressing Whitney's final claim that the act was "a restraint of the rights of free speech, assembly, and association," the court began with a preamble that would serve as the archetype for a restrictive view of First Amendment rights:

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity

for every possible use of language and preventing the punishment of those who abuse this freedom; and that a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. Gitlow v. New York, 268 U.S. 652, 666-668 L. ed 1138, 1145, 1146, 45 Sup. Ct. Rep. 625, and cases cited.

The court gave "great weight" to the determination of the California legislature "that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the state, that these acts should be penalized in the exercise of its police power."

The essence of the offense denounced by the act was "the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy." The court concluded that such "united and joint action" involved even greater danger to the public peace and security than "isolated utterances and acts of individuals." Therefore, it said, "We cannot hold that, as here applied, the act is an unreasonable or arbitrary exercise of the police power of the state, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the state."

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**The Brandeis–Holmes Concurrence**

The *Whitney* decision takes its place in the development of First Amendment law not for what the majority held, but for what Justice Louis Brandeis, joined by Justice Oliver Wendell Holmes, wrote. Their concurring opinion was to serve as a timeless declaration of the true purpose of free speech and association. Despite the fact that both justices felt compelled to concur rather than to dissent (for technical reasons explored below), the clarity of their views and the poignancy of their language overshadowed the actual result.85

85 *Whitney v. California*, 274 U.S. 356, and for all ensuing quotations from this opinion.
Letter from U.S. District Judge Frank H. Kerrigan to Governor C. C. Young, June 16, 1927. [California State Library]

Brandeis wasted no time in revealing the repressive nature of the Criminal Syndicalism Act. For organizing a political party "formed to teach criminal syndicalism," Whitney had been convicted of a felony. "The statute which made these acts a crime restricted the right of free speech and of assembly theretofore existing," Brandeis noted, adding that "The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly." In this instance, he pointed out, "The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine." The accused was to be
punished "not for attempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely." Brandeis chided the "novelty" of a statute that "aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it."

"All fundamental rights," he wrote, including the "right of free speech, the right to teach, and the right of assembly," were contained within the term "liberty" found in the Fourteenth Amendment and were "protected by the Federal Constitution from invasion by the states." He conceded that these fundamental rights were "not in their nature absolute" and might be restricted "to protect the state from destruction or from serious injury, political, economic or moral." Citing Schenck v. United States, he subtly reformulated Holmes's "clear and present danger" test. In Brandeis's hands it became the "clear and imminent danger" test. Moreover, it was transformed from a rationale for upholding a restriction on free speech into a strict test to be used to challenge such a restriction: "That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled."

Brandeis next addressed the majority's willingness to give "great weight" to the legislature in deciding whether the "danger" was "clear and present":

The legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business. The power of the courts to strike down an offending law are no less when the interest involved are not property rights, but the fundamental personal rights of free speech and assembly.

He pointed out that "This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection."

86 Schenck v. United States, 249 U.S. 47.
Brandeis set the state for one of the most quoted passages in Supreme Court history, by urging that we bear in mind "why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence":

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced—by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

With these words, Brandeis inaugurated the worthy tradition by which the Supreme Court would articulate the lofty origins and true spirit of the First Amendment. The seeds Holmes had planted in Abrams v. United States flowered in Brandeis's opinion in Whitney.87

The justice pursued his theme:

87 Abrams v. United States, 250 U.S. 616.
Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage or irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. . . . But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind.

Brandeis returned to his central theme—that the founders of this nation did not fear the challenge of competing ideas:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is, therefore, always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Beyond the immediacy of the threat, Brandeis urged that the seriousness of the threat must be judged before free speech and association could be restricted:

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective
democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society.

Hammering away at the weak foundation for the majority's uncritical support for the Criminal Syndicalism Act, he restated his major premise:

The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state. Among freemen, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

Brandeis then turned his attention to the express terms of the act itself. While acknowledging that its Section 4, by stating a need for "the immediate preservation of the public peace and safety," had satisfied the requirement of the California Constitution concerning emergency legislation, he urged that it did not preclude an inquiry into whether conditions existed that were essential to validity under the federal Constitution.

Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by legislature. The legislative declaration like the fact that the statute was passed and was sustained by the highest court of the state, creates merely a rebuttable presumption that these conditions have been satisfied.

Here Brandeis reveals why he concurred in, rather than dissented from, the judgment of the court. Constrained by the rule that Supreme Court review is limited only to those particular claims under the federal Constitution "duly made below, and denied," he reluctantly concluded that Whitney's counsel had failed to raise the critical issue in her defense.

Whether, in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the
important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury.

Brandeis acknowledged that "there was evidence on which the court or jury might have found that such danger existed," but he was unable to assent to the suggestion in the opinion of the court that "assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the 14th Amendment." He noted that there was evidence of a conspiracy on the part of the IWW to "commit present serious crimes," and that such a conspiracy "would be furthered by the activity of the society of which Miss Whitney was a member."

Unable to "inquire into the errors now alleged," Brandeis, joined by Holmes, concurred in affirming Whitney's conviction.

It is often overlooked that, on the day Whitney was decided, the Supreme Court, also in an opinion by Justice Sanford, unanimously reversed the conviction of an IWW organizer under the Kansas Criminal Syndicalism Act, in Fiske v. Kansas. Unlike Whitney's trial, at Fiske's the only evidence to show any unlawful purpose was the IWW's preamble, which did not mention violence but spoke of the struggle between the working and the employing classes. Faced with a record showing that nothing but lawful methods was used to accomplish the purposes of the IWW, the court concluded that, as applied, the Kansas Syndicalism Act was "an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing the liberty of the defendant."

Lacking ringing phrases in defense of free speech and assembly, Fiske has been relegated to little more than a footnote in the history of the First Amendment. One wonders whether it would have taken its proper place as a landmark decision had Brandeis's concurring opinion in Whitney been recast as the majority opinion in Fiske.
Of all those who read Brandeis's concurring opinion, none was more sympathetic than Clement C. Young, the newly elected Progressive governor of California. Awaiting the court's decision, he had expressed his willingness to pardon Whitney if her conviction were upheld. Among those urging a pardon were Judge Quinn, who had presided at Whitney's trial; Raymond Benjamin, the lawyer who had written California's Criminal Syndicalism Act; former state Sen. William Kehoe, who had introduced the bill; and Upton Sinclair, the author.

On June 20, 1927, Young pardoned Whitney. At the core of his message was Brandeis's dramatic defense of freedom of speech and assembly. Judging whether Whitney posed a clear and present danger based on the evidence before him at the time of the pardon, the governor found:

The Communist Labor Party has practically disappeared, not only in California, but also in other states where no criminal syndicalism law existed. It was a visionary attempt to plant a European radicalism upon an American soil, where it simply could not thrive. I am unable to learn of any activities of this party, in California at least, or possibly in America, which ever rendered it a danger to the state or a menace to our institutions. I am satisfied that, in the light of our present knowledge, no charge of criminal syndicalism would be now brought against its members.

After outlining Whitney's life, the history of her prosecution, and Brandeis's views, Young summarized the basis for his pardon: "Because her imprisonment might easily serve a harmful purpose by reviving the waning spirits of radicals through making her a martyr; because whatever may be thought as to 'the folly of her misdirected sympathies,' Miss Whitney, lifelong friend of the unfortunate, is not in any true sense a 'criminal,' and to condemn her, at sixty years of age, to a felon's cell is an action which is absolutely unthinkable."

Unswayed by the full force of the law's attempts to silence her political activities, Whitney spent the next twenty years building the American Communist Party. She devoted much of her time

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89 Whitten, Criminal Syndicalism, supra note 1 at 52.
91 Young, Pardon of Whitney, supra note 14.
92 Ibid.
93 Rubens, "Charlotte Whitney," supra note 44 at 165.
and energy to its International Labor Defense, which represented people charged for organizing, picketing, and striking. In 1934 she ran for state controller on the Communist Party ticket and won 100,000 votes (twice the number of any other Communist candidate). She polled similar votes when she ran again in 1938, and in 1940 when she ran for the senate. She served as state chairwoman of the Communist Party in California from 1936 to 1944, when the party disbanded to support the allied effort in World War II and continued as the Communist Political Association.

Whitney remained active in political affairs, particularly in the emerging civil-rights movement, throughout her life. She lived to see the Supreme Court decide Brown v. Board of Education and died the following year (1955) at the age of 88. She did not, however, live to see the vindication of her constitutional position.

In 1969 the Brandeis theory of the First Amendment was finally adopted by the Supreme Court in Brandenburg v. Ohio. In a unanimous opinion, the court struck down the Ohio Criminal

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Syndicalism Act. Reversing the conviction of the Ku Klux Klan leader who had implored a rally to take up arms, the court said that "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it for such action."96

In words inspired by Brandeis, the court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."97

CONCLUSION

Brandenburg finished what Brandeis had started in Whitney. No longer could the mere advocacy of the use of force or the violation of law to achieve political ends, unattended by both the intent to incite unlawful action and the likelihood that such action would actually occur, be punished consistent with the First Amendment. Freedom of speech and assembly were more secure from unwarranted government suppression. Trust in the Bill of Rights had prevailed over the fear of unorthodox ideas.

APPENDIX

TEXT OF THE CALIFORNIA CRIMINAL SYNDICALISM LAW
From California Statutes 188 (1919) 281, 282

(An act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefore.)
(Approved April 30, 1919. In effect immediately.)

The people of the State of California do enact as follows:

Sect. 1. The term "criminal syndicalism" as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or affecting any political change.

96 395 U.S. 444.
97 Ibid.
Sect. 2. Any person who:
1. By spoken or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in industrial ownership or control; or
2. Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or
3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal syndicalism; or
4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage or persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or
5. Wilfully by personal act or conduct, practices or commits any act advised, or advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years.

Sect. 3. If for any reason any section, clause or provision of this act shall be any court be held unconstitutional then the legislature hereby declares that, irrespective of the unconstitutionality so determined, of such section, clause or provision, it would have enacted and made the law of this state all other sections, clauses and provisions of this act.

Sect. 4. Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the governor.
Gen. Thomas Green, sitting at the desk he appropriated in the office he seized from the territory's attorney general. [Special Collections, University of Hawaii]
CONSTITUTIONAL LIBERTY IN WORLD WAR II: ARMY RULE AND MARTIAL LAW IN HAWAII, 1941-1946

By Harry N. Scheiber and Jane L. Scheiber

The tragic story of the Japanese-American internments in World War II is now indelibly marked in the chronicles of American history—a dreadful episode in repression, with no timely protection extended to the victims by the nation's courts, during a war fought in the name of universal freedoms.¹

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¹ Peter Irons, Justice at War: The Story of the Japanese-American Internment Cases (New York, 1983) [hereafter cited as Irons, Justice at War] offers the full
The standard histories of the war period seldom even mention another wholesale violation of civil liberties committed at the time in the name of wartime efficiency: the imposition of martial law against the civilians of the Hawaiian Islands and the comprehensive suspension of constitutional guarantees that continued until October 1944. The experience of Hawaii differed from that of the West Coast in that the Army’s control over civilians in Hawaii extended not only to the 159,000 of Japanese ancestry, but to the entire population of 465,000.

When Hawaii’s history after the Pearl Harbor attack is recalled at all, it is often for purposes of documenting the indictment against the internment policy on the mainland. The argument goes as follows: By contrast with the Army’s actions in California, Oregon, and Washington, where residents of Japanese ancestry were detained and evacuated to the camps, in Hawaii most Japanese-Americans were left free to continue their lives. Yet not a single act of espionage or sabotage was committed after Pearl Harbor by anyone in the Japanese-American community in Hawaii. Therefore, the argument concludes, Hawaii’s experience demonstrates that the internment policy on the West Coast—quite apart from its cruelty and the crushing of constitutional rights that it represented—was entirely unnecessary as a matter of security and defense.2

However, the significance of Hawaii’s wartime experience should not be regarded primarily as evidence against the internment policy, though it may well be that; its principal significance concerns the crisis in constitutional rights that was created when

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the military authorities were given extraordinary discretionary powers.\(^3\) We offer a brief account of this experience here.

In the first section, we treat the nature of the military regime and the extent to which it involved the sacrifice of civil liberties from 1941 to 1944. We then consider the earliest legal challenge to martial law in Hawaii, as well as the way in which the Army and Franklin D. Roosevelt's wartime administration responded to demands for at least partial restoration of civilian control. The third section treats the legal assault on martial law—successive petitions for writs of habeas corpus instituted by prisoners who had been convicted by military tribunals—emanating from Hawaii in 1942 and 1943.

The final section is an account of the nearly forgotten case of Duncan v. Kahanamoku. Inaugurated in 1944 as a habeas-corpus petition in the district federal court in Honolulu, it was decided by the U.S. Supreme Court in February 1946, together with the companion case of White v. Steer.\(^4\) The court's decision was handed down more than five months after Japan's surrender—which itself had been preceded by the termination of martial law in Hawaii in October 1944—and so did nothing to affect actual Army rule in Hawaii. Nonetheless, Duncan stands today in stunning contrast to the notorious Japanese-American cases, which upheld the government's wartime power to sweep away citizens' constitutional rights.\(^5\) In Duncan, Justice Hugo Black, writing for the majority, declared that the trial of civilians by

\(^3\) The standard study was published by a leading participant, J. Garner Anthony, Hawaii Under Army Rule (Honolulu, 1955) [hereafter cited as Anthony, Hawaii Under Army Rule].

Gwenfread Allen, Hawaii's War Years, 1941-1945 (Honolulu, 1950) [hereafter cited as Allen, War Years], offers a rich overview of social life and the impact of war conditions. It is based on the extensive documentary collection now in the Hawaii War Records Depository, Richardson Library, University of Hawaii [hereafter cited as HWRD], and includes two chapters on Army rule. An excellent popular work featuring photographs and other illustrations, annotated with excerpts from contemporary documents, is DeSoto Brown, Hawaii Goes to War: Life in Hawaii from Pearl Harbor to Peace (Honolulu, 1989). See also Roger Daniels, S.C. Taylor, and Harry Kitano, eds., The Japanese Americans: From Relocation to Redress (Salt Lake City, 1986) [hereafter cited as Daniels et al., Japanese Americans], in which the government's treatment of the Hawaiian civilian population receives some attention, though not based on new research. The most recent original scholarly work to examine in depth any of the major themes analyzed in the present study is that of Fred Israel, "Military Justice in Hawaii, 1941-44," Pacific Historical Review 36 (1967) 252 [hereafter cited as Israel, "Military Justice"].


\(^5\) The earlier cases included the decisions upholding the exclusion and detention policies: Hirabayashi v. United States, 320 U.S. 81 [1943]; and Korematsu v. United States, 319 U.S. 432 [1943]. See also Irons, "Race and the Constitution," supra note 1 at 18-26. In the Endo case, often forgotten in standard accounts, the court ruled against the government; see note 105 infra.
military courts, under the martial-law regime, had been without legal authority. The Army, in his view, had thus been allowed by the Roosevelt administration and the courts to perpetuate the very type of regime that had been "feared and unflinchingly opposed" by free peoples throughout Anglo-American history.\(^6\) It was, as a Hawaiian journalist declared in 1943, a story substantially without precedent: "Never in the history of the nation had martial law been established over so large an area, containing so many people. Never before on American soil had such a government continued in existence for so long a time.\(^7\)

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**THE DIMENSIONS OF MARTIAL LAW**

The Japanese air attack on Pearl Harbor had been over for only a few hours on December 7, 1941, when the territorial governor of Hawaii and the military commander there announced the institution of martial law. It involved, as martial law does, an outright suspension of all constitutional liberties. In this instance, the civilian courts were declared closed, all governmental functions (federal, territorial, and municipal) were placed under Army control, and a military regime was put in place whose power was complete. The commanding general declared himself the "military governor" of Hawaii, with entire control of the civilian population and with absolute discretionary powers.\(^8\)

As on the mainland, the Army and the Federal Bureau of Investigation moved quickly to round up aliens and other persons who had been investigated previously and who were suspected of being disloyal or dangerous during a war. Some 159,000 Hawaiian residents were of Japanese descent—124,000 of them citizens and another 35,000 aliens. Both military and civilian security officials believed there was substantial danger of "fifth column" activity from within this group if Hawaii were invaded by Japan; such an invasion was, in their view, an immediate danger. The major security and internment effort was therefore against residents of Japanese ancestry. Of the 1,569 persons eventually detained on suspicion of disloyalty, 1,466 were of Japanese descent. With fears running deep about the loyalty of those of Japanese ancestry in

\(^6\) 327 U.S. 304, 319 (Black, J., per cur.).


\(^8\) The general orders are reprinted in Anthony, *Hawaii*, supra note 3 at 138-89 (Appendix). The authors have also used for the present study the complete files of general orders in the HWRD.
Hawaii during the war's early weeks, it was a frightening time for the members of that population.\(^9\)

The Army's imposition of military rule, when Gov. Joseph Poindexter declared martial law and relinquished the entire civilian governmental authority to the Army on December 7, was accepted without resistance in Hawaii, and indeed with much enthusiasm in many segments of the civilian population. Nor was there expressed concern or resistance in the ensuing weeks, either in Hawaii or in official circles in Washington, though both the civilian territorial governor and some leading members of the Hawaii bar informed Army officials directly that they had gone much too far, even in such an emergency, in suspending normal liberties.\(^10\) Some of the business leaders who later adopted a posture of uncritical and enthusiastic support of martial law assumed in early 1942 that the situation would soon end, and they urged officials in Washington to consider speeding up the process. Only the Japanese-Americans and other residents of Asian ancestry in Hawaii were clearly apprehensive as to what martial law would mean for them.\(^11\)

Thus Army control was accepted as necessary because of the dire circumstances. It was generally thought, however, that the civilian courts would be reopened and criminal jurisdiction turned back to the territorial government once the danger of imminent invasion had passed. How far other functions of government would be normalized and returned to civilian control was a matter of speculation, but few commentators would have believed that most of the functions of civilian government would be retained by the military any longer than an acute emergency justified, probably only a few months at most.\(^12\)

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\(^9\) War Department correspondence with the White House as early as 1937 granted the difficulties of defending the islands other than Oahu from such an invasion; deployment of troops had been made to give priority to holding Oahu. See Stetson Conn, Rose Engelmann, and Byron Fairchild, *The United States Army in World War II: The Western Hemisphere and Its Outposts* (Washington, 1964), vol. 2, chs. 5-6 [hereafter cited as Conn et al., *The Western Hemisphere*]. On the fearful days for those of Japanese descent in Hawaii after Pearl Harbor, see Allen, *War Years*, supra note 3 at 39-46, 351-52. Eventually the internees were sent to the mainland, joined voluntarily by relatives; a total of nearly 1,900 were sent from Hawaii to the camps [ibid., 141]. See also Michi Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* (New York, 1976) 49-52, 86-89.

\(^10\) One of them was Garner Anthony of Honolulu, who would later become a major figure in the challenges to martial law.

\(^11\) E.g., Frank Midkiff to Attorney General Francis Biddle, March 1, 1942, Box 435, Office of Civilian Defense Records, Hawaii State Archives [hereafter cited as HSA].

\(^12\) Interview of former Gov. Joseph Poindexter, Honolulu *Star-Bulletin*, April 27, 1946; see also *Newsweek*, September 6, 1943, 54; "Iolani Palace Beehive," *Paradise of the Pacific*, July 1942, 24-25; Midkiff to Biddle, supra note 11.
Any assumption that martial law would be willingly modified or lifted by the Army proved to be erroneous. Until March 1943—for a period, that is, of more than fifteen months—the military authorities ruled Hawaii with virtually a free hand, suspending constitutional guarantees (including the right to jury trial in criminal cases and the privilege of the writ of habeas corpus) throughout that time. A month into the war, the Army permitted the civil courts to open for noncriminal cases, but jurisdiction was strictly limited; no jury trials or habeas-corpus petitions were permitted; and nearly all serious misdemeanors and felonies were tried before military tribunals. Martial law was not lifted until October 1944, more than two years after the Battle of Midway, which even official U.S. Navy and Army observers believed had ended any danger of invasion or massive strike against Hawaii.\(^{13}\)

In October 1941 the territorial legislature, anticipating a war emergency, had enacted the Hawaii Defense Act, which authorized the civilian governor to exercise sweeping executive powers in any war emergency—but with enforcement to be in the civilian courts, with full provision of due process for any person accused of violations. This statute lay at hand on December 7, but when the military assumed control it was cast aside with the rest of civilian law and constitutional rights. The Defense Act subsequently became important to the discussion of whether continued Army rule were necessary; many civilian leaders in Hawaii contended that the act gave the governor ample powers over security in the civilian community, with no need of Army courts to enforce the laws. In the early months of 1942, however, the Defense Act was rendered irrelevant by the preemptive effect of martial law.\(^{14}\)

The Army's readiness to take over every detail of government in Hawaii only hours after the Pearl Harbor attack was in startling contrast to its lack of military preparedness to deal with the onslaught by Japan's air fleet. Behind that readiness was the diligence and enthusiasm of Lt. Col. Thomas H. Green, an Army adjutant who was the chief legal officer for the military command in Hawaii. He had spent the better part of 1941 in planning the minute details of martial law; a bevy of "general orders" was thus in his files, and ready for promulgation, long before Pearl Harbor. During the period of military rule in Hawaii, until late October

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\(^{13}\) There was a partial restoration of civilian courts' jurisdiction in September 1942, but most criminal jurisdiction still remained with the military tribunals. Restoration Day in March 1943 marked the formal return of many important civilian functions to civil authority. See Anthony, *Hawaii Under Army Rule*, supra note 3, and text at note 7, infra.

\(^{14}\) Hawaii Special Laws, 1941, Act 24. The act was amended in 1943 to give the governor an even greater scope of powers, in response to the partial restoration of civil authority [Special Laws, Act 5, approved March 8, 1943].
1944, some 181 such general orders were issued under the names of the commanding general or Col. Green, the latter having been given the title of "Executive, Office of the Military Governor." Under that title—and operating from the office of the territorial attorney general in Iolani Palace, Honolulu, which the Army summarily appropriated for its military governor's functions—Green served until mid-1943 as essentially the czar of civilian life and criminal-law enforcement in Hawaii.\textsuperscript{15}

The scope of military orders reached into every corner of daily life. One of the first measures instituted was the compulsory registration and fingerprinting of every civilian except infants—something that certainly ran against the norms of peacetime American communities.\textsuperscript{16} The Army imposed a strict censorship of the press and broadcasting as well as of the civilian mails, licensed newspapers (withholding such licenses for many months from all but two Japanese-language journals), and closely regulated broadcasting. The system was one of "stringent control over the civilian population," enforced by military police and by the civil agencies under Army direction, with violators brought before military tribunals.\textsuperscript{17}

The Army kept the Islands' schools closed for several weeks; hospitals and other emergency facilities were placed under direct military supervision; food sales were temporarily suspended; and liquor sales and possession were regulated. An evening curfew was imposed, prohibiting any movement by civilians, and strict blackout orders kept civilian homes entirely darkened after sunset—a source of great inconvenience that was at first accepted uncomplainingly, though it later became probably the single most prominent and resented element of Army intrusion into daily life.\textsuperscript{18} The military enforced special rules against enemy aliens, including prohibitions against their meeting in groups of ten or more (even for religious ceremonies); carrying flashlights, portable radios and cameras; or possessing radio transmitters and other items, even road maps, that could be used in espionage.

Certain areas of Oahu, especially in and near the military district


\textsuperscript{18} Allen, \textit{War Years}, supra note 3 at 107-55.
embracing Pearl Harbor and the airfields, were ruled off limits for all enemy aliens. Thus many people of Japanese origin who had lived and worked in Hawaii for decades lost their jobs. Because Army police and sentries said they found it hard to differentiate Koreans from Japanese, the military authorities included persons of Korean ancestry in these prohibitions—a particularly stinging insult to a people whose country and kin had long suffered oppression under Japan's imperial and militaristic rule.19

Gen. Delos Emmons, who took command of the Army in Hawaii in January 1942 and succeeded to the appropriated title of Military Governor, authorized Green to extend Army control even to the full range of federal administrative functions. These eventually included all the wartime powers exercised by the War Production Board, the Office of Price Administration, the War Labor Board, and other "alphabet agencies." The Army's general orders in Hawaii also controlled wartime wages and working conditions. The military controlled allocations of labor on the plantations—including "sweetheart deals" with the sugar and pineapple plantation companies, by which they kept their labor force in place but contracted their workers out to the Army for military construction projects. Within a few months, general orders had been issued concerning gambling (including a ban on loaded dice, marked cards, and other cheating), traffic and parking regulations, assignment of street numbers to buildings, regulation of prostitution, and even dog-leash requirements—all in the name of military security.20 Every violation, from the most serious violent crimes to curfew and dog-leash infractions, was prosecuted in military courts with no conformity to normal constitutional requirements of due process.

The Army won over some powerful employer interests, and thus political influence within the civilian community, by criminalizing job switching and absenteeism from work. These draconian measures required employer permission to leave a job and made it an offense triable before a military tribunal to be absent without permission. The Army further strengthened its political position by preventing the food shortages that plagued many areas of the mainland. By including civilians on an equal basis with the military forces in calculating the overall need for foodstuffs, and by controlling the shipment and distribution of


food from the West Coast, the Army kept Hawaii's civilian households well supplied with food on a priority basis.21

Not surprisingly, therefore, organized business groups generally provided enthusiastic support for Army rule. At one point in late 1942, an officer of the Honolulu Chamber of Commerce told the territory's attorney general that the Chamber wanted martial law continued because the organization "was not interested in the courts or the rights of civilians, but was only interested in the obtaining of priorities and the freezing of labor."22 While this was one man's view, and not necessarily an accurate reflection of the prevailing view within the Chamber, that organization did become a mainstay of political support for the Army and threw its weight on the military's side when civilian officials in Washington moved to reduce the military's authority in Hawaii.

The Army's concern to maintain labor availability had one ironic benefit for the Islands' residents of Japanese ancestry: the military protected them against pressures for their removal into concentration camps or their evacuation to the mainland. President Roosevelt himself was convinced that this community must be evacuated from Oahu, as a minimum security measure, and either placed in camps on Molokai or else sent for internment to the mainland; and his secretary of the navy, Frank Knox, urged him that "no matter what it costs or how much effort it takes," Hawaii's Japanese-Americans must be removed.23 On February 26, 1942, Roosevelt actually instructed his cabinet officers to begin the process. "I do not worry about the constitutional question," he told Knox, first because his Executive Order 9066, which was the legal basis for the mainland evacuation orders, was already in place,

and, second, because Hawaii is under martial law. The whole matter is one of immediate and present war emergency.

I think you and [Secretary of War Henry L.] Stimson can agree and then go ahead and do it as a military project.

Ask the Director of the Budget how we can finance it.24

21 Allen, War Years, supra note 3 at 310-26; Anthony, Hawaii Under Army Rule, supra note 3 at 31; Star-Bulletin, May 24, 1944, 8. It should be noted that in 1944, when civilian controls were reinstituted over about half the work force, the civilian authorities directed an intensive public-relations effort against (but did not criminalize) labor absenteeism.

22 Reported in Garner Anthony to Joseph Farrington, January 26, 1943, Farrington Delegate Papers, HSA.

23 Knox to Roosevelt, February 23, 1942, PSF Confidential, FDR Papers, Franklin D. Roosevelt Library [hereafter cited as FDR Library].

24 Roosevelt to Knox, February 26, 1942, ibid. See also Conn et al., The Western Hemisphere, supra note 9 at 209.
The Army command in Hawaii resisted mass evacuation. Gen. Emmons did admit privately, however, that from the standpoint of military security he would have liked to see "all Japanese influence removed." An evacuation would also have satisfied a small minority of white civilians—including some prominent business figures—who advocated the policy explicitly because the Japanese-Americans had, in their view, gained an unseemly economic foothold and had become a threat to white control of the Islands' economic and even political life.25

With no evidence of a single incident of espionage or sabotage after the attack of December 7, however, the argument for mass evacuation was a hollow one—based only on prejudice and the fear of disloyal activity, not on any palpable current threat. In late October, Stimson certified to the president that no persons of Japanese descent regarded as "hostile to the United States" any longer remained free in Hawaii and outside the internment camps.26

The Army also opposed mass evacuation because it would tie up shipping desperately needed for troops and supplies.27 But the most important reason for the Army's resistance to evacuation was that Hawaii's labor force would be decimated; a complete collapse of agricultural, dockyard, and commercial operations vital to the Army would ensue.28 Arguing in War Department circles against mass removals, Emmons had the support of the most influential business leaders in Hawaii. And so, although in March 1942 the government was on the very brink of ordering mass evacuations from Hawaii, the president's preference in the matter apparently died a slow death by bureaucratic strangulation at subcabinet and staff levels.

"Mass evacuation from Hawaii is impractical," Assistant Secretary of War John McCloy asserted in a press release of March 27: "The Japanese problem [in Hawaii] is very complex and all


26 Stimson to Roosevelt [copy], War Department file, PSF Box 104, FDR Papers, FDR Library. A presidential commission headed by Justice Roberts visited Hawaii shortly after the Pearl Harbor attack to investigate responsibility for the catastrophe. Among other findings were some of espionage conducted in 1939-41 coordinated by the Japanese Consulate; the commission's report of this activity stimulated anti-Japanese sentiment. See Francis Biddle, In Brief Authority [Garden City, N.Y., 1962] 215-16.

27 Arnold to the Director, AES, December 16, 1942, Japanese-American Resettlement Collection, supra note 25; Notes of Senator Monrad Wallgren, meeting of Committee on Aliens and Sabotage, February 5, 1942, Carton 7, ibid.

28 Conn et al., The Western Hemisphere, supra note 9 at 208-11.
tied up with the labor situation." The Army would make the continued presence of 159,000 civilians of Japanese ancestry in Hawaii a key argument, however, for continuing martial law. The presence of this group would also be cited repeatedly by the government when martial law was subsequently challenged in judicial battles.

Even while he was successfully resisting a mass evacuation of Japanese-Americans in early 1942, Gen. Emmons pursued a policy of encouraging women and children who were Hawaiian residents to go to the mainland for their safety. Several thousand of them were evacuated from the Islands, most of them to California and Washington. Eventually they became an embarrassing problem for the military command, for, as the war situation improved in the Pacific, there was increasing political pressure in Hawaii to return them to their homes and families. Even in late 1943 an estimated 3,000 of these "strandees" were still on the West Coast, denied places on Hawaiian-bound ships by the system of allocations under the control of Col. Green in Honolulu. Clearly this was one of several cases in which Army policies in Hawaii were administered ineffectively.

The strandee issue took on political urgency when Hawaii's civilian community realized that the Army was recruiting thousands of male workers from the mainland for defense jobs in the Islands, and even giving shipping priorities to their wives (thereby, incidentally, creating enormous pressure on the Honolulu housing market), while continuing to strand residents of Hawaii on the West Coast. The fact that a significant proportion of workers being recruited for dockyard and other defense jobs were Afro-American may have added to the resentment of the recruitment policy. Civilian leaders in the Islands also resented the Army's apparent lack of concern regarding another aspect of the situation: a large number of young women who were recruited on the mainland to be office workers or "entertainers" for the troops were believed to have taken up a more remunerative life as prostitutes upon arriving in Hawaii.

It was Army-administered justice, however, that became the real storm center of controversy regarding Hawaii's military government. When the first general orders suspended civilian courts on December 7, 1941, the Army announced the creation of a "military commission"—which was initially planned to

29 Star-Bulletin, March 27, 1942.
30 Allen, War Years, supra note 3 at 106-9; Midkiff to Adm. E.S. Land, October 16, 1943, Farrington Delegate Papers, HSA. The Army was also strongly criticized for its failure to give priority to the provision of housing for workers recruited for defense jobs in Honolulu.
31 Stainback to Fortas, February 25, 1944, Harold Ickes Papers, LC; Walter E. Smith to Farrington, November 29, 1943, Farrington Delegate Papers, HSA.
include some civilians, but was almost immediately refashioned to consist only of Army officers—to try crimes of war such as treason and sabotage, as well as murder and other most serious crimes. The commission proved to have a limited role, in fact trying only a few cases during the war period. Much more important were the provost courts, established to enforce the whole range of military regulations; they also conducted trials for felonies and misdemeanors under territorial and federal laws, which were continued in effect by military orders. These provost courts, in sum, became the principal institutions of justice in Hawaii.\textsuperscript{32}

Trial in a provost court bore only the remotest and most superficial relationship to a trial in civil court under ordinary constitutional rules of procedure. A single officer generally presided; most of the officers in provost court, though not all, were lawyers. Jury trials were prohibited. In the war's early months, the court officers all wore sidearms; prisoners, prosecutors, and witnesses (if any) typically stood in a circle and were examined or cross-examined in a free-hand way by the presiding provost judge only. Arrests, searches, and seizures of evidence were made, and the evidence admitted, with no requirement or even procedures for issuance of warrants. No written charges were given to prisoners, and for nearly a year there were minimal records, if any, in many provost courts; data on verdicts or sentences was therefore sadly lacking.\textsuperscript{33}

In at least two instances, the Army used plantation managers as provost judges. These men, although not holding military commissions, presided over trials involving their own employees, and meted out sentences to them—an insidious form of labor control. Army leaders in Hawaii justified this extraordinary practice on grounds that no officers were available and "the number of white civilians was small"—an explanation that reflects a general assumption underlying many Army administrative policies that only citizens who were "of a high type" and were white could be trusted as competent or loyal enough to exercise authority in the most sensitive areas of military rule.\textsuperscript{34}

The average trial in provost court took five minutes or less; more than 22,000 trials were conducted in Oahu alone during


\textsuperscript{34} Notes made by General Green at Washington, D.C., August 1942, MS, RG 338, supra note 33.
1942 and 1943. Guilty verdicts were handed down in more than 99 percent of the cases. The provost courts formally allowed defendants a right to counsel; but the provost judges apparently frequently told defendants it was neither desirable nor necessary to have a lawyer. It soon became the common wisdom that to appear with counsel virtually guaranteed a harsher sentence than to appear without one and contritely accept the court’s verdict. There was no right to appeal, though Green’s office claimed to review routinely each decision and sentence.

The sentencing policy was an especially egregious feature of military justice. The commanding general authorized the provost courts to exact compulsory purchases of war bonds from prisoners in lieu of fines, a practice that the Treasury Department later disallowed, but this was the least of the outrages. People convicted in provost court were required to donate blood, or else were given a choice between doing so and serving time (one pint was made the equivalent of fifteen days in prison). Moreover, economic discrimination was inherent in the practice of commuting certain sentences by the alternative of money payments—a practice not uncommon in civilian courts, to be sure, but one that was linked to the bond-purchase policy in this instance.

Open discussion by Hawaii’s citizenry of their complaints about martial law or of the notorious procedures of the provost courts was highly problematic: a suspicion of “disloyalty” could all too easily lead to summary internment, as befell more than 1,500 Hawaiian residents. In addition, press censorship ensured that there would be no critical reporting of trials (if there were any

35 Data on the 1942-43 operations of the Oahu provost courts are in the Transcript of Record, Duncan v. Kahanamoku, U.S. Supreme Court (October Term, 1945) [hereafter cited as Duncan v. Kahanamoku]. How the 99 per cent (or higher) conviction rate compares with a similar mix of cases, including police court cases, in Hawaii's civil courts has not been determined. Note, however, that Anthony, Hawaii Under Army Rule, supra note 3 at 52-53, states that in 1942 some 22,480 persons were arrested, of whom all but 359 were found guilty. The total number of cases heard by provost courts to mid-1944 was approximately 37,000, with more than $1 million in fines imposed. Several hundred persons were sentenced to prison, and in May 1944 some fifty-nine were still being held in Army custody or in civilian prisons on provost orders. An estimated 55,000 cases in all went through the provost courts during the war. (“Operation of Provost Courts,” Star-Bulletin, May 18, 1944; Allen, War Years, supra note 3 at 183; Anthony, Hawaii Under Army Rule, supra note 3 at 50-52.)

36 Testimony of petitioner, Ex parte Spurlock, Habeas Corpus 31 [Judge McLaughlin], Transcript of Record, 151-52, U.S. District Court, Hawaii, Habeas Corpus Files, Record Group 21, National Archives, San Bruno [hereafter cited as RG 21]; “Civil Affairs and Military Government,” supra note 15; Report of the Attorney General, Territory of Hawaii, on Martial Law (December 1943), MS, HSL.

37 Anthony, Hawaii Under Army Rule, supra note 3 at 54-58.
reporting at all). Because of Army censorship of civilian mail, even private comment on the martial-law regime was necessarily guarded. Indeed, documents in the War Department archives reveal that Gen. Green's office obtained information of tactical importance to bureaucratic infighting by the simple expedient of having censors open and report the contents of correspondence between the civilian territorial officers, including the governor, and cabinet officials in Washington.

Moreover, to offset such criticism as did arise, Green's office developed a busy press-release operation and appointed the publisher of one of Hawaii's two major newspapers to be special public-relations adviser to the military governor. The management of news by officialdom is unique neither to the Army nor to wartime situations, but the Army command was indeed thorough in seeing that its side was presented, with suitable accompanying editorials, in the Hawaiian newspapers and magazines.

It is of little wonder, then, that one of the leading Hawaiian journalists, reflecting on the record of martial law in May 1944, concluded that the Islands' civilians had "experienced a greater regimentation in thirty months of war than that of any other American community in history." A federal district court judge put it rather differently, simply characterizing martial law in Hawaii as "the antithesis of Americanism."

THE GENERALS, THE ROOSEVELT ADMINISTRATION, AND THE POLITICS OF "RESTORATION" AND MARTIAL LAW

The military authorities' effort to portray martial law favorably did not end with classic public-relations and propaganda efforts; it carried over into the internal administrative realm, in particular the Hawaii command's duties to furnish the War Department with accurate background information for assessment of the martial-law policy. Gen. Emmons, as well as Col. Green—whose

38 Allen, War Years, supra note 3 at 146-48; "Censorship," File 13, HWRD.
39 Thus contents of a letter from the governor to Ickes, reported "from usual source," were sent on by the commanding general in Hawaii to his legal officer, then in Washington [Emmons to Green, Radio 2338, August 19, 1942, McCloy Files, Record Group 107, National Archives [hereafter cited as McCloy Files]]. Censorship of nonmilitary mail was later shifted to the civilian office of censorship under line control from the civilian agency in Washington [Willard Wilson, "Censorship in Hawaii," MS, 3-11, HWRD].
40 Anthony, Hawaii Under Army Rule, supra note 3 at 38; Emmons to Green, Radio 2338, August 19, 1942, McCloy Files, supra note 39.
new responsibilities catapulted him almost overnight in the first months of war to the rank of one-star general—consistently provided Washington with only the most favorable picture of their policies and accomplishments. Even when the most notorious violations of fair process in the provost courts had forced Emmons to order an inside review and reform of those tribunals, he and Green repeatedly told the War Department that martial law had been “highly successful,” largely because it was being “administered with the utmost regard for the feelings, the civil rights, and the interests of the local population.” In provost-court procedure, they asserted, “the civil rights of the public have been interfered with as little as possible.”

In the early months of the war, procedural issues tended to be obscured by memories of the recent air assault on Pearl Harbor and the terrible specter of a new assault by sea or air. Within a short time, however, the martial-law policy would come before the courts, bringing into the open some serious legal, constitutional, and administrative questions about the Army’s methods and the scope of its rule in Hawaii. By mid-year, moreover, some influential figures in Hawaiian society and in the national government’s highest circles were openly questioning the need for continued martial rule on so comprehensive a scale.

First came the court test in a suit initiated by Clara Zimmerman on behalf of her husband, Dr. Hans Zimmerman, a German-born American citizen who had a substantial osteopathic practice in Hawaii and apparently enjoyed considerable social standing. He had been picked up as a suspected security risk in the first sweep after the attack on December 7, brought before a mixed civilian-military board appointed by the military commander, found to be a subversive or loyalty risk, and interned by the Army with hundreds of Japanese-Americans and others apprehended in the initial days of the war. Zimmerman was never shown the charges or evidence against him, was given no opportunity to cross-examine witnesses, and was denied access to the written record, if any existed, of the board’s proceedings.

When application for a writ of habeas corpus was presented to the federal district court in Honolulu, Judge Delbert Metzger declared that “as a matter of course” under federal law Zimmerman was entitled to the writ. But his court was “under duress” by the terms of the martial law that had been imposed, Metzger ruled, and the prevailing general orders had specifically suspended

42Emmons to McCloy, July 1, 1942, and Notes Made by General Green, Washington, August 1942, MS, RG 338, supra note 33. Compare “Civil Affairs and Military Government,” supra note 15, on abuses and the investigation followed by reforms. Some of the most flagrant abuses of due process continued until late 1944.

43Transcript of Record, Ex parte Zimmerman, RG 21, supra note 36.

The case was then appealed to the Ninth Circuit, and briefs were filed in San Francisco by Zimmerman's counsel and by the American Civil Liberties Union. The government, in a brief led by Solicitor General Charles Fahy, stood firm on the proposition that "military necessity" had clearly warranted the entire suspension of civil liberties (including the writ of habeas corpus) in Hawaii, and that martial law was soundly based, both on the government's legitimate right to defend itself against immediate calamity and on the terms of the relevant statutes—in this instance the Hawaii Organic Act, establishing the territory in 1900 and authorizing the territorial governor to declare martial law. Such a declaration, it is important to note here, was authorized by the statute "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it."\footnote{Hawaii Organic Act, 31 U.S. Stat. 153 [1900].}

Against the government's contentions, the American Civil Liberties Union, in an impressive brief by A. L. Wirin, argued that the Organic Act was not a sufficient or proper basis for martial law.\footnote{Brief of the American Civil Liberties Union as amicus, Zimmerman v. Walker [hereafter cited as ACLU brief], No. 10,093, Case Files, RG 21, supra note 36.} The ACLU's position rested heavily on the terms of the 1866 decision of \textit{Ex parte Milligan}, the most recent ruling of the Supreme Court on martial law affecting American citizens in wartime. In \textit{Milligan}, the court's majority had set down the standard by which the validity of martial law should be adjudged: there must be conditions of actual, not merely anticipated, invasion; and the civilian courts must perforce be closed and unable to function by reason of the invasion.\footnote{Ex parte Milligan, 71 U.S. [4 Wall.] 2 [1866]. See discussions in J. Garner Anthony, "Martial Law in Hawaii," \textit{California Law Review} 30 [1942], 379-82 [hereafter cited as Anthony, "Martial Law"]; tenBroek et al., \textit{Prejudice, War}, supra note 1 at 227-59; and John P. Frank, "Ex parte Milligan v. The Five Companies: Martial Law in Hawaii," \textit{Columbia Law Review} 44 [1944] 639-68 [hereafter cited as Frank, "The Five Companies"] [legal arguments against the Army's position in the then-pending Duncan case].} On more general grounds, the ACLU brief argued that close judicial scrutiny of a major deprivation of civil liberties was certainly required in this case.\footnote{The ACLU argued that judicial scrutiny in such an instance had been announced as necessary in dictum in the famous "Carolene footnote," in \textit{United States v. Carolene Products}, 344 U.S. 144, 152n. [1938], and then applied in a leading civil-rights decision, \textit{Thornhill v. Alabama}, which served as precedent.} Scrutiny by the court, the brief went on, must extend to...
the facts: the judges must inquire into the actual situation and decide whether the facts constituted a "military necessity" grave enough to suspend all traditional guarantees of due process.\textsuperscript{49}

The Ninth Circuit decision, which came down with one dissent in November 1942, rejected out of hand the arguments for Zimmerman and against unrestrained Army discretion. The panel's majority subscribed wholesale to the view that if the Army declared that an emergency sufficient to warrant martial law existed, then it could be declared; it was legal under the Organic Act; and, furthermore, it could be perpetuated as long as the military authorities believed it was needed.\textsuperscript{50}

In sum, just as the government's policies for internment of the mainland's Japanese-Americans would be upheld in the Ninth Circuit and the Supreme Court, the Ninth Circuit panel, with only one dissenting vote, approved a virtually plenary military regime in Hawaii. The Army commanders, who had been taken entirely by surprise at Pearl Harbor, were now unwilling to tolerate any division of authority which (as they believed) might aid the Japanese in effecting another devastating blow; and the Ninth Circuit responded with full and unqualified approval of this posture.

Zimmerman's counsel immediately prepared an appeal to the Supreme Court; but, rather than face such a test, "because the decision in his case is so favorable [to the Army]," as Gen. Green wrote, the Army decided to take Zimmerman to the mainland and release him there. Thus the case was purposefully mooted.\textsuperscript{51}

For Zimmerman, it was the end of an arduous, frustrating, and certainly humiliating imprisonment during which the Army had shipped him off to a camp in Wisconsin and then summarily returned him to Hawaii, only to send him again to California for his release.\textsuperscript{52} It also meant that the Supreme Court would have no chance to rule on martial law in Hawaii until another test case was launched and made its way (probably very slowly) through the system. Together with Judge Metzger's self-denying view that his court was "under duress," the Army's mooting of Zimmerman sent a disheartening message to others who might consider legal challenges to military rule. For the moment, martial law in Hawaii seemed virtually immune from effective legal attack.

\textsuperscript{49} ACLU brief, supra note 46 at 27-28.

\textsuperscript{50} 132 F.2d 442.

\textsuperscript{51} Green to Emmons, Radio 2006, Cramer to Comdg. Gen., December 24, 1942, RG 338 [also stating, "Parole prior to appeal would be more effective than after"], supra note 33; cf. Anthony, Hawaii Under Army Rule, supra note 3 at 63-64, 82.

\textsuperscript{52} Zimmerman's travails are detailed in a file memorandum by Metzger, reprinted in McColloch, "Now It Can Be Told," supra note 44 at 366-67.
If a curtain was drawn for the time on legal challenge, this did not foreclose the possibility of political challenge. As the months passed and the military situation improved in the Pacific, especially after the Battle of Midway had been won, challenge in the political arena gathered some strength. It came first from within the Roosevelt administration itself, especially from the Department of the Interior, whose secretary, Harold Ickes, was an old-line Progressive, a committed civil libertarian, and by no means an admirer of the military. Ickes had at first accepted the martial-law decision, even though it meant that his department lost control of Hawaii and that due-process guarantees were suspended there; but Ickes did not intend military rule to endure very long. By mid-1942, urged on by some of his closest aides in Interior, he had begun pushing the War Department to order a softening of military rule; he also sought, though with little success at first, to introduce the question into cabinet deliberations.\(^53\)

In June 1942 the decision to appoint a new civilian governor for Hawaii served to open up the question of martial law still further in Washington. Ickes's choice for governor, not opposed in Hawaii even by conservatives, was Ingram Stainback, a longtime Democrat who had been serving on the federal district court bench there. Stainback came to Washington in June for last-minute discussion of his appointment, which the president was sending forward, and for hearings on confirmation. While in town, he left a strong mark—indeed, an unforgettable one—in the War Department, where he put legal officers on notice that he regarded the martial-law regime as having gone well beyond the limits of what constitutional and statutory law properly allowed. His parting words to War Department legal officers were to the effect that if Hawaii's governor could declare martial law, then the governor might equally well "revoke his call upon the commanding general to take charge."\(^54\) From that day, he never reduced his pressure on Washington for curbs on military rule and the fullest possible restoration of civilian authority.

Stainback's political efforts were seconded by the territory's congressional delegate, Samuel Wilder King. In June King met with several administration officials, urging that the War, Interior, and Justice departments should formulate a mutually satisfactory division of powers to be retained by the Army and powers to be returned to the governor. It was improper, King declared, that the Army itself should decide the jurisdictional question:

Regardless of whether an enemy attack is imminent or not, martial law should not displace civil administration

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\(^{54}\) Col. Archibald King, Memorandum for the Files, Washington, June 16, 1942, McCloy Files, RG 107, supra note 39.
for a prolonged period. . . . For a civilian community to live for months under what is in effect a military government is detrimental to the maintenance of self-government and repugnant to every principle for which we are fighting.\textsuperscript{55}

Meanwhile, a legal-academic debate had begun on the issues. Questions arising from Hawaii’s martial law were aired fully in an article in the \textit{California Law Review} by Garner Anthony, a prominent Honolulu lawyer who had made most of his career as counsel to some of the Islands’ leading families and corporate firms.\textsuperscript{56} A member of Hawaii’s social establishment, Anthony, who as a young man had served in the military forces in World War I, now went to the ramparts against the Army’s claims of authority. His article provided the case from the \textit{Milligan} principles that Hawaii’s martial law could be warranted in any event only if the federal courts had examined the factual situation and ruled that there was a sufficient necessity for such measures. Moreover, he denied that the regime was operating constitutionally so many months after the acute emergency of Pearl Harbor. The courts were in fact open (though only for civil and non-jury-trial cases) and were clearly able to function, except insofar as the Army had restricted their jurisdiction and operations; and the military’s authority ought not to extend to purely civilian matters in criminal law.

An Army legal officer, Col. Archibald King, responded to Anthony in the same journal, presenting the arguments for constitutionality and validity of the martial-law regime. In late 1942, a full analysis by one of the acknowledged legal experts on martial law, Charles Fairman (later a member of the Harvard Law School faculty), also came down squarely on the government’s side. The extent of Army rule, the suspension of guarantees, and even the drastic punishments in Hawaii’s provost courts were “about what one would expect,” he stated laconically. Military necessity was for the Army, not for civilian judges, to decide, the nation must be able to defend itself adequately. Fairman’s approval of broad discretion for the Army extended to the Japanese-internment policy and early court decisions upholding it, as well as to martial law in Hawaii.\textsuperscript{57}

\textsuperscript{55} Samuel King to Ickes, June 17, 1942, Assistant Secretary of War Records (McCloy), supra note 39.

\textsuperscript{56} Anthony, “Martial Law,” supra note 47 at 371-96. Biographical material on Anthony is from the \textit{Star-Bulletin} and the \textit{Advertiser} “Anthony, Garner” file in the University of Hawaii Library at Manoa.

If nothing else, this academic debate brought the issue of martial law out into a position of visibility and some controversy in the legal community. It also prompted Gen. Emmons to issue a press release in Honolulu replying to Anthony's views, contending that the Organic Act and the president's acceptance of the martial-law decision had fully warranted all that had been done in Hawaii. Although he acknowledged the propriety of "legal debates," Emmons concluded thus: "In this theater of operations we are not going to question the wisdom of our congress in passing the Organic Act nor question the judgment of our president in approving the declaration of martial law."58

The sweeping claims on behalf of the military's discretion made by Col. King and by government counsel in the Zimmerman case caused a deepening concern in the Interior Department that the Army was digging in to resist any concessions whatever on martial law. As the result of Ickes's personal concern, the dogged resolve of his departmental aides (especially his assistant secretary, Abe Fortas), and the pressure from Gov. Stainback and Delegate King, the War Department was forced to accept that some modification of the regime must be instituted. Gen. Green therefore was sent back to Washington to work out the details, but his arrogant and unyielding defense of the provost courts and other aspects of martial law simply hardened the perception in Interior and in the Justice Department that he was a rigid and undemocratic individual who had little concern for anything but sustaining the Army's monopoly of authority in Hawaii. The antagonism was mutual. Green, for his part, concluded from the talks that "the very purpose of the present controversy is to divest the Military from control"—a view of things that was perhaps somewhat exaggerated but not entirely devoid of truth.59

Against this tense background, an interdepartmental agreement was reached in August 1942 that provided for restoration of the civilian courts' jurisdiction over criminal-law matters, but only a partial one. The exceptions were significant: members of the armed forces and persons engaged in defense activities under the Army's direction (numbering about 80,000, or half the work force) were to be tried only by military tribunals; specified violations of military general orders would similarly be enforced only by the provost courts. The writ of habeas corpus continued to be suspended, and the continued existence of martial law was explicitly recognized.60

58Quoted in the Advertiser, May 15, 1942, 4; and in the English-language paper serving the Japanese-American community, Honolulu Nippu Jiji, May 15, 1942, 1.

59Notes made by Green at Washington, August 1942, MS., RG 338, supra note 33.

60General Orders 133, HWRD.
The Army announced the new division of jurisdiction in early September 1942, and for two quiet days it seemed that the long-awaited modification of martial law had been put in place. But then the Army's Hawaii command dropped a legal bombshell, issuing a "delineation" order that purported to clarify terms of the new civilian-military division of authority. In fact, the order reversed the major concessions of the earlier order. The military tribunals' jurisdiction was now specified as including the control of prostitution, traffic violations on public roads after blackout hour, and a range of selected crimes under the terms of territorial and federal law. All military proceedings would be conducted, as before, without right to a jury or other due-process guarantees.61

Gov. Stainback was outraged by this blatant violation of the agreement worked out in Washington, and he called on Ickes and the War Department to straighten things out. It proved a difficult undertaking because of the Army's intransigence. Once again interdepartmental negotiations were necessary; once again Green was brought out from Hawaii to represent Emmons. And as

61 General Orders 135, HWRD.
before, Green's uncompromising position antagonized all the Justice Department and Interior officials who met him. No one, it seemed, could name a single concession of Army authority without eliciting from Green (and, by cable, from Emmons) a response that the entire defense of the Hawaiian Islands would thereby be jeopardized.62

Green miscalculated badly by taking so stubborn a line, for this time he managed to arouse the ire of Attorney General Francis Biddle, who had previously been reluctant to challenge the Army's discretion in policy areas where a claim of military necessity was made. Biddle now became thoroughly convinced, however, that the military, "who are now running Hawaii lock, stock and barrel, don't want to give an inch"; and in December he wrote directly to the president that he regarded the Army's administration in Hawaii as "autocratic, wasteful, and unjust." He also denounced Green as a "stuffy, overzealous, unyielding" martinet, recommending that he be replaced at once.63

Biddle's intervention with the president turned matters around quite suddenly. Roosevelt penned a note indicating he wanted the War Department "to clean this thing up," and the die was cast.64 Assistant Secretary of War John McCloy had visited Hawaii in October 1942, and, though he recognized that there was "considerable agitation among the lawyers," had reported to the White House that he found general satisfaction with martial law. McCloy found no good reason, however, to keep civil (as opposed to criminal) jurisdiction in the hands of the provost courts any longer. He was even prepared, as he told a White House aide, to return to the civilian courts jurisdiction over all criminal cases that did not have "a military aspect." And this became, in fact, the basis of the subsequent compromise agreement, which would finally be reached in January 1943.65

Gen. Emmons raised objections at virtually every step of the negotiations. It is worth recounting in some detail his position on the issues, because throughout the ensuing months it would represent the Army's official view of military needs in Hawaii—and it would also be reflected in (and incorporated into) the government's formal defense of martial law before the courts.

The cornerstone of Emmons's position was that Hawaii was a "fortress" (a word he and others in the War Department used repeatedly), so that every aspect of civilian life must be regarded

62 Documentation of the negotiations is in the McCloy files, supra note 39.
63 Biddle to Roosevelt, confidential, December 17, 1942, Francis Biddle Papers, FDR Library [hereafter cited as Biddle Papers]. For Biddle's deference to Army judgment earlier in the war, see Irons, Justice at War, supra note 1 at 17-18, 52-54.
64 Roosevelt to Biddle, December 18, 1942, Biddle Papers, supra note 63.
65 McCloy to Harry Hopkins, October 19, 1942, McCloy Files, supra note 39.
as part and parcel of the military effort and vital to the efficiency of military operations. Also basic to his argument was his view that security of the Islands could be assured only by complete military rule because of the presence of so many residents of Japanese ancestry. Emmons was certainly a moderate compared with Army leaders on the mainland with respect to how Japanese-Americans should be treated; indeed, he had spoken out on several occasions against mindless racial prejudice, urging that white citizens not discriminate against their compatriots of Japanese ancestry. He had also encouraged the enlistment of Japanese-Americans for Army Engineer unit service in the Islands, and, against much resistance in the War Department, he staunchly championed the formation of an Army combat unit to be composed of Nisei volunteers—an important matter of principle to Hawaii’s Japanese-American community. The latter proposal came to fruition in early 1943, with the organization of Nisei enlistees into the famous 100th Infantry Battalion and the 442nd Regimental Combat Team, known as “the Army’s most decorated unit.”

Nonetheless, in all his dealings with his civilian superiors, Emmons reiterated the premise that a core of disloyal aliens and Japanese-American citizens existed in Hawaii. Moreover, he insisted that further air attacks on Hawaii were not only possible but even likely, so that the Army must have full control to avoid another disastrous experience like Pearl Harbor. It flowed from all this, in Emmons’s rendition of the exigencies, that he, as commanding general,

[being] responsible for the security of the Hawaiian Islands, must be the one to determine what functions can be returned to the civil authorities and the courts. . . .
I promise to consider sympathetically every recommendation from the Governor of Hawaii for the return of such functions; but, on the other hand, I feel that he must leave to me the final determination . . . and that when I so determine he loyally accept that determination and cooperate with me and the other personnel of the military government. . . . Furthermore, it is my firm opinion that a decision as to the distribution of functions between the military and civil government cannot wisely be made here in Washington by persons unfamiliar with the military situation or local conditions.

66 Allen, War Years, supra note 3 at 263-73 (also discussing combat service by the Engineers’ units); cf. Eileen O’Brien, “Making Democracy Work,” Paradise of the Pacific, November 1943, 42-45.

In all these contentions Emmons received the full backing of Adm. Chester Nimitz, the naval commander in Hawaii, and of the Department of the Navy. In the negotiations with Interior and Justice, Assistant Secretary McCloy—who was the civilian official to whom Emmons reported—staunchly defended Emmons's position, even though privately he differed with Emmons on some key points at issue. In the end, however, McCloy had to compromise under the instructions from the White House, and he effectively ordered Emmons to accept the compromise agreement when the time came.68

A fundamentally different view of the situation in Hawaii and the claims of military authority was advocated by Abe Fortas, who represented Interior in the negotiations, and by Attorney General Biddle. Far from accepting the argument that military security absolutely required a single unified control, Fortas and Biddle proposed the transfer to civilian agencies not only of ordinary civilian governance but also such security-related functions as mail censorship, civil defense, and price control. Little room for discussion was left in their response to Emmons's conclusion that he alone, as commander, should have the power to decide on what functions could be transferred without compromising military needs: "We think that no such proposition," they wrote, "has ever been advanced with respect to American territory." They also demanded that Emmons give up the self-assigned title of Military Governor, which they regarded as suitable only in enemy territory occupied by invading American troops.69

Both Gov. Stainback and the newly elected territorial delegate in Congress, Joseph Farrington, Jr., in press releases and private talks alike, lent their full support to the Interior and Justice positions opposed to the Army view. (As the scion of a leading publishing family and a socially prominent figure in Hawaii, Farrington enjoyed a certain degree of immunity from criticism of his "loyalty.").[70] Meanwhile the Democratic Party in Hawaii had adopted a platform resolution that called for the restoration of civilian administration and reinstatement of the privilege of the writ of habeas corpus.70

The outcome of the talks in Washington, probably a foregone conclusion from the time President Roosevelt responded to Biddle's letter, was the new compromise understanding by which the military would give up its authority over a wide range of governmental functions. The plan provided for a continuation of

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68 Correspondence of McCloy and Emmons, December 1942-January 1943, McCloy Files, supra note 39. See discussion of McCloy's style in dealing with the Army more generally, in Irons, Justice at War, supra note 1 at 44-53 et passim.
69 Biddle and Fortas to McCloy, December 19, 1942, McCloy Files, supra note 39.
70 Star-Bulletin, September 21, 1942; Anthony, Hawaii Under Army Rule, supra note 3 at 110-11; on Farrington, see ibid., 105-6.
martial law and of suspension of the habeas-corpus writ. The military also retained jurisdiction over rules-making and punishment with regard to absenteeism from jobs and other labor rules in areas under direct military control, such as the docks, covering half the total civilian work force. For some reason the Army also insisted on, and was granted, continued exclusive control over prostitution. Otherwise, however, the long-disputed decision was reached that jurisdiction over civil cases and over criminal offenses not directly related to security was to be returned to the civilian authorities. The territorial and federal courts would thus resume functioning in these areas, with restoration of due process except for habeas corpus. Food and price controls, labor relations except where under military control, and censorship of civilian mail were also transferred back to civilian agencies, both federal and territorial. The title of Military Governor was left for settlement later. A "recapture" clause was also inserted, authorizing the commanding general to reinstate full martial law in case of acute military emergency. Finally, unknown at first to the Army generals in Hawaii, McCloy agreed under great pressure to transfer the controversial Green to a new post.71 (McCloy kept a surprise from Ickes and Green's other critics: Green would later be named adjutant general of the U.S. Army.)

Stainback was displeased that Interior had compromised on the key issue of continuing martial law and had not obtained firm agreement on the Army's giving up the title of Military Governor. For his part, Emmons was equally distressed by the agreement, predicting that "divided authority, indecision, confusion, and endless and unhappy arguments" would ensue.72 There was no escaping the decision, however, and so in January 1943 he and Stainback issued proclamations simultaneously, stating the terms that had been reached. Civilian agencies, territorial and federal, immediately geared up for change.73

The official transfer of power occurred on March 10, 1943, announced as "Restoration Day," at a gala marked by music from the Royal Hawaiian Band, dancing, and other entertainment amidst lavish floral displays in the legislative chamber. The Army provided a unique basso continuo by running a big anti-aircraft gun drill in Honolulu at the same hour. The symbolism of the gesture was not lost on the governor's party guests.74

71 A surprisingly detailed recounting of the inside negotiations in Washington came out in testimony in the Duncan case. See Transcript of Record, Duncan v. Kahanamoku, supra note 35. The proclamations of the governor and commanding general (military governor) are also in the transcript, and are reprinted in Anthony, Hawaii Under Army Rule, supra note 3 at 129-32.

72 Emmons to McCloy, January 3, 1943, McCloy Files, supra note 39.

73 On the proclamations, see note 71 supra.

74 "A Unique Experience in Government," Paradise of the Pacific, April 1943, 2.
The modified martial-law regime would remain in place with only minor adjustments until October 1944, when, after additional cabinet-level debate, control of civil affairs was finally restored fully to civilian authorities in Hawaii. Meanwhile Gen. Emmons was succeeded in June 1943 by Gen. Robert C. Richardson, Jr., who would prove no less obdurate than his predecessor in demanding plenary authority and would defend equally vigorously the record of the provost courts. The same was true of Col. R. C. Morrison, who had been Gen. Green’s chief staff officer and who succeeded him in June 1943 as “Executive” for the military government.  

Many lawyers and territorial judges in Hawaii remained convinced that the continued suspension of the writ of habeas corpus was wholly unconstitutional, despite the Zimmerman decision, and thus it came as no surprise that the issue should have soon returned to the federal courts. The first challenge occurred in July 1943, four months after Restoration Day, and it quickly developed into a spectacularly embarrassing confrontation between the Army and the federal district court.

The resulting scenario had comic-grotesque aspects that belied the seriousness of the constitutional issue in question. The legal challenge took the form of two petitions for writs of habeas corpus, presented in federal district court in Honolulu, in the cases Ex parte Glockner and Ex parte Seifert. The two prisoners in question were U.S. citizens, born in Germany and naturalized, who had been picked up by the Army as security risks—Glockner just after Pearl Harbor, Seifert in December 1942. They had been held without trial, without the opportunity to confront witnesses, and without access to the record. In the Zimmerman hearing in February 1942, Judge Metzger had declared his court closed “under duress”; this time he determined to hear the petitions,
which were submitted in July, and he called upon the Army to respond. Gen. Richardson refused to file an answer, on grounds that the Army’s general orders had closed the court to habeas petitions. The U.S. attorney, representing Richardson, also indicated that the secretary of war and Gen. George C. Marshall, commanding general of the Army, had specifically instructed Richardson not to appear. This refusal was based explicitly on the view that the military authorities should not be required to justify before a civilian court their opinion that “military necessity” required martial law.78

Metzger was known as a tough, curmudgeonly lawyer; before the war, he had served as counsel to labor organizers in some of Hawaii’s most turbulent labor disputes. It was therefore not surprising that he should have called the Army to account in this case. When Richardson refused to accept process, even permitting his guards to rough up one of the deputy U.S. marshals who was seeking to serve papers in August, Metzger declared the general in contempt and fined him $5,000. Richardson then responded with a general order that specifically prohibited the federal court from continuing with the proceedings, making Judge Metzger subject to trial by a military commission, with a sentence for violation as long as five years at hard labor, or other “appropriate” punishment.79

Officials in Washington were aghast at Richardson’s precipitate response to the court’s orders. Ickes by then had a sympathetic hearing in other departments for his view that “the time has come when we must stop governing Hawaii through a series of law suits, and resort to common sense instead.”80 After hasty consultations with War and Interior officials, the Department of Justice sent Edward J. Ennis, who had worked on the Japanese-American mainland evacuation policy and resulting legal cases, to Hawaii to mediate. With the help of territorial officials on the scene, Ennis worked out a compromise by which Richardson withdrew his extraordinary order and Judge Metzger lifted the contempt order (though he insisted on a nominal $100 fine to make his point). Eventually the president gave Richardson a pardon.

78 Advertiser, August 27, 1943; Transcript of Record, Ex parte Glockner, RG 21, supra note 36.
79 Anthony, Hawaii Under Army Rule, supra note 3 at 70-71. Harriet B. Sawyer wrote briefly in 1967 of Metzger’s service as counsel to the Filipino labor leader Manlapit in 1924, when Metzger successfully obtained a writ of habeas corpus releasing Manlapit from jail and permitting him to speak to plantation workers whom he sought to organize. (Sawyer to the editor, Star-Bulletin, April 29, 1967; see also “Ex-Judge Metzger Dies: Champion of Civil Rule,” Star-Bulletin, April 25, 1967.)
80 Ickes to Stimson, April 20, 1944, McCloy Files, supra note 39.
Ennis and the attorneys for Glockner and Seifert meanwhile agreed that the prisoners would be transferred to the mainland, thus removing them from Metzger's jurisdiction, and that their cases would be presented at once for a judgment to the Ninth Circuit Court in San Francisco. All parties knew that the circuit court had come down foursquare on the Army's side in the Zimmerman case a year earlier. This time, however, the outcome might be different. As Ennis declared, most likely the Government will have more difficulty with any habeas corpus proceeding now... I do not believe that any lawyer could say with certainty that the courts will not inquire into the particular facts, in any particular case, when the person detained under martial law has been detained for over a year and a half... Although review of the facts of a particular case has never been judged necessary, ... no case testing the propriety of a detention, under martial law, lasting over a year and a half has ever been decided by the Supreme Court.

Apart from the possibility that the federal courts might be inclined to follow the line that Judge Metzger had clearly been prepared to pursue—that is, to give close judicial scrutiny to the military's claim that “necessity” required continuation of martial law—there was another, potentially embarrassing, facet of the Glockner case. As Ennis warned, “The FBI reports indicate that there is almost nothing which would suggest that this man is dangerous.” The ominous import of Ennis's suggestion persuaded the Army to moot both cases, and thus avoid review, by releasing both prisoners.

Although the Glockner and Seifert cases were thus put behind them, cabinet officials in Washington found in the confrontation between Richardson and Metzger's court additional reason to press for termination of military rule. Thus Ickes declared to the War Department in February that he was “getting fed up with the usurpations of power and the monkey shines thereunder” by Richardson, and he again demanded that the title of Military Governor be given up. Justice Department officials, especially in light of Ennis's dealings with the Army command in Hawaii, were more skeptical than ever as to whether the martial-law policy could stand a full court test.
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Richardson, for his part, was taking an even harder line and seeking ways to save martial law from what he viewed as the naive and sometimes unprincipled "political" attacks that were being sounded. His response, had it been known to Ickes, would simply have confirmed the latter's worst suspicions: the general suggested to the War Department, as a "logical and proper" reform, the transfer by presidential order of entire formal jurisdiction over government for the Territory of Hawaii from the Department of the Interior to the War Department. In a single stroke, Richardson pointed out enthusiastically, the Army could thereby put to rest "the consistent complaining of the Territorial officials by making them responsible to the Secretary of War for the duration." Even if the president did not agree to the plan, he continued, mere discussion of the idea in Washington would perhaps have "a salutary effect" by inducing Interior Department people to be "content with the existing martial law setup" as the better alternative.\(^8\)

Richardson's enthusiasm for this scheme was not shared by Assistant Secretary McCloy, who apparently spared his superiors in the War Department (not to mention the president) any information of it. Ickes and Abe Fortas meanwhile pressed McCloy to consider an alternative legal means for enforcement of Army regulations that were deemed vital to security in Hawaii, by application of the presidential order (No. 9066) and the congressional legislation (the Act of March 21, 1942) that had authorized the Japanese-American evacuations on the West Coast. These measures, Fortas declared, were more than sufficient to Hawaii's needs. They provided that any restrictions imposed on the population of a declared military area should be enforced in the federal courts, where they ought to be; thus the Army could give up its controversial and (as Fortas saw it) unwarranted use of the provost courts for enforcement against civilians.\(^8\) This plan—in essence advocated earlier by Garner Anthony—became the basis for the later agreement to end martial law in Hawaii, a change finally ordered in October 1944.\(^8\)

An intervening episode—one that surely had a decisive effect on the discussions of whether, and how, to end martial law—was the beginning of legal proceedings in the Duncan case, which was first brought in federal district court on March 14, 1944, on petition for a writ of habeas corpus. A civilian shipyard worker,

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8*Richardson to McCloy, February 10, 1944, RG 338, supra note 33.
8*Fortas to McCloy, April 6, 1944, McCloy Files, supra note 39.
8*As early as August 1943, Ickes had also proposed ending martial law and substituting the enforcement of Army regulations under the terms of Executive Order 9066 and the implementing congressional act of 1942 [Ickes to McCloy, August 9, 1943, Ickes Papers, LC]. See also Anthony, "Martial Law," supra note 47.
Lloyd Duncan, had quarreled with and struck two military sentries in February. Arrested by military police, he was tried and convicted by a provost court a few days later and sentenced to six months in prison.  

Judge Metzger's courtroom was again the scene of proceedings, only this time the Army did not challenge the district court's hearing the petition. Anthony, the former territorial attorney general, represented Duncan in what quickly became a dramatic legal debate over the constitutionality and legality of the Army's rule. Ennis was once again sent out by the Justice Department to represent the Army. He based a vigorous defense of continued martial law on the view (embodied in the Ninth Circuit's 1942 decision in the Zimmerman case, and consistently argued for by the Army since then) that "military necessity" was a factual issue that only trained military authorities could properly decide. Unlike a year earlier, in the confrontation over the Glockner and Seifert petitions, the War Department this time instructed the principal uniformed officers in Hawaii to testify in the district

court on the matter of "necessity." Both Gen. Richardson and Adm. Nimitz gave oral testimony and were cross-examined; both insisted that, despite the waning of Japanese military and naval power, there was a continuing emergency and serious danger of "imminent invasion." Anthony put Gov. Stainback on the stand to testify that the civilian authorities (including the courts) had ample power under the Hawaii Defense Act and federal law to deal with any security threats behind the lines. It was also accepted as stipulation that the "courts were open" and capable of functioning, and had been so at least since March 1943—an important factual matter, given the Milligan test for the validity of martial rule's supplanting civilian justice.88

Judge Metzger found in favor of Duncan and issued the writ, ordering him to be released from the Army's custody. The opinion stated that the Nimitz and Richardson testimony, contrary to the conclusion these two witnesses had offered, actually supported the view that "an invasion by enemy troops is now practically impossible." The office of military governor had been created illegally in any event, the court ruled: there was no authority under the statutes or by terms of the compromise "Restoration" agreement of 1943 for the provost courts to try civilians for ordinary crimes. Martial law was illegal, Metzger stated, at least from Restoration Day in March 1943 forward.89

Immediately afterward, another habeas petition was presented to the federal court, with Judge J. Frank McLaughlin presiding. The petitioner was Harry E. White, a stockbroker and resident of Honolulu who had been convicted of embezzling $3,240 from clients' funds with his firm and sentenced to five years. The date of his trial was crucial, since it had been conducted in a provost court in August 1942, seven months before the Restoration Day agreement had gone into effect, and its legality was thus not decided by Metzger's ruling in the Duncan case. White now contended that his sentence of five years in prison by a military tribunal was a violation of his constitutional rights. The testimony of Stainback, Richardson, and Nimitz was incorporated, by agreement of counsel, from the record of the Duncan case. Ennis again handled oral argument for the government, contending that whether martial law was for military security reasons "necessary" in August 1942 was "the kind of determination which courts

88 The testimony of Richardson, Nimitz, and Stainback is in the Transcript of Record, Duncan v. Kahanamoku, supra note 35. See also excerpts in majority and dissenting opinions, Duncan v. Kahanamoku, 327 U.S. 304 (1946).
89 66 F. Supp. 976, 979-81; Star-Bulletin, April 14, 1944. The court's interpretation of the Restoration Day military orders and the civilian governor's proclamation was strained at best and confused at worst, and the decision thus turned on a seriously deficient construction of language in the orders. Judge McLaughlin took a different tack in Ex parte White, discussed at note 91 infra.
should leave to the executive.” With the nation still “actively at war,” he argued, “there is no reason for the courts to interfere.”

Judge McLaughlin’s decision also went against the government, but on much broader grounds than had prevailed in the Duncan decision. He ruled that the case must turn upon whether the civilian governor’s proclamation of December 7, 1941, which had originally ceded all authority over civil justice matters to the Army, had been valid. He decided that the governor had exceeded his legal authority in thus “abdicating” his authority, going well beyond what the Organic Act had warranted. Hence he found the “purported delegation of powers that [the governor] did not have” to have been “absolutely and wholly invalid.” As to “necessity,” the court found that trying White before a military tribunal, denying the defendant the basic constitutional rights of a citizen before the law, had “advanced, preserved, and protected the military situation in Hawaii not one iota.” Merely to proclaim that there was a military necessity “does not make it so,” McLaughlin declared. Thus White was given his freedom—but, more important, the entire legality of martial rule in Hawaii was thrown into question.

With a third case, Ex parte Spurlock, which was later mooted by the Army, the Duncan and White decisions were appealed immediately to the Ninth Circuit. The court’s decision, announced in November, reaffirmed its position in the Zimmerman case, upholding the full range of powers claimed by the Army in Hawaii. Judge William Healy, author of the court’s opinion, cited the continued presence of a large Japanese-American population in Hawaii as a potential threat to security; he accepted the government’s contention that “summary punishment of criminal offenders of every sort” could materially assist the Army’s maintenance of “general security” by acting as a deterrent force against unrest or crime; and he asserted that “the courts were disabled from functioning,” making a military trial necessary in August 1942 and even in March 1944. That the courts were “disabled” only because the Army had decided to disable them, as counsel for the prisoners had pleaded, was a point on which the court did not discourse.

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90 Advertiser, April 21, 1944.
92 Ex parte Spurlock, 66 F. Supp. 997 (D. Haw. 1944); Steere v. Spurlock, 146 F.2d 652 (9th Cir. 1944). For lack of space, and because of the now-familiar mooting tactic that removed the case before it reached the Supreme Court, Spurlock is not considered here but will be treated in our larger study (in progress).
93 146 F.2d 576 (9th Cir. 1944). Two concurring opinions were filed, in one of which two members of the court declared that, lacking “implied fraud on the part of the governor and the military authorities,” a finding by the Army must be upheld and the lower court reversed. See the full discussion of the opinions in J.
Once again, the government faced the possibility of a test of its martial-law policy before the Supreme Court. While all the foregoing judicial tests of the Army's rule were taking place, and while the war in the Pacific took the area of combat farther and farther from Hawaii, the Army continued to maintain rigorous, and often harsh, control of Hawaiian society through general orders enforced in the provost courts. The Army maintained jurisdiction over all labor cases associated with the military operations (which, as noted earlier, involved some 80,000 civilian workers), enforced curfew and blackout rules, and continued to have full control over regulation of enemy aliens and citizens interned because of suspected disloyalty. Until the final hours of martial rule in October 1944, the provost courts continued to operate under policies that departed from every norm of constitutional justice in the civilian courts of the nation.94

Despite Assistant Secretary McCloy's view that the title of Military Governor was "always an obnoxious one in our own country" and hardly worth the grief it had caused, and despite Interior's view that in civilian eyes the title was "an important symbol of military usurpation," the War Department also permitted Richardson to hold the title until July 1944.95 The Army, in sum, was obviously determined to maintain its control in Hawaii on its own terms, and with the nomenclature of its choice. It was fully upheld in that position by the Ninth Circuit Court of Appeals in every case that court had decided since Pearl Harbor.96

Nonetheless, the Army command in Hawaii well knew that martial law stood on a legal foundation that by its nature became weaker as time passed and the tide of war shifted. It would be difficult, as even the military's own legal officers recognized, to


94 This last phase of martial rule will be treated fully in the authors' forthcoming longer study.

95 McCloy to J.A.G. Cramer, November 17, 1944, Fortas to McCloy, April 6, 1944, McCloy Files, supra note 39. In July 1944 Richardson adopted the title of "Office of Internal Security" as a replacement for "Office of the Military Governor." It was a cosmetic change only [Richardson to McCloy, July 21, 1944, ibid].

96 The vexed history of the Hawaii habeas-corpus petitions, and the appeals they generated, strongly support John P. Frank's view that when the federal judiciary has given citizens protection against governmental attacks on civil liberties, they have generally acted definitively not during but after—sometimes long after—the crises that produced those attacks, and therefore long after the effective damage was done [Frank, "Judicial Review and Basic Liberties," in Supreme Court and Supreme Law, ed. Edmond Cahn (Bloomington, 1954), reprinted in American Law and the Constitutional Order, ed. Lawrence Friedman and Harry N. Scheiber (Cambridge, Mass., 1978) 397-407].
make the "necessity" argument before the Supreme Court. As early as January 1944, months before *Duncan* went up on appeal, Ennis—who had been a principal figure in preparing and arguing the infamous Japanese-interment cases as well as the *Duncan* hearing and its appeal to the Ninth Circuit—was expressing strong personal reservations as to whether martial law was defensible. In fact, Ennis was telling his colleagues in the Justice Department that martial law in Hawaii was "probably unconstitutional."97

The Army was also finding it increasingly hard to withstand the inexorable political pressures building in 1944, when the threat of a Japanese attack against Hawaii began to appear altogether remote. For the same reason, in the middle of that year the Army began slowly turning back to civilian agencies some of the more controversial—and administratively bothersome—aspects of economic controls.98

After wrestling with his conscience, Ennis finally overcame his scruples and continued to represent the government position competently on behalf of the Army in the *Duncan* arguments. (He had done likewise in the Japanese-American cases, even after becoming aware that the Army had engaged in a misrepresentation of facts to justify the evacuation and internment policy to the president and Congress.) However, he privately hoped that, as new test cases were brought in the Supreme Court, the justices would choose to reaffirm traditional constitutional liberties and equal justice rather than to give reflexive approval of the Army's judgments of "necessity" simply because war conditions prevailed.99

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**Denouement: The Duncan and White Appeals in the Supreme Court**

The Supreme Court heard argument in the joined Duncan and White appeals on December 7, 1945, four years to the day after the attack on Pearl Harbor—and nearly four months after V-J day. Because of the extensive testimony given by Gen. Richardson, Adm. Nimitz, and Gov. Stainback in the district courts, the justices had the full argument spread before them on the record with respect to the vexed and oft-aired issues of "military necessi-

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97 Ennis to the Solicitor General, memorandum, January 21, 1944, Charles Fahy Papers, FDR Library.
99 On Ennis and the litigation of the Japanese-American cases, see, inter alia, Irons, "Race and the Constitution," and *Justice at War*, supra note 1. See also note 97 supra.
ty.” All the four opinions that finally came down—Justice Hugo Black’s for the majority, Justice Frank Murphy and Chief Justice Harlan Stone in concurrences, Justice Harold Burton for himself and Justice Felix Frankfurter in dissent—referred explicitly to that testimony.

The government’s brief, led by the solicitor general and Ennis, presented the court with an argument that the Organic Act, Section 67, offered ample legislative basis for the imposition of martial law as had been done in December 1941, standing as a modification of the Constitution’s restriction of martial law as interpreted in *Milligan*. Moreover, the government argued, even if the Constitution applied fully in Hawaii, military rule could be imposed constitutionally in emergency conditions as a matter of “the inherent power of self-defense and self-preservation possessed by this nation.” If the civilian courts were to subject the military’s judgment to a test in such an instance, it should be only that of “determining whether all the circumstances afforded a reasonable basis for the action taken.” This invitation to the court to address whether a “reasonable basis” existed was an opening that the Army had never wanted to admit.100 By contrast, the Ninth Circuit had declared that such judicial review (to determine “reasonableness” or on any other grounds) would risk “idle or captious interference” by judges in strictly military affairs. Since 1941 the Army had always insisted on an absolutist view of necessity and discretion in regard to the martial-law policy; the Army contended that only military leaders could, and should, decide when martial law was justified.101

In his brief as counsel for Lloyd Duncan, Garner Anthony came back to the *Milligan* criteria for validating martial law, quoting that decision to effect that even if habeas corpus were properly denied, the Constitution does not permit a citizen so denied to be “tried otherwise than by the course of common law.” Nothing in the legislation authorizing suspension of the writ, he said, could be construed as authorizing the executive “to prescribe new crimes or offenses or to create ‘courts’ or ‘tribunals’ to try offenses.” Imploring the court to overturn the Ninth Circuit ruling

100 *Brief for the United States*, 55-57, 58-59, in *Duncan v. Kahanamoku*, supra note 35. Perhaps it was a concession to Ennis by the Justice Department strategists that this argument was put forward; certainly it was consistent with Ennis’s apparent intention to place the military-necessity issues before the court in a way that fell short of full endorsement of the Army’s “blanket” position.

101 The Ninth Circuit is quoted from *Ex parte Zimmerman*, 132 F. 2d 442, 446 (1942). The Army’s absolutist position has been termed the “blanket view” of the martial-law power—as opposed to the “qualified view,” which admits that the military’s judgment can be reviewed on the facts by civilian courts. See discussion in Anthony, *Hawaii Under Army Rule*, supra note 3 at 64; Frank, “The Five Companies,” supra note 47; and, for the early constitutional history, George M. Dennison, “Martial Law: The Development of a Theory of Emergency Powers, 1776-1861,” *American Journal of Legal History* 18 (1974) 52-79.
—a decree that, he contended, "in effect holds that the will of the commander, not the Constitution and laws of the United States, is the supreme law of the land"—Anthony asked the justices to find that nothing in the Organic Act or the Constitution could prevent judicial review or issuance of a writ in the case of a civilian tried by the provost courts "for an offense of the class constitutionally triable only by jury." In an amicus brief filed on behalf of the petitioners, the Bar Association of Hawaii and Nils Tavares, territorial attorney general, similarly called upon the court to rule that the existence of martial law could not itself be cited as ample reason for closing the courts and subjecting civilian justice "to the will of the military commander."  

Invalidity of the provost-court trials was a theme also hammered home by the ACLU in a brief signed by seven of the nation's most distinguished constitutional lawyers, with Osmond Fraenkel appearing for oral argument. The Army had enjoyed a period of more than two years, it was pointed out, before the arrest and conviction of Duncan, "during which no attempt had been made to get congress to authorize military trials of any kind." This, the argument concluded, "show[ed] the absence of any real necessity for such trials" so long after the true emergency following the Pearl Harbor attack.

This strategy of underlining the arbitrariness of the military's claims to authority and the lack of explicit congressional authorization for the provost courts' jurisdiction over civilian offenders proved highly effective. First, at a general level, it distinguished the facts of the Duncan and White cases from the Japanese-American cases, which had been concerned with evacuation orders explicitly authorized by the president and then pursued under terms of a statute and appropriations bills that reinforced the executive's action, and which technically had been concerned only with the initial actions of the Army for evacuation, amidst the emergency conditions of early 1942. This brought Duncan more within the ambit of the Endo case, the one major decision of the war period in which the high court overturned an Army internment order precisely because it was lacking in statutory

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102 Brief for Lloyd C. Duncan, Petitioner, Records and Briefs, Duncan v. Kahanamoku, supra note 35 at 39-40, 44-45. In preparing for oral argument, Anthony conferred intensively with the Interior Department's legal staff, whose talents were thus mobilized behind the scenes for use against the Justice Department and Army lawyers [interview with John P. Frank, October 1989. In 1944-45 Frank was a lawyer in Interior and worked with Anthony on the Duncan case issues].


104 Brief of American Civil Liberties Union, Records and Briefs, Duncan v. Kahanamoku, supra note 35 at 20.
authority that would possibly have validated denial of normal constitutional due process.\(^{105}\)

Second, and probably of overriding importance, by pointing so tellingly to lack of clear statutory authority for extraordinary wartime military discretion, counsel cast a strong light on the threat to judicial power itself inherent in the government's view of "necessity" and validation of martial law. Justice Black's opinion for the majority rested in a technical sense upon the interpretation of the Organic Act, which he construed as lacking the sweeping authority for the Army to have undertaken a program of comprehensive rule. In a narrow legal sense his opinion thus did not reach the constitutional issue of whether Congress could ever properly authorize such a regime over a long war period with a receding threat of invasion.\(^{106}\) Nonetheless, his long discourse on the entire history of habeas corpus in Anglo-American law eloquently represented the Army's rule as the very kind of tyranny that made the writ so vital to liberty.\(^{107}\)

In a spare and eloquent concurring opinion, highly focused on a single key issue, Chief Justice Stone was willing to concede that "a law of necessity" can justify great sacrifices of liberty. He found, however, that power to command sacrifice "may not extend beyond what is required by the exigency which calls it forth." It was the civil courts operating under constitutional rules, and not flat of the Army, that must be relied upon to decide the necessity.\(^{108}\) A very different tone and scope characterized Justice Murphy's concurring opinion. Obviously outraged by the Richardson testimony in the district court, Murphy discussed the general's views seriatim: he refuted each one vigorously, especially assertions such as that the civilian courts could not be relied upon because they were subject to "all sorts of influences, political and otherwise," and that to be effective martial law must be comprehensive and not subject to challenge. Murphy saved his strongest criticism for the government's argument that the presence of Japanese-Americans in Hawaii in such large numbers was a justification for Army rule despite the complete absence of any documented sabotage or espionage.\(^{109}\)

\(^{105}\) Ex parte Endo, 323 U.S. 283 [1944]. An interesting discussion of Endo in the context of the exclusion cases is in Howard Ball, "Judicial Parsimony and Military Necessity Disinterred: A Reexamination of the Japanese Exclusion Cases, 1943-44," in Daniels et al., Japanese Americans, supra note 3 at 179-83.


\(^{107}\) 327 U.S. 304, 319-23 [Black, J.].

\(^{108}\) 327 U.S. 304, 336-37.

\(^{109}\) Ibid. at 324-35.
The dissenting opinion by Justice Burton, with Justice Frankfurter concurring, replayed in considerable measure the main themes of the Ninth Circuit majority's position since 1942 on the matter of necessity. Openly raising the issue whether the court's vote in *Duncan* might not have been quite different if the war were still being waged—that is, if the court were not ruling while enjoying the luxury of peacetime conditions as well as the hindsight that time afforded—Burton asserted the need to leave the military with a wide range of authority when the nation was threatened by war conditions. "The possible presence of many Japanese collaborators," the exposed condition of Hawaii (which was "like a frontier stockade under savage attack"), and above all the need to give the executive appropriate latitude, all supported a broad construction of the Organic Act's terms, and in Burton's view should have validated the Ninth Circuit's reversal of the district court grants of writs to the petitioners.1

**Conclusion**

Army rule under martial law in Hawaii thus lasted through most of the war, ending only in October 1944; even then, its legal defense was pursued in the nation's highest court well after the surrender of Japan. The Supreme Court's majority ruling was, in an important sense, technical and narrow, with its focus on construal of the Organic Act; but still, the justices had at a minimum reasserted (albeit in dictum) the essence of the *Milligan* doctrine, that "our system of government clearly is the antithesis of total military rule. . . . Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government. Military tribunals have no such standing."111 If nothing else, should the fate of civil liberties again hang in the balance against arguments for military necessity in wartime, in *Duncan* the court had underlined the judiciary's responsibility as the guardian of those "cherished American institutions."

Legal historians and constitutional lawyers alike have permitted the social-legal and administrative history of Hawaii's martial law in World War II to recede gradually from consciousness as a significant chapter in the history of civil liberties. The admonition of Garner Anthony some forty years ago is still fully applicable: that the study of Army rule in Hawaii is of deep interest not only to scholars and lawyers but also to everyone "who believes that the constitutional safeguards of civil liberties are as important in time of war as in time of peace."112

10 Ibid. at 337, 341-42.
111 Ibid. at 322.
Southern California and the Origins of Latino Civil-Rights Activism

By Ricardo Romo

Historical literature on racial segregation in post-Civil War America generally places the institutionalization of Jim Crowism in the Reconstruction era, when Southerners began legislating the segregation of blacks and whites socially and economically, and in the southern Jim Crow statutes of the 1880s. However, long before the Civil War, white Southerners in the West had already found support for such statutes among their compatriots from northern and midwestern states. Within months of becoming American territories, California, Texas, and New Mexico enacted laws banning the social mingling of whites with members of racial and ethnic minorities, including blacks, Asians, Native Americans, and those of Mexican descent,* and

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* Persons of Mexican descent are also referred to throughout as "Mexican Americans," "Mexicans," and "Latinos."
limiting the civil rights of these minorities in voting and the judicial process. Some of the statutes—for example, denying court testimony by nonwhites against whites—were struck down by federal courts during the late nineteenth century, while others, including a ban on interracial marriages, the mandatory segregation of schoolchildren, and the exclusion of nonwhites from certain white neighborhoods, survived well into the twentieth century.

The following is an account of the Mexican-American community’s efforts to gain full rights as citizens in the modern West. The prejudice and discrimination of whites against Mexican Americans in California take on a special meaning, since by 1940 that state had the largest concentration in the nation of Latinos—nearly 300,000 in Southern California alone. The legal analysis touches on racial hostility and the effects of racist statutes on several communities in Southern California at the time of World War II.

The rapid rise of the Mexican-American population in Southern California may be attributed in part to the area’s reputation for tolerance of racial and ethnic differences. Many Latinos had


3Francisco Ramirez, editor of El Clamor Publico, a Spanish-speaking newspaper published in Los Angeles in the late 1850s, cites the example of Manuel Dominguez, a signer of the California Constitution of 1849, a landowner, and county supervisor of Los Angeles. When Dominguez went before a San Francisco court to testify for a defendant, an Anglo lawyer challenged his right to do so on the basis that Dominguez had Indian blood. The judge agreed, and dismissed Dominguez from the stand. Leonard Pitt, The Decline of the Californio: A Social History of Spanish-speaking Californians, 1846-1890 [Berkeley, 1968] 202; El Clamor Publico, April 25, 1857.

The complex issue of race and color was argued before the California court in The People v. Hall [Oct. 1, 1854]. Section 394 of the Civil Practice Act [1850] provides that “no Indian or Negro shall be allowed to testify as a witness in any action in which a White man is a party.” Section 14 of the Criminal Act provides that “no Black, or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a White man” [Act of April 16, 1850]. Cited in The People v. Hall, 4 Cal. 399 (1854).


migrated from Texas, where Jim Crow laws helped keep them seriously economically and socially deprived. California offered jobs that were more varied, with higher wages than did other regions of the West. Not unexpectedly, as a result of the economic enticements, during the post-depression era California surpassed Texas as the state with the largest Mexican-American population. In many cases, however, the Golden State offered no great haven to those seeking full equality. Racist sanctions were entrenched in California, and a broadly structured segregation system affected Mexican Americans there profoundly.

In the debate over equal rights, the U.S. Constitution offered only limited protection to members of minority groups. The Supreme Court's *Plessy v. Ferguson* decision of 1896 had legitimized segregation in its ruling that separate facilities for whites and blacks did not deprive blacks of their constitutional rights. The ruling initially dealt with transportation facilities in Louisiana, but southern and western states found that it permitted them considerable latitude in implementing restrictions that legalized segregation.

The inequities that blacks suffered for the next half-century as a result of the ruling have been well recorded. Jim Crow was a social system characterized by the segregation of schools, the denial of access to restaurants, hotels, and theaters by blacks, and the exclusion of blacks from the economic arena after 1896. *Plessy* served to limit social and political integration and thereby increased economic disparities. That it said nothing of minorities other than blacks mattered little to white westerners, for they had resolved long before that Native Americans, Asians, and Mexicans were undeserving of full protection under the U.S. Constitution. For the next fifty years, few voices in the West were raised against the evils of segregation.

In the 1940s, the issue of racial and ethnic inequality found prominent expression in public discourse. The rise of Nazism no doubt amplified American consciousness of race relations, and the publication in 1944 of Gunnar Myrdal's *An American Dilemma* initiated an unprecedented dialogue in intellectual circles about the status of minority groups. While Myrdal demonstrated the degree to which racial discrimination had

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become institutionalized in the United States, the reader might easily have assumed that Jim Crow was a one-dimensional struggle between whites and blacks. But, as incidents in Southern California during the war years show, that struggle included several other racial and ethnic minorities, from whom white Americans were equally anxious to be separated.

The development of the Mexican-American community is intrinsic to the history of ethnic and racial diversity in the United States, and the relative lack of legal scholarship on the subject is not easily explained. Mexican Americans, after all, derive from a Hispanic population group that is as old as the New World itself and that has helped to shape the environmental and cultural history of this country. The first Europeans to build towns on both the Atlantic and Pacific coasts spoke Spanish. From the founding of St. Augustine in the late 1500s to the construction of the now famous missions of the West, Hispanics have made their presence felt. Moreover, they have been at the center of some of the crucial reforms that have influenced the legal foundations of U.S. democracy, including the prohibition of slavery in the frontier communities of Texas in 1824, the passage of liberal laws affecting community property between married couples, and the legal adoption of children.

Throughout the late nineteenth and early twentieth centuries, the dominant society extended a distinctly second-class citizenship to Mexican Americans, Native Americans, Asians, and African Americans. Native Americans could not vote, testify in court, or attend white schools; Asians faced similar prohibitions, and most could not own land in California. Mexican Americans, or mestizos of Indian and Spanish ancestry, experienced racism because of their Indian background, their Catholic religion, and


their brown skin color. The following case studies of the civil-rights violations and acts of prejudice contested by Mexican Americans in Southern California make it apparent that Jim Crow's presence in the Mexican-American community mocked the democratic principles embodied in the Constitution, the Bill of Rights, and the Fourteenth Amendment.

**SOUTHERN CALIFORNIA IN THE 1940s**

The historian interested in race relations could not find a more interesting environment for analysis than Southern California in the 1940s. During the first half of the decade alone, several shocking events occurred. The first of these were the arrest, detention without trial, and arbitrary relocation of 120,000 Californians of Japanese descent who were sent to internment camps. In 1942 the arrest of hundreds of Latinos in connection with an alleged crime wave in Los Angeles resulted in the denial of due-process rights for many of the arrested and an angry response in the Mexican-American community. Then, in 1943, the City of Angels experienced an outbreak of violence between white servicemen and Latino and black civilians on the downtown boulevards, which again resulted in the arrest of hundreds of Latinos as well as African Americans, many of whom had been severely beaten by the recruits.

Few regions in the United States underwent more rapid transition during the war years than the Los Angeles basin. As the country began aiding the Allied cause in Europe in early 1940, the city's aircraft and ship manufacturers pushed production levels up rapidly and publicized the need for semi-skilled and skilled labor. In consequence, thousands of blacks, Mexican Americans, and whites from southern and western states migrated to the region. Many Anglo community leaders were convinced that social customs should change slowly, and steadfastly opposed disturbing traditional attitudes about work and culture. Major

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15 Mirande, *Gringo Justice*, supra note 2 at chs. 5 and 6.


companies not directly involved in war industries refused to hire blacks or Latinos at the time, and resisted government efforts and community pressure to offer work to members of minority groups. Moreover, strict housing segregation denied Latinos and blacks the chance to live near jobs related to the war.

The drive for equal economic opportunity took a new turn in the summer of 1941, when the all-black railway union threatened a protest march on the nation’s capital. A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters, called on blacks and Latinos to join him in Washington, to draw attention to the virtual exclusion of African Americans and other minority groups from war-production work. This activism was successful in bringing blacks and Latinos into the war industries. President Franklin D. Roosevelt’s executive order of June 1941 establishing the president’s Fair Employment Practices Commission included the protection of Mexican Americans, the first national protection extended to a nonblack minority group. The employment of blacks and Latinos in assembling ships and planes and other military construction proved that nonwhite and white employees could work side by side. The new regulation had a major impact on the West and Southwest, where much of the war-related manufacturing was concentrated.

The campaign to end overt discrimination and segregation in Southern California began in the early 1940s, and was marked by two cases involving Mexican-American civil rights. The first was instigated by the arrest of hundreds of Latino youngsters linked with a rising “crime wave” in Los Angeles. People v. Zammora demonstrated the extraordinary extent and persistence of prejudice in a western community thought to be exemplary in race relations. Popularly referred to as the “Sleepy Lagoon” case, it concerned the prosecution of twenty-four young men for the alleged murder of Jose Diaz in the summer of 1941, and was one of the largest murder trials ever held in the States.

The second case, Mendez v. Westminster, was a successful school-desegregation suit in Orange County, initiated in 1946 by

18 Ruth D. Tuck, Not With The Fist: Mexican Americans in a Southwest City (New York, 1946) ch. 9; Carey McWilliams, “The Forgotten Mexican,” Common Ground (1943) 69-70.


20 President’s Committee on Civil Rights, To Secure These Rights (Washington, GPO, 1947). The first sentence in the summary of the commission’s final report [at 59] bluntly observes that “the wartime gains of Negro, Mexican American and Jewish workers are being lost through an unchecked revival of discriminatory practices.”

21 People v. Zammora, 66 C.A. 2d 166; 152 P.2d 180 (1944) [hereafter cited as People v. Zammora].
the Mexican-American community. It was the first twentieth-century desegregation case argued in federal court in the West. The decision struck down school segregation for children of Mexican, Native American, and Asian descent, and was a precursor of the Brown v. Board of Education decision of a decade later.

### The Sleepy Lagoon Case

With the outbreak of war in Europe, West Coast communities responded anxiously to the perceived threat of an Axis invasion. Rumors circulated that Japanese submarines had been spotted off the coast of Santa Barbara. Law-enforcement officers in Los Angeles grew increasingly impatient with the activities of nonwhites, often arresting young Mexican Americans on the pretext that their incarceration would make the city safe for citizens and newly arriving throngs of troops. Carey McWilliams, a lawyer who was the former head of the California Immigrant and Housing Authority, later commented in an article that "following the lead of the Hearst press, the newspapers of Los Angeles launched a violent campaign against 'Mexican' juvenile delinquency and 'Mexican' crime in the spring of 1942. Featuring every story involving the arrest of a Mexican, they soon had the public clamoring, in semi-hysterical fashion, for 'action' and 'strong methods.'"  

Anglo residents of the city, unsettled by the coming war, looked across the river at the eastside barrio and decided there was ample evidence of crime, disloyalty, and violence in its midst. According to McWilliams, "Mounting in daily intensity and violence, the newspaper campaign culminated in the notorious Sleepy Lagoon case in August 1942."  

The case got its name from a popular Hollywood movie of the early 1940s. The "lagoon" was a small gravel pit in East Los Angeles, used in the daytime for swimming and in the evening as a romantic setting for lovers. For decades nonwhites, including blacks, Mexicans, and Asians, had been prohibited from using the city's recreational facilities. For that reason, Mexican Americans sought out rural swimming holes in the outlying areas, such as the gravel pit near the Williams Ranch.

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22 Westminster School District v. Mendez, 161 F.2d 774 (9th Cir. 1947) [hereafter cited as Westminster v. Mendez].


25 Ibid.
On the evening of August 1, 1942, members of the Downey Boys gang accosted Henry Leyvas, Gus Zammora, and several of their friends from the 38th Street neighborhood at the reservoir. Leyvas returned to the vicinity of the Williams Ranch later that evening with twenty-five companions and eventually led them to the Delgadillo home, where a birthday party was under way. Attempts to eject the group resulted in a fight between Leyvas's friends and the birthday celebrants. Several people were badly beaten, and at least two were stabbed in the scuffle.26

The facts are unclear concerning the events immediately afterward. A young guest named Jose Diaz, who had left before the fighting began, was found unconscious on the roadway several hours later. Admitted to the hospital with bruises on the side of his head, he was found to have a brain concussion and died without regaining consciousness. An autopsy revealed a high blood-alcohol level, but there were no conclusive clues to the origins of his bruises.27 The police assumed that he had been the victim of a brutal beating, and treated the case as a murder.

There had been other violent deaths in the Los Angeles basin over the years, and Diaz's was unusual only in the attention the police gave to it. Many Latino community leaders believed that the police had been waiting for an opportunity to launch a drive against Latino gangs in the barrio, and that Diaz's death gave them the pretext for an aggressive campaign in the city. Within the first week and a half of the assault, police officers arrested numerous suspects from the East Los Angeles barrio, among them Manuel Reyes and Angel Padillo.

Reyes, a Navy volunteer awaiting orders for basic training, was picked up on August 9 and charged with draft violations. The police deprived him of a preliminary hearing. Several days later, when it was determined that he lived in the 38th Street neighborhood, he was rebooked on suspicion of murder and denied his basic constitutional rights when he was held without a hearing for four days.28

The "unnecessary delay" in Reyes's booking was not the only one. Police officers held Padillo, an 18-year-old furniture worker, in jail for seven days before taking him before a magistrate. Moreover, they denied him the opportunity to contact a lawyer while he was detained. The investigators, anxious to extract a confession from Padillo and at the same time to teach him a lesson about "fighting fair," took him to the police station, where they interrogated him. He testified later that he had been handcuffed to a chair and beaten, and reported that an officer had told

26 People v. Zammora, supra note 21 at 178-80.
27 Ibid. at 177-78.
28 Ibid. at 220-21.
him, "You Mexicans think you are smart, you guys never fight fair . . . We ought to shoot every Mexican dog like you."29

The Latino community soon learned its vulnerability to extralegal police tactics. McWilliams wrote that "the Los Angeles Police Department in conjunction with the Sheriff, California Highway Patrol, the Monterey, Montebello, and Alhambra Police Department, conducted a drive on Mexican gangs throughout Los Angeles County on the nights of August 10th and 11th." The law officers stopped all persons suspected of gang activities and took into custody approximately 600 young men. At the police station, the police charged nearly 175 of them with possession of "knives, guns, chains, dirks, daggers, or any other implement that might have been used in assault cases."30

The campaign succeeded, for within two weeks police officers had incarcerated twenty-four members of the 38th Street gang, charging them with the murder of Jose Diaz. Leyvas became a prime suspect in the alleged killing. After his arrest, the police handcuffed him to a chair at the Firestone substation and beat him with "fists and with 'saps,' kicked him in the ribs and in the head, until he lay unconscious." His attorney, Anna Zacsek, happened to enter the room where the police were beating her client and found him "barely conscious, smeared with his own blood, his upper lip mangled, torn, swollen, so that it extended beyond the tip of his nose." She requested an opportunity at the trial to testify to what she had seen, but Judge Charles W. Fricke of the Superior Court of Los Angeles County, who had been assigned the case, denied her plea by informing her that to do so would jeopardize her right to argue Leyvas's case before the jury.31 When the youngsters were taken before the grand jury, the prosecution denied them the privilege of changing their clothes, cleaning up, and getting their hair cut. Naturally, they were dirty, bruised, and haggard.

The hostility toward Mexican-American youths was also evident from the attempts of the Los Angeles County sheriff to charge all the young men in the case with murder. Two of the defendants asked for a separate trial, and the court approved their

29 Guy Endore, The Sleepy Lagoon Mystery (Los Angeles, 1944) 16 [hereafter cited as Endore, Sleepy Lagoon].

30 Carey McWilliams, North From Mexico (New York, 1968) 235-36 [hereafter cited as McWilliams, North from Mexico]. See also "Report of Special Committee on Problems of Mexican Youth of The 1942 Grand Jury of Los Angeles County," December 22, 1942 [hereafter cited as "Report of the Special Committee"]). I am grateful to Richard Fajardo, an attorney for the Mexican American Legal Defense and Educational Fund in Los Angeles, for helping me find this document.

31 Endore, Sleepy Lagoon, supra note 29 at 15.
That the sheriff and his subordinates would pursue the indictment with a determined and coordinated attack is also apparent from the prepared statements of Lt. Edward Duran Ayres, head of the Los Angeles County Sheriff's Department's "Foreign Relations Bureau." The sheriff expounded a theory that the Indians of Mexico had their origin in Asia, which explained their "utter disregard for the value of life." He maintained that the Mexican Indians had historically demonstrated a "total disregard for human life" and that this behavior had "always been universal throughout the Americas, among the Indian population—with the exception of the American Indians, [who] we well know are Americans."

Ayres hoped to imply a connection between the Aztecs who tore the hearts out of their victims and the Mexican Americans in California who participated in gang fights. This leap of faith came in his remarks about fighting. Ayres reported that Caucasians "resort to fisticuffs," but that "the Mexican element considers all that to be a sign of weakness, and all he knows and feels is a desire to kill, or at least let blood. When there is added to this inborn characteristic that has come down through the ages, the use of liquor, then we certainly have crimes of violence." He concluded his remarks with a plea for indictment and harsh sentences.

The fact that little blood had been spilled in Diaz's death did not deter Ayres. The autopsy surgeon testified that Diaz could have met his death by repeated hard falls on the rocky ground of the road, and admitted that the injuries at the base of his skull were similar to those seen on the victims of automobile accidents.

If the Sleepy Lagoon defendants expected a less biased atmosphere in court, they were disappointed. Taking a page out of Ayres's testimony, the prosecution argued that "when Leyvas and members of the 38th Street gang returned to the Sleepy Lagoon,
the defendants had entered into an unlawful combination of conspiracy, the object of which, as the result of their malignant hearts, was to commit murder in satisfaction of their lust for revenge [emphasis added]." In order to try all the young men charged with the murder of Diaz, the prosecution attempted to establish that the fighting at the Delgadillo party had been a "collective intent upon the part of the defendants to commit murder," and maintained that members of the 38th Street gang had acted in "a conspiracy to commit murder." Having failed to find any witnesses who could identify the alleged killer, the prosecution held all the 38th Street neighborhood youths who had been in the vicinity of the Sleepy Lagoon on that fateful evening responsible for Diaz's death. Clearly, some observers noted, the entire Mexican-American community was on trial.

The court had the defendants seated in a column of seats like "prisoners in a prisoner's box, and the jury [were] looking at them." George Shibley, one of the lawyers for the defendants, tried in vain to change the seating arrangement so that he could sit next to his clients.

In another unusual procedure, the judge seated the defendants in alphabetical order and ordered each young man to stand up when witnesses made references to him. When a witness referred to several defendants, they had to rise and sit as if in a game of musical chairs. Los Angeles writer Guy Endore commented that "in this particular case the effect was not only ludicrous, it was incriminating. For when you are made to stand up when you are being accused of this and that, the effect on the jury must be as if you had acknowledged your guilt." Because they were seated alphabetically, a lawyer representing several clients found it difficult to consult with them, since they sat in scattered seats. In sum, at every turn the defense found itself stifled in its attempt to secure a fair trial for its clients.

The defendants' attorneys had numerous other problems with the judge. Fricke proved to have little patience, and gave way to his anger freely. He admonished the defendants' attorneys on the slightest pretext, and proved unwilling overall to assure those under indictment that they would receive a fair hearing. Moreover, the prosecution consistently characterized the young men as gang members, which supported the logic behind trying all the defendants together. The appeals court acknowledged that it had

39 People v. Zammora, supra note 21 at 176.
40 Ibid. at 177.
41 Ibid. at 227-28.
42 Ibid.
43 Endore, Sleepy Lagoon, supra note 29 at 31.
problems with the "evidence received as to what was throughout
the trial commonly referred to as 'The 38th Street Gang.'" During the trial the word "gang" was used liberally, and the judge, in a statement to the jury, deliberately linked the horror of Chicago gangsterism with the defendants.

The trial lasted thirteen weeks and was given full coverage by the Los Angeles press. On January 12, 1943, an all-white jury found three of the defendants guilty of first-degree murder and nine guilty of second-degree murder and two counts of assault. The three charged with first-degree murder were given life sentences. The nine convicted of second-degree murder and two counts of assault were sentenced to five years to life at San Quentin. Five defendants were ordered confined in the Los Angeles County jail.

The conviction shocked the Mexican-American community. Soon after the sentencing, concerned citizens organized the Sleepy Lagoon Defense Committee to defend the imprisoned youths and to plan an appeal of the case. Hollywood stars Orson Welles, Rita Hayworth, Joseph Cotten, and Anthony Quinn also lent their support to the newly formed defense committee. Manuel Reyes, one of the incarcerated young men, acknowledged his gratitude in a letter to the committee:

Let the people know that there is prejudice against the Mexicans and how the police treated us when we were arrested just because we were Mexicans. But being born a Mexican is something we had no control over, but we are proud no matter what people think, we are proud to be Mexican-American boys. I joined the Navy in July of last year [1942]. They didn't turn me down because I was Mexican, because we are needed to fight this war. I was told to return to the Navy Station to take my pledge, but unfortunately I was arrested for this crime which I didn't have anything to do with or know of.

_The People v. Gus Zammora_ went before the state's District Court of Appeals in October 1944. The judges found that "the evidence was insufficient to show that the defendants had

45 Ibid. at 169.
46 Endore, _Sleepy Lagoon_, supra note 29 at 15.
47 _People v. Zammora_, supra note 21 at 174; The Citizens' Committee for the Defense of Mexican American Youth, _The Sleepy Lagoon Case_ (Los Angeles, 1943) 27.
48 Carey McWilliams, _The Education of Carey McWilliams_ (New York, 1978) 110.
49 Endore, _Sleepy Lagoon_, supra note 29 at 39.
conspired to commit the crimes charged." The appeals court did not see the logic behind the mass trial, concluding, "The mere fact a number of defendants are principals in an offense of assault, battery, disturbance of the peace, riot, rout or unlawful assembly, does not show that all would be principals in an offense of murder or felonious assault that may occur during such a disturbance." In essence, there had been no legal ground to try all the defendants for the same offense—the murder of Jose Diaz. The court also found the trial judge "guilty of judicial misconduct in making undignified and intemperate remarks tending to disparage or cast reflection on defendants' counsel." Further, the judge had committed a "prejudicial error" by admitting "evidence of declarations made to police officers by some defendants which contained accusatory statements against co-defendants.

Al Waxman, editor of the *Eastside Journal*, refused to be caught up in the "Mexican crime" campaign and wrote in an editorial that the "real crime in this trial was the way these boys were handled at the bar of justice." He saw little justice for the young men, who even before their case went to court had been "tried and convicted in the metropolitan press." The youngsters, he lamented, had been 'condemned as 'zoot suit' wearers, as boys who wore their hair long instead of cutting it, as boys who roamed the streets in search of recreation—which was being denied to them." Living in East Los Angeles, Waxman had witnessed at first hand the discrimination and prejudice directed at the Mexican-American community.

McWilliams followed the case closely. In an introduction to Endore’s appeal for the Sleepy Lagoon Defense Committee, he wrote that the case had become "a symbol of the struggle of the Mexican minority to free itself from a pattern of racial ostracism and discrimination." Impressed with the response to organizing the committee, he predicted that "In retrospect, it will be clearly recognized that this case... represents the first well-organized and widely-supported effort in Southern California to bring the case of the Mexican, or the citizen of Mexican descent, to the attention of all the peoples of the area." When the young men won their release from jail as a result of the appellate decision, the community celebrated their victory.

50 *People v. Zamrnmora*, supra note 21 at 167.
51 Ibid.
52 Ibid. at 168.
53 Ibid.
54 *Eastside Journal*, January 20, 1943.
55 Ibid.
56 Ibid.
57 Endore, *Sleepy Lagoon*, supra note 29 at 3.
The Mexican-American civil-rights movement entered a new phase in the aftermath of the *Zammora* appeal. The arrest and initial conviction of the young men had exposed the vulnerability of the Mexican community, whose members had then responded to injustice. United by the appeal, in victory they demonstrated an ability to fight the domestic fires of racism and discrimination.

**MENDEZ v. WESTMINSTER**

**SCHOOL SEGREGATION IN CALIFORNIA**

In the years following the American conquest of California in 1848 and the subsequent Americanization of Mexican institutions, Anglos and Mexican Americans worked together in building a new society. In Los Angeles, for example, Mexican Americans were active in creating the first public-school system. Because their population was the dominant group, the newly established schools provided for an integrated program. In 1853, for instance, Antonio Coronel, the mayor of Los Angeles, appointed an Anglo as the first superintendent of schools. After the completion of the transcontinental railroad line to the city in the 1880s, Anglo children began to predominate in the schoolyards. Proposals for separate schools for Mexicans appear to have surfaced around the turn of the century, when Mexican immigration began to increase.

There was ample confusion about segregation in California at the time. Historian Charles M. Wollenberg writes that in the *Wysinger* case involving the segregation of a black child in Visalia, "the state Supreme Court had once again upheld the 'separate but equal' doctrine and recognized the right of the legislature to reimpose segregation whenever it wished." He adds that an 1880 statute prohibiting blacks from attending white schools was subsequently amended to permit districts to establish separate schools for Asians and Indians.

When the Los Angeles School District began operating separate schools for Mexicans just after World War I, educators rationalized generally their decision by saying that Mexican children exhibited "different mental characteristics" from Anglos. Mexican children,

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59 Wollenberg, *All Deliberate Speed*, supra note 10 at 26. Citing the *Wysinger* case as precedent (*Wysinger v. Crookshank*, 82 Cal. 588, 23 P. 54), Judge Denman noted that "'[t]he Judicial Department of the State has emphatically declared it to be unlawful to establish separate schools for Mexican pupils'" (*Westminster v. Mendez*, supra note 22 at 783). However, Mexican Americans are not mentioned in the decision. The highest tribunal in California ruled that Visalia must allow a black youth to attend the regular public schools.
according to a typical assessment, "showed a stronger sense of rhythm" than Anglos, and, unlike Anglo children, they "are primarily interested in action and emotion but grow listless under purely mental effort."  

From a different perspective, a sociologist at the University of Southern California, Emory Bogardus, observed that "in the non-segregated schools, the Mexican children are often at a disadvantage. They arrive at school age with little or no knowledge of English, and hence do poorly until they learn English." For this reason he favored segregated schools, where Mexicans would not have to suffer through "invidious comparisons with Anglo students."  

The issue of health dominated much of the discussion of Mexican-American education. In 1920 a teacher in California, Grace Stanley, commented that a call for separate schools was "one of the first demands made from a community in which there is a large Mexican population." The reasoning behind this demand, she wrote, was "generally [based upon] a selfish viewpoint of the English-speaking public and... largely on the theory that the Mexican is a menace to the health and morals of the rest of the community."  

Another educator in Southern California tried to put the issue into perspective by commenting, "The Mexican race is of less sturdy stock than the white race and as a result there is a much larger percentage of cases of communicable diseases among the Mexican population than among the American population." It proved easy to suggest that immigrants, as foreigners, were unclean and too unrefined for community schools.  

Joseph Santos, who in the 1920s conducted research on Mexican immigrants in the Los Angeles region, observed that school segregation was often closely allied with "a consciousness of racial differences on the part of the Anglos," in addition to the desire by Mexican families "of protecting Mexican children from the social prejudice of Americans." He found that the most common method of segregating Mexican children "was accomplished by drawing the boundaries of a school around a Mexican colony and providing a school therein."  

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60 Grace Stanley, "Special Schools for Mexicans," The Survey (September 15, 1920) 715 [hereafter cited as Stanley, "Special Schools"].  
62 Stanley, "Special Schools," supra note 60 at 715.  
64 Stanley, "Special Schools," supra note 60 at 714.  
65 Joseph M. Santos, "Poverty and Problems of the Mexican Immigrant" (Master's thesis, University of the Pacific, 1931) 120.
The historian Francisco Balderrama considers that the school-segregation problem was one of the most "formidable issues" facing the Mexican-American community during the Great Depression.66 However, the civil-rights arm of that community was relatively weak before the 1940s, and whatever harm was done by separate schooling went unheeded. Balderrama comments, "By the time the Depression hit, the segregation policy was firmly entrenched. Though no state statute legally sanctioned segregation, local school boards had purposely separated *la raza* children by drawing up boundaries of a school district around the Mexican colony and providing a school for that area."67

In the 1930s some educators added two more reasons for segregating Mexican children in the Los Angeles schools: "the high percentage of juvenile arrests among Mexicans, [and] the nature of the offenses committed."68 However, simply to deny *all* Mexican-American children the right to attend a particular neighborhood school on the basis of unproven notions about criminality violated their rights, since most of the children had no connection with the crimes committed or with the accused or indicted perpetrators.

Throughout the 1930s and 1940s, segregated schools were widespread in all of California. In eight of the largest counties, sixty-four schools in the 1940s had an enrollment that was 90 or 100 percent Mexican-American. The "personal cruelties inherent in official segregation," as Meyer Weinberg has put it, were felt in many ways. School officials required Mexican children in one part of Los Angeles, where integrated schools did exist, to have separate graduation ceremonies from Anglos attending the same school.69 John Steven McGroarty wrote that in one school district, officials unable to provide separate buildings for Mexican Americans would simply assign them to separate classrooms.70

Most of the civic leaders associated with county government in Los Angeles failed to recognize the legal issues or the deleterious psychological and social effects of segregation. Supervisor John Ford, for example, spoke on this question before the Los Angeles County Joint Committee for Interracial Progress in March 1944. The minutes of the session recorded that he thought that there might be "a problem of the segregation of Mexicans in some schools. However, in one case," the minutes quoted him as saying, "the school buildings for Mexican pupils were superior to


67 Ibid. at 56.

68 Ibid. at 61.


those used by Caucasian children in a nearby school."71 Before Brown v. Board of Education, educators and political leaders commonly defended segregation by arguing that the school facilities for minorities were equal to those of whites, since Plessy allowed the "separate but equal" justification of school segregation.72

But the evidence pointing to discrimination was abundant. C.C. Trillingham and Marie M. Hughes wrote during the World War II years that the Los Angeles City and County school systems were plagued with prejudice. During their first six years in school, Mexican-American children were segregated from the "big school" and assigned to buildings away from the "white school" in the bungalows across the street. The "Mexican school" often had no kindergarten, cafeteria, auditorium, or shop.73

The campaign against segregationist laws in Southern California began in San Bernardino County, some thirty miles northeast of Orange County. In September 1943 a University of Southern California graduate, Ignacio Lopez, and a group of his friends were denied the use of a public swimming pool in the City of San Bernardino. Lopez, who at the time was a translator for the Division of War Information in California, consulted with Los Angeles lawyer David Marcus and filed suit in district court. He was joined by the Reverend R.N. Nunez, a parish priest from Guadalupe Catholic Church; Eugenio Nogueroa, an army veteran; and two students, Virginia Prado and Rafael Munoz.74 Their suit against the City of San Bernardino represented one of the first class-action suits in the nation concerned with the civil rights of Mexican Americans.

71 March 2, 1944, John Anson Ford Collection, Box 65, Huntington Library. On May 15, 1941, J.H. O'Connor, county counsel for Los Angeles, wrote the superintendent of Ranchito School District as follows: "In our opinion you may require all Mexican students to attend the one [segregated] school provided the educational facilities offered at the Mexican School are equal in every respect to the educational facilities offered at the other two schools." John Anson Ford Collection, Box 62, Huntington Library.

72 See Richard Kluger, Simple Justice [New York, 1976] 670, 695 [hereafter cited as Kluger, Simple Justice]. Derrick Bell notes that "There were literally dozens of school desegregation cases brought during the latter part of the nineteenth and the early part of the twentieth century. Most upheld segregation policies unless the school board was segregating Blacks without legislative authority or had made no provision for educating Blacks, in which case a few courts ordered Blacks admitted to white schools." Bell, "The Remedy in Brown is Effective Schooling for Black Children," Social Policy [Fall 1984] 15, fn. 5.


74 Ibid. Lopez et al. v. Seccombe et al., 71 F. Supp. at 769 [hereafter cited as Lopez v. Seccombe]. These individuals constituted the young and emerging community leaders of the San Bernardino Latino barrio.
Judge Leon R. Yankwich found the City of San Bernardino guilty of violating the petitioners' rights and privileges guaranteed by the Fifth and Fourteenth amendments of the Constitution. In finding that the petitioners were "entitled to such equal accommodations, advantages, and privileges and to equal rights and treatment with other persons as citizens of the United States" in the use of city public recreational facilities, the court struck one of the first major blows against segregation aimed at persons of Mexican descent. Marcus was to have yet another opportunity to fight for civil rights when, a year after the Lopez decision, he was retained by Mexican-American parents in Orange County interested in ending the segregation of their children.

Litigation

Although scholars often credit the G.I. generation with instituting the Mexican-American civil-rights struggle, in Southern California it began in the schools before Latino soldiers had returned from overseas service. The collapse of segregation commenced with the granting of privileges to a small number of children in one high school. Court records show that school pride may have contributed to the decision of Mexican-American families in Orange County to file suit in federal court to ban segregation in the schools.

In the pre-depression years, many communities in California with a small population of Mexican origin considered it fiscally irresponsible to construct separate schools for Spanish-speaking children when their numbers suggested that only a few would be attending. As a consequence, a number of Mexican Americans had attended Franklin School in Orange County. By the 1940s, school officials had drawn boundaries around the Mexican-American barrio so that they could attend Fremont School only. Nonetheless, school loyalty prevailed, and officials allowed children whose parents had attended Franklin School to enroll there even though they lived outside the boundary. In 1944 Franklin enrolled only a small number of students from the barrio, whereupon parents of the rejected children mounted a protest movement against the school. The school board resented the protest and decided to make a radical change in policy. In 1945 the board sent notice that none of the children from the Fremont area would be allowed to attend Franklin School.

75 Lopez v. Seccombe, supra note 74 at 770-71.
76 Servin, The Mexican-Americans, supra note 34 at 143-60.
78 Ibid. at 551.
notification angered the Mexican-American community, and Gonzalo Mendez, William Guzman, Frank Palomino, Thomas Estrada, and Lorenzo Ramirez filed a class-action suit on behalf of “some 5,000” persons against the Westminster, Garden Grove, and El Modeno school districts and the Santa Ana City schools, all in Orange County. They were represented by David Marcus. Mendez et al. v. Westminster School Dist. of Orange County et al. was not only about Franklin and Fremont, but about the larger issue of segregated schools in the county as a whole.

In a little-noticed article published in 1949 in Phylon, an African-American journal, Lester H. Phillips commented on the Mendez case. At the outset, he expressed disappointment that the school authorities were not appealing the decision to the U.S. Supreme Court, for “there will be no opportunity for our highest tribunal to review the opinions and the ruling.” He hoped that an appeal by the Westminster district might provide an opportunity for the high court to consider the entire issue of segregation and thus possibly repudiate Plessy v. Ferguson. Phillips believed that the perceptions of District Judge Paul McCormick and the Ninth Circuit relative to segregation “suggest that this case must be ranked among the vanguard of those making a frontal attack upon the ‘equal but separate’ canon of interpretation of the equal protection clause.” He concluded that the Mendez decision “foreshadows a far-reaching possibility that the precedent of 1896 [Plessy] may not be vested with permanence.”

Orange County schools attorney Joel E. Ogle argued that the federal court had no jurisdiction in the case, since education was a state, not federal matter, a position also taken by the courts in most southern states. The court found it necessary to reject the defendants’ states'-rights argument. Citing several recent precedents in the field of education, McCormick quoted the Barnette decision, which found that “The Fourteenth Amendment, as now applied to the States, protects the citizens against the State itself and all of its creatures—Board of Education not excepted.” He observed that “it is clear that the respondents should be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.”

Once rejecting the states’-rights argument, McCormick moved to the equally important question of separate but equal treatment.
In 1896 the *Plessy* court had ruled favorably on the separation of blacks and whites, but had been silent about other racial and ethnic groups. Still, there was no federal standard by which to defend segregation against nonblack minorities. In 1927, in *Gong Lum v. Rice*, the Supreme Court had affirmed a Mississippi decision that allowed the exclusion of a Chinese child from a white school on the ground that Mississippi law required separate schools for the "white" and "colored" races. The word "colored" could thus be interpreted to include all but whites.84 Although no statute in California prohibited Mexicans from attending integrated schools, the *Gong Lum* ruling could be used in applying Jim Crow practices: nonwhites—by implication, non-Anglos—could be considered "colored."

*Mendez v. Westminster* is unquestionably a study in complex racial and ethnic social arrangements in the West. The court noted, for example, that it was "conceded by all parties" that "there is no question of race discrimination in this action." Whereas the school districts admitted to segregating the children, they did so only to keep Mexican children "separate and apart from English-speaking pupils."85 The court responded that it "perceive[d] in the laws relating to the public educational system in the State of California a clear purpose to avoid and forbid distinctions among pupils based upon race or ancestry except in specific situations not pertinent to this action."86 Quoting the *Hirabayashi* decision, McCormick commented that the distinctions among pupils based on "race or ancestry" had "recently been declared by the highest judicial authority of the United States 'by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'"87

In three county schools—Westminster, Garden Grove, and El Modeno—board members had taken official action "declaring that there be no segregation of pupils on a racial basis but that

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84 275 U.S. 78 (1927); see also Derrick Bell, *Race, Racism and American Law* (Boston, 1980) ch. 7 [hereafter cited as Bell, *Race, Racism*], and *Mendez v. Westminster*, supra note 77 at 546.

85 *Mendez v. Westminster*, supra note 77 at 546.

86 Ibid. at 548.

87 Ibid. When U.S. military commanders on the West Coast ordered a strict curfew for Japanese Americans during World War II, Gordon Kiyoshi Hirabayashi, a U.S. citizen, challenged the order's constitutionality, charging that the military had infringed upon his rights under the Fifth Amendment. Speaking for the court, Justice Harlan Stone pointed out that the Fifth Amendment contained no equal-protection clause, although he admitted that distinctions among citizens because of their ancestry "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Nonetheless, he acknowledged that "in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry." *Hirabayashi v. United States*, 320 U.S. 81 (1943) 100, 106.
non-English-speaking children... be required to attend schools designated by the boards separate and apart from English-speaking pupils." The petitioners saw this language separation as "a covert attempt" to cause arbitrary discrimination against schoolchildren of Mexican extraction.

The court commented that "the common segregation attitudes and practices of the school authorities in the defendant school districts in Orange County pertain solely to children of Mexican ancestry and parentage." These children had "been singled out as a class for segregation," in an action that was "antagonistic in principle" to California's educational policy.

A significant part of the Mendez ruling was the issue of the equal-protection clause. The schools in Orange County, the court found, could not provide equal protection by "furnishing in separate schools the same technical facilities, text books and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry." The court stated: "A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage."

The defendant schools took the position that racial segregation had nothing to do with the creation of separate schools. This was done, they argued, simply because the Latino children had language difficulties; in an effort to meet their educational needs, they had been placed in "special schools." The court rejected this argument. It noted that the elementary schools in the community, Lincoln (for Latinos) and Roosevelt (for Anglos), were 120 yards apart on the same school ground. It scrutinized the school records and concluded that separation was based on more than language differences. Indeed, it noted, "No credible language test [was] given." It discounted the "proof of language disabilities" when it found that, the previous year, "the students in the seventh grade of the Lincoln [sic] were superior scholarly to the same grade in the Roosevelt School and to any group in the seventh grade in either of the schools in the past. It further appears that not only did the class as a group have such mental superiority but that certain pupils in the group were also outstanding in the class itself."

88 Ibid. at 546.
89 Ibid. at 548.
90 Ibid. For an excellent discussion of desegregation cases in other southwestern states, see Guadalupe San Miguel, Jr., "Let All of Them Take Heed": Mexican Americans and the Campaign for Educational Equality in Texas, 1910-1981 [Austin, 1987] [hereafter cited as San Miguel, "Let All of Them Take Heed"].
91 Mendez v. Westminster, supra note 77 at 549.
92 Ibid.
McCormick thought that if Mexican Americans lagged behind in language it was not, as suggested by the district's attorneys, a result of their inherent inferiority, but, rather, as a result of their "lack of exposure to [English] because of segregation." The very purpose of public schools, he affirmed, clearly perceiving the larger issues, centered around "the perpetuation of American institutions and ideals." For that reason he believed that only through the "commingling of the entire student body" could such values be instilled. He foreshadowed the Brown decision when he commented on the consequences of discrimination, noting, "It is also established by the record that the methods of segregation prevalent in the defendant school districts foster antagonisms in the children and suggest inferiority among them where none exists."\textsuperscript{93}

When the court ordered a permanent injunction against the Orange County schools in February 1946, it led one observer, W. Henry Cooke, to explore the causes and consequences of the suit in print.\textsuperscript{94} He wrote that, at about the time of the decision of the Ninth Circuit Court of Appeals, "The California legislature dropped from the Educational Code of the State Section 8003 and 8004, which had been the basis for the segregation of Indians and Mongolians," thus making it legal to segregate any ethnic group in the state's public schools.\textsuperscript{95} The above statutes stated:

\begin{quote}
Sec. 8003 . . . The governing board of any school district may establish separate schools for Indian children, excepting children of Indians who are wards of the United States Government and children of all other Indians who are descendants of the original American Indians of the United States, and for children of Chinese, Japanese, or Mongolian parentage.

Sec. 8004 . . . When separate schools are established for Indian children or children of Chinese, Japanese, or Mongolian parentage, the Indian children or children of Chinese, Japanese, or Mongolian parentage shall not be admitted into any other school.
\end{quote}

Under these conditions, Cooke observed, "It is noteworthy that twenty-five or more districts in one of the larger counties still continue to segregate Mexican-Americans and that numerous districts in other counties likewise follow the older custom."\textsuperscript{96}

\textsuperscript{93}Ibid.


\textsuperscript{95}Ibid. at 421.

\textsuperscript{96}Ibid.
An unusual aspect of the Mendez case was the participation of Thurgood Marshall of New York, who prepared an amicus curiae brief on behalf of the National Association for the Advancement of Colored People. During the early years of its existence, the NAACP had been largely unsuccessful in challenging segregation in the Deep South, where white racists held political and economic power. In 1930 the NAACP began developing a new national strategy for fighting racist laws. Its leaders considered attacking separate schools outside the South—as one report noted, "in parts of Pennsylvania ... and certain sections of the Southwest." Charles Hamilton Houston and Marshall, who litigated the major NAACP cases between 1930 and 1950, initiated numerous suits outside the South, including the graduate-school cases of Missouri ex rel. Gaines v. Canada, McLaurin v. Oklahoma State Regents, and Sweatt v. Painter. Not until 1946, however, when Marshall learned of the suit filed by Mendez et al. in Southern California, did the NAACP realize that it might be helped by other minority groups affected by segregation statutes. Also among those submitting briefs in support of the Latino students were representatives from the American Civil Liberties Union, the Japanese American Citizens League, and the National Lawyers Guild.

Common to many of these class-action suits was an initial discussion of whether the case under consideration merited such status. An unusual feature of the Mendez decision concerned the qualification of the plaintiffs to bring suit in federal court. The Ninth Circuit Court ruled that because the plaintiffs were "taxpayers of good moral habits, not suffering from disability, infectious disease [emphasis added]," they qualified for class-action status. One wonders why the court felt it necessary to address the plaintiffs' morals and health. It may well have been a strategy to offset the arguments made by the school districts that they practiced segregation in an effort to protect the health of children—Anglo children.

Joel Ogle argued his case for the school district with two major contentions. First, he asserted that "no substantial federal question" was involved, so that the district court had no standing.

97 Mendez v. Westminster, supra note 77 at 775.
98 Morgan Kousser, The Shaping of Southern Politics (New Haven, 1974).
101 Mendez v. Westminster, supra note 77 at 775.
102 Ibid. at 776.
in the case. The court rejected the argument, noting that "the school district officials in segregating children of Mexican descent against their will and contrary to the laws of California violated the Fourteenth Amendment by depriving them of liberty and property without due process of law and by denying to them the equal protection of the laws." Ogle then introduced the notion of "separate but equal," as affirmed in the *Plessy* case, to contend that no violation had occurred; the Latino children attended separate schools, but the Anglo and Latino facilities were "equal."

If the civil-rights activists following the case sought some signal about the broader issue of race discrimination, they would have been disappointed to find that it surfaced only in a footnote. Footnote five in the court ruling began with an acknowledgment that *Plessy v. Ferguson* had ruled on "the protection and deprivation of liberty and property without due process of law clauses of the Fourteenth Amendment." There seems general agreement that the due-process clause has some puzzling elements to it—what "process" is "due" in what circumstances?

The Vinson court was sensitive to no area of law more than that of racial segregation. Under Chief Justice Frederick M. Vinson, according to one observer, the Supreme Court avoided the issue "primarily by turning any constitutional question away from the 'separate but equal' versus equal protection doctrines to a question of federal authority under the commerce clause." In the matter of segregated educational facilities in higher education, however, the separate-but-equal doctrine had already been considered in *Missouri ex re. Gaines v. Canada,* and similar attacks were sustained the year after *Mendez* in an Oklahoma University case. The admission of a few nonwhite graduate law students to a university was a first step toward ending segregation in higher education, but it was evident that bringing children from different ethnic backgrounds together in the same classroom would prove more challenging.

If the *Plessy* decision stood blocking the door to racial integration, one encouraging statement from the court of appeals surfaced in the addition of a footnote citing yet another famous Louisiana case, *American Sugar Refining Co. v. Louisiana,* which, like the *Slaughter-House* cases from the same state, had

103 Ibid.
104 Ibid. at 774.
105 Ibid. at 780.
106 Ibid. at 777, fn 5.
108 Kluger, *Simple Justice,* supra note 72 at 662; see also Bell, *Race, Racism,* supra note 84 at 375-76.
dealt with economic restrictions. The Mendez court said in a footnote that in the Sugar Trust case of 1892 the Supreme Court had ruled that "discrimination, if founded upon a reasonable distinction in principle, is valid." Nevertheless, the court warned, "if such discrimination were arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes." The issue in Mendez did indeed focus on the "equal protection" question and the U.S. Ninth Circuit Court's examination of previous rulings on this protection, even if those rulings had initially protected trusts rather than individuals.

The school districts sought to have the Ninth Circuit Court ignore the protection provided by the Fourteenth Amendment, arguing that the amendment had nothing to do with education issues. Nonetheless, in addition to citing Gong Lum v. Rice, Ogle presented before the court an 1855 case, Roberts v. City of Boston, which provided for the segregation of "colored" children. (Citation of Gong Lum, upholding separate Chinese schools, was no doubt a reference to the idea that segregation need not be limited to black children.) The inclusion of Roberts presented several problems, not the least of which concerned the subsequent adoption of the Fourteenth Amendment in 1868. Although Boston had earlier validated the segregation of "colored" children, in light of the passage of the Thirteenth and Fourteenth amendments could it constitutionally have done so later? We can never know the answer, but the Ninth Circuit Court had an opportunity to renounce school segregation as a relic of antebellum days. That the court failed to seize the opening left many antisegregationists disillusioned.

The Ninth Circuit Court understood the challenge before it, noting that two of the amicus curiae briefs asked the court to "strike out independently on the whole question of segregation, on the ground that recent world stirring events have set men to the reexamination of concepts considered fixed." However, the justices felt that the time had not yet come for such bold action. Writing for the majority, Judge Albert Stephens responded, "We are not tempted by the siren who calls to us that the sometimes slow and tedious way of democratic legislation is no longer

109Mendez v. Westminster, supra note 77 at 777.
111Mendez v. Westminster, supra note 77 at 779.
112Ibid. at 780. See also Harry N. Scheiber, "Economic Liberty and the Constitution," in Essays in the History of Liberty: The Seaver Institute Lectures at the Huntington Library [San Marino, 1989] 75-100.
respected in progressive society." Instead, he argued that "the segregation cases do not rule the instant case," thereby rejecting the option to strike down *Plessy*.11

Plaintiff attorney David Marcus had placed the civil-rights lawyers from the ACLU and the NAACP in an awkward situation by agreeing to accept as stipulation the defendants' claim in district court that "there was no question as to race segregation in this case." The court of appeals noted, however, that the writers of the amicus curiae brief did "not agree that this was so." The court ruled that the segregation of Mexican-American children violated California law, which permitted segregation only of "Indians and certain named Asians." Thus the court concluded that Mexican Americans were white, and thereby of "the great races of mankind."114 More important, the appeals court decided that the Orange County schools had "violated the federal law as provided in the Fourteenth Amendment" by "depriving [the students] of liberty and property without due process of law and by denying to them the equal protection of the laws."115

Judge William Denman wrote a concurring opinion to the majority decision. He thought it an oversight to exclude mention of *Lopez v. Seccombe*,116 and viewed the Orange County case from a broader perspective than did his fellow judges on the bench. He commented that it was not only in Orange County that "public officers [were] guilty of such perversions of the privileges long recognized at common law [sic] as essential to the orderly pursuit of happiness by free men." He saw no reason to defend segregation in California, adding, "Were the vicious principle sought to be established in Orange and San Bernardino Counties followed elsewhere, in scores of school districts the adolescent minds of American children would become infected."117

**Aftermath**

The *Mendez* decision was a landmark case for Mexican Americans. Following the appeal in the Ninth Circuit Court, Latinos in other southwestern states pushed for the legal ending of segregated schools. In Texas, for example, civil-rights activists George I. Sanchez and Gus Garcia, an attorney for the League of United Latin American Citizens, filed a class-action suit in a district court in central Texas against several local school districts that

113 *Mendez v. Westminster*, supra note 77 at 780.
114 Ibid.
115 Ibid. at 781.
116 Ibid. at 781-83.
117 Ibid. at 783.
denied Mexican Americans the right to attend integrated schools. Sanchez secured a copy of the Mendez decision and helped Garcia prepare the factual brief. The application for injunction filed by Garcia in Delgado v. Bastrop Independent School District indicated that the plaintiffs used arguments before the courts similar to those in Mendez. Judge Ben Rice granted an injunction, commenting that the segregation practices of the district were "arbitrary and discriminatory and in violation of the 14th Amendment." The Court of Appeals' affirmation prohibiting school segregation in California in 1947 struck an important blow against segregation in the West. Mendez offered the federal judges the opportunity to consider the Fourteenth Amendment questions related to the deprivation of civil rights. The court also heard arguments concerned with the psychological effects of segregated classrooms, an issue that would be raised again successfully in Brown.

Neither Mendez nor Brown, however, completely eliminated the separation between Mexican-American and Anglo school-children. Twenty years later, the U.S. Civil Rights Commission found extensive segregation in the Los Angeles public schools. Even with the ruling of Brown v. Board of Education, school officials in Southern California managed to draw boundaries so that Anglo children attended classes with other Anglo children. With the filing of Keyes v. School District No. 1, Denver, Colo. in the 1970s, a Mexican-American challenge to de facto segregation in Denver finally reached the Supreme Court. But Keyes has not resolved all the problems, and it is apparent that de facto segregation will remain throughout the 1990s.

**CONCLUSION**

The events of the 1940s in Southern California clearly establish that the Mexican-American community had begun a successful drive to challenge its second-class citizenship status. It is worth

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noting that the Latino community pressed many of its demands through the courts, an institution that in previous years had not shown much compassion to its plight. Nonetheless, as historian Rodolfo Acuna has written, the east-side community was "under siege," and, although the courts were sometimes responding to injustice and inequality, few other institutions were changing their attitudes about Latinos.122

As the Sleepy Lagoon trial came to a conclusion and the defendants began planning their appeal, a dramatic racial conflict broke out in Los Angeles. On June 3, 1943, numerous U.S. Navy sailors and Marines fought with several Mexican-American youths from the east-side community. For the next week, young Latinos and Anglo servicemen battled in the streets of downtown Los Angeles and the east side. On several evenings, more than a thousand men in uniform roamed freely through the east-side **barrio** in search of young men dressed in zoot suits—a dress style made popular during the evolution of the jitterbug. Latino and African-American youths wearing wide-shouldered suits with pegged pants were perceived as hoodlums, and Navy and Marine recruits submitted them to brutal beatings, even stripping the clothing off some of them. As in the Sleepy Lagoon case, the press sensationalized the events. Newspapers linked zoot-suiters to Mexican-American gang members responsible for a multitude of crimes. The police acted no less irresponsibly, arresting only zoot-suiters in the aftermath of the fights between sailors and Latinos. Pressure from Latino leaders and complaints from the Mexican Consulate eventually convinced the military authorities in Washington, D.C., to make the downtown and east-side streets of Los Angeles off limits to Navy and Marine personnel.

In the months immediately after the Zoot Suit riots, leaders in the Mexican-American community continued to press for recognition of their constitutional rights. Although the court victories of **People v. Gus Zammora**, **Lopez v. Seccombe**, and **Mendez v. Westminster** did not end Jim Crow sanctions directed at Mexican Americans, they contributed to the collapse of an archaic system. In the struggle for racial and ethnic equality, the heroes were many and the sacrifices great. What the community learned from that decade of civil-rights activism was simply that the fight for equality had only just begun.

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